

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 3, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0386

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

ETTA DUS, A/K/A ANTOINETTE DUS,

PETITIONER-RESPONDENT,

V.

STEVEN AMBROSE DUS, A/K/A STEVEN A. DUS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County:
THOMAS J. SAZAMA, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Cane, P.J., Myse and Nolan, JJ.

PER CURIAM. Steven Ambrose Dus appeals an amended divorce judgment that equally divided \$195,000 in bearer bonds that had not been

disclosed at the time of the initial divorce judgment. The bonds had been given to his daughter, Sharon, for safekeeping. She used the bonds as security on a loan, defaulted on the loan, and forfeited the bonds. Steven ultimately recovered the value of the bonds in a lawsuit against Sharon and the bank. He argues: (1) that the bonds were not subject to disclosure at the time of the divorce because that asset was no longer in existence; (2) that the bonds were purchased with the children's social security payments and, as money set aside for the children, was not part of the marital estate; (3) that the trial court erroneously exercised its discretion by equally dividing the bonds without considering the factors set out in § 767.255, STATS.; (4) that the court improperly exercised its discretion by awarding Etta Dus 8% interest from the date of the divorce; and (5) that Etta should have been required to share in the cost of the lawsuit that resulted in the return of the bonds. We affirm the trial court's finding that the bonds were marital property subject to disclosure and division and the court's award of one-half of the bonds' value to Etta with 8% interest. However, because the trial court did not specifically address whether Etta should be required to share in the cost of retrieving the bonds, we remand that issue to the trial court for further consideration.

The record supports the trial court's finding that the bonds were subject to disclosure. Section 767.27(1), STATS., requires disclosure of all assets owned in full or in part, including future interest whether vested or nonvested. Steven incorrectly describes his interest in the bonds as a past interest because the bonds had been wrongfully taken from him. Rather, the bonds were properly considered a present or future interest because Steven retained the right to collect on the debt, a right that he eventually exercised. A party is not allowed to

unilaterally decide that an asset or interest should be hidden or withheld from the court or the opposing party.

The trial court properly rejected Steven's contention that the bonds were not marital property. The bonds were purchased during the marriage from an account in Steven's name and were held solely for him until they were converted by Sharon and the bank. They were presumptively marital property and the burden was on Steven to prove otherwise. *See Preuss v. Preuss*, 195 Wis.2d 95, 101, 536 N.W.2d 101, 103 (Ct. App. 1995).

Steven failed to prove that the bonds were the children's property, purchased with their social security payments and that these assets maintained their character and identity. *See Brandt v. Brandt*, 145 Wis.2d 394, 408, 427 N.W.2d 126, 131 (Ct. App. 1988). Factors the court must consider in determining ownership of an asset are title, control, intent, possession and right to use. *See Tesky v. Tesky*, 106 Wis.2d 491, 496-97, 317 N.W.2d 172, 175 (Ct. App. 1982), *rev'd on other grounds*, 110 Wis.2d 205, 327 N.W.2d 706 (1983). Steven's testimony about the funds used to purchase the bonds was vague and contradictory. While he established that he held the children's money until they came of age, he gave the children substantial amounts of money after they came of age, allowing the inference that he paid all that he owed the children. During the time Steven purchased the bonds, he received substantial amounts of money from the sale of his business, suggesting that the bonds were purchased with his own money for his benefit. Steven maintained absolute control over the bonds, and testified in his action against Sharon and the bank that the bonds were his and that the children had no ownership rights. Based on Steven's testimony, the jury in the previous action found that Sharon and the bank converted property owned by Steven and that the bonds had not been given to the children at the time they were

converted. After considering these factors, the trial court properly found that the original funds, which had been subject to countless withdrawals, deposits, additions, reductions and gifts, were so commingled with other funds that it would be speculative for the court to try to identify what part of the funds, if any, might have belonged to the children.

The trial court properly exercised its discretion when it equally divided the value of the bonds. Steven argues that the trial court should have considered unequal division based on the factors set out in § 767.255, STATS. That statute presumes equal division of assets, but allows the court to depart from equal distribution based on enumerated factors. The trial court reasonably refused to depart from the presumptive equal division of the property. When an additional asset is discovered after the initial divorce judgment due to the deliberate concealment of the asset by one party, the innocent party should not have to incur the expense of retrying the entire property division. In addition, the nondisclosing party would suffer no repercussions due to his lack of candor if, upon discovery of the hidden asset, the court divided the asset as though it had been timely disclosed. Steven is in a poor position to argue that the bonds were inequitably divided 50-50 after he deliberately failed to disclose their existence.

The trial court properly awarded Etta 8% interest from the date of the divorce.¹ Had the asset been timely disclosed and its ownership adjudicated in the original judgment, Etta could have invested the proceeds. The award of interest is an equitable compensation to Etta for the loss of interest she could have received had Steven complied with the disclosure statutes.

¹ Steven argues that the trial court should not have awarded any interest. He does not challenge the rate of interest.

We remand the matter for the trial court to consider an issue raised in Steven's trial brief but not addressed by the trial court. In cases involving family law, it is preferable for the trial court to make specific findings regarding all of the issues raised by the parties. *See Vier v. Vier*, 62 Wis.2d 636, 639, 215 N.W.2d 432, 433 (1974). Steven argued that Etta should share in the litigation expenses required to secure the return of the bonds. Because the trial court has not exercised its discretion on this issue, we remand the cause for consideration of Steven's argument that he should not be faulted for negligent safekeeping of the asset prior to the divorce and that the cost of the litigation to secure the return of the bonds would have occurred regardless of when their existence was discovered.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

