

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2005AP1387

Cir. Ct. No. 2003FA598

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

KATHRYN R. FLEMING,

PETITIONER-RESPONDENT,

V.

DEAN P. FLEMING,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dean Fleming appeals a judgment of divorce from Kathryn Fleming. He raises several issues. We affirm.

¶2 Dean first argues that the circuit court erred by finding that a certain piece of property was gifted to Kathryn individually and, therefore, was her separate, non-divisible property under WIS. STAT. § 767.255(2) (2003-04).¹ It is undisputed that the property was quitclaimed by Kathryn's mother and aunt in 1966 to Kathryn and Dean as joint tenants with survivorship. Kathryn testified that it was her understanding that the property was a gift to her, but the court sustained hearsay objections that prevented her from explaining any basis for that understanding. Kathryn testified that her mother and Dean were not close, that the deed was prepared by Dean's brother, who was an attorney, and that she had not seen it until Dean produced a copy during this action. Dean testified that it was not a gift to only Kathryn, but he did not explain any basis for that opinion.

¶3 The circuit court found that Kathryn understood the donors intended to gift the property to her but, when the deed was prepared by Dean's brother, both Kathryn and Dean were named as grantees. The court further found that Kathryn did not see the deed until Dean produced a copy of it during this action, and that Dean has not provided any evidence, apart from the deed prepared by his brother, to establish that the property was not intended for Kathryn alone.

¶4 Dean argues that the circuit court made an error of law because the deed was unambiguous in conveying the property to both Dean and Kathryn, but the court nevertheless allowed Kathryn to present extrinsic evidence about the donors' intent. We agree with Kathryn's argument that this is not properly viewed as a deed interpretation issue, but as a question of fact about the donors' intent, as

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

discussed in *Derr v. Derr*, 2005 WI App 63, ¶¶27-40, 280 Wis. 2d 681, 696 N.W.2d 170. Although *Derr* involved a possible gift from one spouse to the other, we regard its reasoning as equally applicable to a gift from outside the marriage. Kathryn concedes that the joint titling creates a presumption that the donors' intent was to make a gift to both her and Dean, but it is a presumption that can be overcome. Dean argues that Kathryn's testimony was too indirect, self-serving, and after-the-fact to overcome the presumption. We disagree. A trial court is not precluded from finding self-serving and after-the-fact testimony credible, and the court in this case specifically stated that it found Kathryn more credible on this issue.

¶5 Dean next argues that the court erred by awarding what he calls the "marital home" to Kathryn, although at the time of the divorce judgment neither party was living there. Dean argues that he clearly told the circuit court that he wanted to be awarded this property, while Kathryn did not present evidence that she needed or wanted the home, and, therefore, the court should have awarded it to Dean. Neither party has directed our attention to any explanation by the court for why it awarded this property to Kathryn. In her post-trial brief, Kathryn asked that this property be awarded to her, but she did not state any reason. The structure of her proposal and argument suggests that her proposal was to award Dean the properties that would produce the most income, and award the other properties to her. The court followed her proposal as to the major pieces of real estate. Because the marital home property was vacant and in poor condition at the time of divorce, and therefore was not an income property, it was reasonable to award this to Kathryn. In addition, Dean's argument is founded on the unstated assumption that if only Dean requested the property, it must be awarded to him. He cites no authority for that proposition.

¶6 Dean next argues that the court erred by denying him maintenance. He argues that the court erred in certain factual findings related to maintenance. For example, he argues that the court erred by saying his use of alcohol “may have ... caused” or “certainly ... exacerbated” the problems that prevent him from employment. Dean argues that the evidence does not support these statements, but only that his alcohol use “could aggravate” those impairments. We are satisfied that this factual distinction, read in the context of the court’s entire maintenance decision, is not meaningful to the ultimate outcome. Similarly, Dean argues that the court erred by referencing his “ongoing refusal to participate in treatment” for his physical and mental health needs. Without attempting to detail the evidence here, we are satisfied that it was not clearly erroneous for the court to find that Dean has not fully accepted or continued available treatment.

¶7 Dean argues that the court erred by finding that he can realize significant rental income from the real property he was awarded. This was error, he argues, because he is incapable of managing property, and there is no evidence that he would hire a management company, as proposed in the court’s decision, because the evidence shows that strokes have left him with a guarded, suspicious, and irritable personality that will prevent him from trusting and hiring a management company. Even if we assume that Dean is genuinely incapable of hiring a management company, that does not necessarily lead to a different maintenance decision. Ordinarily, if a person is incapable of managing his financial affairs properly due to brain damage, a guardian or conservator can be appointed to properly manage the estate. Dean has not cited any authority suggesting that it is the obligation of his former spouse to compensate for this problem by paying maintenance. In addition, he argues that the amount of rental income assumed by the court is speculative. That is, of course, true of all types of

future business income. Moreover, Dean does not specifically dispute the evidence that was presented regarding their rent potential.

¶8 Dean argues that the court erred by finding that Kathryn contributed more to the marriage than he did. Dean asserts that the record shows he did contribute significantly. This argument does not undercut the court's finding. It is possible for one to make "significant" contributions while still providing less than an equal contribution.

¶9 Dean argues that the court failed to properly implement the fairness objective of maintenance. He argues the outcome is unfair to him because he does not end up sharing in the parties' increased earnings level, and is left to live on a "fixed income." We disagree with this description, because the income-producing real estate he was awarded was presumably at least partly obtained with their income, and will continue to produce income for him. And, while it is true his income will not equal Kathryn's, the record shows a sufficient basis for a disposition that leaves Kathryn with more income.

¶10 Dean next argues that the court erred in its valuation of the Raymond Road property and by excluding half of its value from the marital estate. He argues that the court erred by accepting Kathryn's explanation of the financial history of the property and the involvement of their son Scott in it. While we agree with Dean that the evidence is amenable to other interpretations, that does not make the court's finding clearly erroneous. This finding was based in part on the court's credibility assessment of witnesses, which is the type of decision we ordinarily defer to. *See Plesko v. Figgie Int'l*, 190 Wis. 2d 764, 775-76, 528 N.W.2d 446 (Ct. App. 1994). Dean argues that the court should have provided

more explanation of its reasons for this finding, but we regard it as adequate explanation to say that the court found some witnesses more credible.

¶11 Dean next argues that the court erred by awarding Kathryn money for attorney fees on the grounds of overtrial and unreasonable conduct by Dean. Dean does not dispute that this conduct occurred, but instead argues that the court failed to consider that it was the result of stroke-related impairments. However, even if that was the cause of his conduct, Dean offers no legal authority demonstrating that it was improper to require Dean to bear some of Kathryn's cost of dealing with that conduct. He also argues that the court should have considered other factors, such as Kathryn's own conduct, the disparity between their incomes and earning capacities, and the "inadequacy" of Dean's attorney. We are satisfied that the court considered appropriate factors and reached a reasonable result.

¶12 Finally, Dean argues that we should grant discretionary reversal under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried and justice has miscarried. These things occurred, Dean argues, because his attorney failed to submit a post-trial brief. We reject the argument. Even if we assume that poor representation can be a ground for discretionary reversal, the record in this case does not show performance so poor that this extraordinary remedy is warranted.

By the Court.—Judgment affirmed.

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

