

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP183-FT

Cir. Ct. No. 2002FA177

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

SHANNON JEANNE KRUG,

PETITIONER-APPELLANT,

V.

THEODORE RICHARD KRUG,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Shannon Jeanne Krug has appealed from a judgment of divorce from Theodore Richard Krug. Pursuant to this court's order

of January 31, 2005, and a presubmission conference, the parties have submitted memo briefs. Upon review of those memoranda and the record, we affirm the judgment of the trial court.

¶2 Shannon raises three issues on appeal: (1) whether the trial court erroneously exercised its discretion in valuing the parties' plumbing business and dividing their property; (2) whether the trial court erroneously exercised its discretion by permitting Theodore to submit additional evidence as to the value of the business after the close of evidence, but denying Shannon the same opportunity; and (3) whether the trial court erroneously exercised its discretion when it denied Shannon's motion for reconsideration without a hearing. None of these issues have merit.

¶3 The trial court conducted an evidentiary hearing on the property division and maintenance on July 2, 2004. As acknowledged by Shannon in her appellant's brief, the parties agreed that the testimony of Ronald Brien, an expert retained by Theodore to value the plumbing business, would be presented at the July 2, 2004 hearing through the submission of his pretrial deposition. In his deposition testimony, Brien valued the business at \$45,000.¹

¹ Although Shannon discusses Brien's deposition in her brief, the deposition is not included in the record on appeal. An appellate court may review only matters of record in the trial court and cannot consider materials outside that record. *South Carolina Equip., Inc. v. Sheedy*, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984). The responsibility for ensuring that the deposition was included in the record lay with Shannon if she wished to rely on it to allege trial court error. See *State v. Turner*, 200 Wis. 2d 168, 176 n.5, 546 N.W.2d 880 (Ct. App. 1996). When an appeal is incomplete in connection with an issue raised by the appellant, this court will assume that the missing material supports the trial court's ruling. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). We therefore rely on the description of Brien's deposition testimony as set forth in the testimony, argument and discussion at the July 2, 2004 hearing, and assume that any missing material supports the trial court's decision.

¶4 On August 24, 2004, the trial court made an oral decision on the property division. It found that the value of the plumbing business was \$45,000, relying on the testimony at trial and Brien's deposition testimony. In arriving at the \$45,000 figure, Brien had valued the plumbing company's assets and then deducted a \$37,000 loan owed by the company to Theodore individually. Shannon argued that if the corporate debt of \$37,000 was deducted from the value of the business, it had to be included as a personal asset of Theodore's. The trial court rejected this argument, finding that Theodore had borrowed this sum to keep the business operating during the divorce proceedings. Based on its finding that Theodore had to repay the money, the trial court declined to include the \$37,000 as an asset in his share of the property division.

¶5 On September 13, 2004, the trial court held a telephone conference with the parties. The record contains no minutes or transcript from that conference. However, on December 9, 2004, an additional hearing was held. The trial court explained that, after issuing its decision on August 24, 2004, it had concluded that Brien should answer some questions that had been posed to him by Shannon's attorney at his deposition. The trial court stated that it had subsequently been provided with a letter from Brien addressing each of the issues raised by Shannon's counsel. The trial court stated that Brien's opinion as to the value of the business had not changed. The trial court therefore reaffirmed its prior finding that the value of the business was \$45,000, and entered written findings of fact, conclusions of law and judgment dividing the parties' property based upon this value. The trial court denied Shannon's motion for reconsideration without further hearing, and denied her request for additional time to present more evidence as to the value of the business. The trial court stated that

a complete trial had already been held on the issue, and that the additional information requested by the court had been provided.

¶6 “A trial court has wide discretion to reconsider an earlier decision, and nothing prevents the court from accepting additional evidence in the interests of justice.” *Salveson v. Douglas County*, 2000 WI App 80, ¶43, 234 Wis. 2d 413, 610 N.W.2d 184, *aff’d*, 2001 WI 100, 245 Wis. 2d 497, 630 N.W.2d 182. It is clear from the record in this case that the trial court chose to reopen the proceedings for the limited purpose of requiring Brien to answer questions that had been posed by Shannon’s counsel at his deposition, but left unanswered. The trial court merely sought clarification of Brien’s testimony based on questions previously posed by Shannon, in effect benefiting Shannon. Nothing in the record indicates that the trial court was reopening the matter for the presentation of other new evidence or witnesses, nor did anything in the law require it to do so. Based upon these facts, we reject Shannon’s contention that the trial court erroneously exercised its discretion by permitting Theodore to provide additional evidence as to the value of the business, but denying her the same opportunity.

¶7 We also reject Shannon’s argument that the trial court committed reversible error when it denied her motion for reconsideration without an additional hearing. We review a trial court’s decision on a motion for reconsideration under an erroneous exercise of discretion standard. *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. *Id.*, ¶44. A party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier. *Id.*, ¶46.

¶8 As already noted, after issuing its initial decision, the trial court required Brien to answer questions that had been posed by Shannon's counsel at his deposition. However, nothing in the record indicates that the trial court granted Shannon permission to present new evidence as to the value of the company, or to do anything more than comment on Brien's supplemental answers. Although counsel for Shannon informed the trial court at the December 9, 2004 hearing that he was still in the process of gathering additional information as to the value of the business, Shannon made no showing as to why, through reasonable diligence, she could not have presented additional evidence as to the value of the business at the time of trial. The trial court therefore acted within the scope of its discretion by refusing to reconsider its decision and permit the presentation of additional evidence. *See id.*, ¶48.

¶9 The final issue is whether the trial court committed reversible error when it valued the plumbing business and divided the marital estate. The division of property is entrusted to the discretion of the trial court and will not be disturbed on appeal absent an erroneous exercise of discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. The trial court's valuation of the property, including the valuation of a closely-held corporation, constitutes a finding of fact which will not be disturbed unless it is clearly erroneous. *Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993).

¶10 In a trial to the court in a divorce case, the weight and credibility to be given to the opinions of expert witnesses is uniquely within the province of the trial court. *Id.* When there is conflicting expert testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. *Id.* at 397. If the trial court accepts the testimony of one expert over that of another expert who testified

differently, and the first expert's testimony is sufficient to support the trial court's finding, it must be sustained. *Id.*

¶11 In valuing the plumbing business at \$45,000, the trial court accepted the opinion of Brien, a certified public accountant. The record indicates that Brien valued the assets of the business, excluding real estate, at \$90,000, representing the average of the tangible personal property appraisals provided by Timothy Sweeney and Larry Plum, appraisers retained by Shannon and Theodore. Brien then deducted the corporate debt from that value, including a \$37,000 loan owed by the company to Theodore individually.

¶12 Brien's testimony clearly supports the trial court's finding that the value of the business was \$45,000. Because that finding is not clearly erroneous, it cannot be disturbed by this court.

¶13 We also reject Shannon's contention that the trial court erroneously exercised its discretion when it declined to include the \$37,000 corporate obligation as an asset belonging to Theodore. Theodore testified that before the divorce proceeding began, the corporation had a line of credit with the bank and would periodically borrow money to continue operating during periods of slow business. He testified that after the divorce was commenced, Shannon refused to sign the necessary papers to permit the corporation to borrow money; he therefore personally borrowed money from the bank and his mother to keep the business operating. He testified that he was personally liable for the \$37,000 loan he put into the business.

¶14 Based upon Theodore's testimony, the trial court was entitled to reject Shannon's contention that the corporate debt of \$37,000 must be included as a personal asset of Theodore's. Although Shannon objects that Theodore

produced no note or other written evidence of a loan, he testified that he borrowed the money and loaned it to the business. The determination of the credibility of Theodore's testimony was for the trial court. See *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976).

¶15 Shannon also contends that Theodore should be personally liable for the \$37,000 because the temporary order required each party to pay the obligations he or she incurred after the date of the temporary order. However, based on Theodore's testimony that the debt was incurred for the operation of the business, a marital asset, the trial court acted reasonably in permitting it to be deducted from the value of the business. Because it found that Theodore had to repay the money, it also acted within the scope of its discretion in declining to include the \$37,000 as an asset in Theodore's share of the property division.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

