

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2006

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. 2005AP2711

Cir. Ct. No. 2004FA94

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JEAN L. WHITE,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

JAMES B. WHITE,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Jean White and James White have filed cross-appeals from their judgment of divorce. At issue are certain aspects of the

maintenance award, the property division, and attorney fees. For the reasons discussed below, we affirm the judgment in all respects.

BACKGROUND

¶2 James and Jean were married twice: first from 1969 to 1981, and again from 1986 to 2005. By the time of the second divorce judgment, both were 59 years old. James was earning \$465.50 per month as a driver, and Jean was not employed. The court, however, imputed James's earning capacity to be \$59,000 and imputed Jean's earning capacity to be \$17,000. The parties also had income from several rental properties, which were allocated in the property division. The court ordered James to pay Jean \$750 per month in maintenance for six years, when both would reach a reasonable retirement age.

¶3 With regard to the property division, the court found that \$99,042 in interest earned on government bonds which James had inherited was divisible, but that \$21,000 worth of the value of a cabin in Wyoming was non-divisible.

¶4 The judgment made no mention of a \$535 hospital bill and \$35 insurance premium which Jean had paid and for which she had requested credit in the property division.

¶5 Finally, the court granted Jean's motion for attorney fees as a sanction for discovery violations by James, but awarded only \$5,323, rather than the \$10,376.77 she requested. We will discuss additional facts where pertinent.

DISCUSSION

Maintenance

Earning Capacity

¶6 Jean first challenges the trial court's determination that she had an earning capacity of \$17,000. She claims the trial court erred in disregarding her testimony and testimony from a social worker who opined that Jean had a series of medical conditions, including post-traumatic stress disorder and depression, which significantly impaired her ability to work.

¶7 We may set aside the factual findings of the trial court only if they are clearly erroneous. WIS. STAT. § 805.17(2) (2003-04).¹ In addition, because the trial court is the ultimate arbiter of credibility when acting as fact finder, we will defer to factual findings which resolve conflicts in the testimony. *See Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶8 Here, the trial court found that, although Jean's ability to work was "limited," the evidence did not support her claim that she could work only half time. The trial court was not required to give weight to either Jean's own testimony or that of the social worker regarding her degree of impairment from various medical conditions. The \$17,000 earning capacity figure the court adopted was supported both by the testimony of a vocational expert who testified that Jean could earn between \$14,500 and \$18,700 per year working full time, and

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

by Jean's own testimony that she had previously earned about \$35,000 per year in her highest wage-earning years and could probably still work part-time. Therefore, the court's finding of Jean's earning capacity was not clearly erroneous.

Tax Consequences

¶9 Jean argues that the trial court erroneously failed to consider the effect of taxes when awarding maintenance. The tax consequences of a maintenance award is one of the statutory factors considered when awarding maintenance. WIS. STAT. § 767.26(7). The trial court here did not include a calculation of tax consequences, explaining: "Because this Court has not adopted an absolute proportional comparison of income due to circumstances in which neither party currently works at earning capacity, this factor is not relevant." We are unsure what the trial court means. If the court is saying that tax consequences should not be taken into account when a court relies on imputed rather than actual earning capacities, we disagree. Such hypothetical calculations are made routinely in the divorce context. However, if the court means that the parties failed to submit calculations showing what the tax consequences would be based on their earning capacities, the court properly concluded that it lacked a factual basis for incorporating tax consequences into its findings.

¶10 Here, Jean submitted an exhibit showing what the tax consequences would be if James were earning \$59,836 and paying \$17,000 per year in maintenance, while she was earning \$17,200. The \$17,200 figure is a combined figure composed of Jean's income from half-time work and rental income. However, Jean did not submit any calculations for what the tax consequences would be if she were working at or near full time, which the trial court found she

had the capacity to do, despite the fact that her ability to work full time was a contested issue. Jean's supporting exhibit does not make use of the alternate assumptions feature in the Mac Davis program. Jean apparently assumes, without supporting authority, that the trial court was required, *sua sponte*, to make the calculations she failed to provide. We disagree. Furthermore, because the trial court was not presented with an estimate of the tax consequences based on figures close to those it ultimately adopted, we are not persuaded that Jean raised the issue of tax consequences with sufficient prominence to require the trial court to address it. *See Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 ("A party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling.").

¶11 Jean also appears to argue that, since the tax consequences under the scenario she presented to the trial court would have resulted in a fairly even division of net income, the trial court misused its discretion by taking a different approach. However, Jean has not presented this court with any analysis of what the tax consequences are under the actual figures adopted by the trial court. Therefore, even assuming that the trial court should have made its own calculations as to what those tax consequences are, Jean has not shown that such a calculation would have resulted in a significantly different allocation of the parties' combined income.

Duration

¶12 Jean argues on appeal that the trial court erred in setting a limited term of maintenance because there was no evidence that she could be self-supporting within six years. However, in both her argument at the hearing and her

brief to the trial court, Jean asked the court to order maintenance to retirement age. Therefore, she has waived the right to argue for an indefinite term of maintenance on appeal. See *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476 (this court will not consider issues raised for the first time on appeal, so that we don't "blindsided trial courts with reversals based on theories which did not originate in their forum").

Property Division

The Cabin

¶13 The parties were both named on the title of a cabin in Wyoming valued at \$70,000. James testified that he and his sister inherited property in Wisconsin from their mother in 1988, and sold two parcels of that property a year or so later for about \$80,000. James could not recall the exact year(s) or the exact amounts of the sales, but said he used \$39,000 of the proceeds to help buy a cabin in Wyoming. Jean introduced a letter from 1993 showing that James's share of the net proceeds from at least one of the sales was \$20,772.24.² The trial court concluded that, although the cabin itself was divisible property, at least \$21,000 of the cabin's value was directly traceable to James's inheritance. It therefore credited that amount to James outside of the divisible estate pursuant to Wis. STAT. § 767.255(2)(a).

¶14 Jean contends that the trial court erred in relying on James's testimony that he used inherited funds to purchase the cabin because his testimony

² It was not apparent from the letter whether the proceeds being discussed were from one sale or the total from two sales of the inherited property.

about the amount and timing of his sale of inherited property was impeached. As we have already noted, however, credibility determinations lie solely within the trial court's discretion. See *Global Steel*, 253 Wis. 2d 588, ¶10. "Even when a single witness testifies, a trial court may choose to believe some assertions of the witness and disbelieve others." *State v. Kimbrough*, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. As the trial court noted, there was no other evidence regarding what funds were used to purchase the cabin. Therefore, the trial court could properly credit James's testimony that he used some inherited funds, even if his recollection of the amount and timing of the transactions was fuzzy. And, the court's use of the \$21,000 figure was supported by Jean's own exhibit.

¶15 The facts here are not comparable to those in *Krejci v. Krejci*, 2003 WI App 160, 266 Wis. 2d 284, 667 N.W.2d 780, or *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988), where it was impossible to trace the portions of assets attributable to inherited funds.

¶16 Having made a factual finding that James used \$21,000 of inherited money to purchase the cabin, the trial court properly excluded that amount from the divisible estate. See *Friebel v. Friebel*, 181 Wis. 2d 285, 296, 510 N.W.2d 767 (Ct. App. 1993).

Interest from Government Bonds

¶17 On cross-appeal, James argues that the trial court erred as a matter of law in categorizing \$99,042 earned interest as divisible property. We disagree.

¶18 James inherited \$85,781 in government bonds from his mother. During the marriage, those bonds earned \$99,042 in interest. Wisconsin case law

has repeatedly held that the traceable interest or income generated from a non-divisible asset should be included in the divisible estate. *See, e.g., Friebel*, 181 Wis. 2d at 293-94; *Arneson v. Arneson*, 120 Wis. 2d 236, 244-45, 355 N.W.2d 16 (Ct. App. 1984).

¶19 James argues that the *Arneson* rule is unfair to the extent that it treats the interest generated from a non-divisible asset differently from appreciation from a non-divisible asset. Again, however, prior case law has already acknowledged this different treatment, *see Derr v. Derr*, 2005 WI App 63, ¶20 n.6, 280 Wis. 2d 681, 696 N.W.2d 170, and we are bound by the precedent of our own court, *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

Hospital Bill And Insurance Premium

¶20 Jean testified that she ended up paying a \$535 hospital bill and \$35 auto insurance premium which James was supposed to have paid under the temporary order. In her trial brief, she requested a credit for these amounts in the property division. On appeal, Jean complains that the trial court did not mention her request when making the property division. We agree with James, however, that Jean invited this error—if it was error—by failing to include these amounts in her proposed findings of fact or her motion for clarification and by failing to include them in the revised asset and debt schedules she later submitted at the court's request. *See State v. Wollenberg*, 2004 WI App 20, ¶13, 268 Wis. 2d 810, 674 N.W.2d 916 (appellant cannot complain of errors invited or induced by the appellant in the circuit court).

Attorneys' Fees

¶21 Finally, Jean claimed that she incurred \$10,376.77 in unnecessary attorneys' fees from four different firms as the result of James's refusal to cooperate during discovery. The trial court found that James failed to cooperate in the discovery process, but awarded \$5,323, about half of the amount Jean requested.

¶22 An award of attorney fees in a divorce case is discretionary. *Bisone v. Bisone*, 165 Wis. 2d 114, 123-24, 477 N.W.2d 59 (Ct. App. 1991). “‘Because the exercise of discretion is so essential to the trial court’s functioning, we generally look for reasons to sustain discretionary decisions.’” *Burkes v. Hales*, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (citation omitted). Thus, even if the trial court has relied upon a wrong rationale, we may affirm the decision if the facts of record provide a basis for the trial court’s decision. *See State v. Gray*, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999). Furthermore, “‘when a specific finding is missing, appellate courts may assume that the missing finding ‘was determined in favor of or in support of the judgment.’” *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993) (quoting *Sohns v. Jensen*, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960)).

¶23 Here, we agree with Jean that the trial court did not adequately explain which requested fees it was disallowing or why. However, Jean has not persuaded us that the record does not support the trial court’s decision. James objected to \$8,041.27 of the requested amount in a trial brief on the ground that he was unable to comply with some of the discovery requests because he was barred from entering the Lake Mills property where many of the documents were located. The court stated that it had reviewed the itemized attorneys' fees and determined

that only some of them were incurred as the result of bad faith by James. We see no reason why the trial court, who was in the best position to analyze the issue, could not have accepted some of James's explanations for his failures to comply with various discovery requests. Accordingly, we affirm the award of attorneys' fees.

By the Court.—Judgment affirmed.

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

