

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2007

David R. Schanker
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. 2006AP1085

Cir. Ct. No. 2004FA19

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

GAIL CURTIS-CLAY,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

DARIN MICHAEL CLAY,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: ROBERT A. DeCHAMBEAU, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Darin Clay and Gail Curtis¹ have filed an appeal and a cross-appeal, respectively, from the property division component of their divorce judgment. Clay claims the trial court erred by treating only \$10,000 of the value of a residence in Texas as subject to division in the marital estate. Curtis claims the court erred by including the value of a set of replacement wedding rings in the marital estate and by requiring her to reimburse Clay for the full amount of an advance she had received on the property division. We uphold the trial court's implicit findings that the down payment and a large pay-down on the mortgage for the Texas property were made with funds traceable to a non-divisible source, but conclude that the trial court erred in failing to recognize that other mortgage payments throughout the marriage came from marital income. We further conclude that the trial court erred in including the full amount of the advance in its calculations for an equalization payment, and should have also considered whether the rings were subject to division. Accordingly, we reverse the divorce judgment in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 Clay and Curtis were married in Texas in 1999. Each had children from a prior marriage, but they had no children together. The family moved to Wisconsin in 2000. After Curtis filed for divorce, the parties entered a series of partial property settlements that disposed of most of their assets, and both waived maintenance. Among the issues remaining for trial were the disposition of a house in Flower Mound, Texas, which Curtis had brought into the marriage; the

¹ Although the action is captioned in Gail's married name of Curtis-Clay, we note that the trial court restored her former name Curtis.

insurance settlement for a set of stolen wedding rings; and an advance Curtis had taken on the property division. We will set forth the facts relevant to each issue in our discussion of that issue.

DISCUSSION

¶3 The marital estate includes all of the property and obligations of either party which have been acquired before or during the marriage, unless specifically exempted by statute. *McLaren v. McLaren*, 2003 WI App 125, ¶8, 265 Wis. 2d 529, 665 N.W.2d 405. WISCONSIN STAT. § 767.255(2)(a) (2003-04)² provides:

Except as provided in par. (b),³ any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:

1. As a gift from a person other than the other party.
2. By reason of the death of another
3. With funds acquired in a manner provided in subd. 1. or 2.

The burden of showing that certain property is not subject to division at the time of divorce is on the party asserting the exclusion. *Derr v. Derr*, 2005 WI App 63, ¶11, 280 Wis. 2d 681, 696 N.W.2d 170. In order to satisfy this burden, a party must show: (1) that the value and source of the purportedly non-divisible asset (or

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

³ WISCONSIN STAT. § 767.255(2)(b) allows the court to divide gifted or inherited property if the refusal to include the property in the property division would create a hardship on the other party.

a portion thereof) can be directly traced back to a gift or the death of another; and, if the issue is raised, (2) that the party who obtained the asset by gift or someone's death did not subsequently donate the asset to the marriage. *See id.*, ¶¶22-23.

¶4 Whether certain property is subject to division under WIS. STAT. § 767.255(2)(a) presents a mixed question of fact and law. *Derr*, 280 Wis. 2d 681, ¶45. We will review the circuit court's resolution of any disputed historical facts regarding the tracing of the source of a particular asset back to a gift or someone's death, or any finding about a spouse's subjective donative intent, under the clearly erroneous standard. *Id.*, ¶¶45, 51. We will treat the application of any legal presumptions regarding donative intent and the ultimate characterization of a traced asset as either divisible or non-divisible as questions of law subject to *de novo* review. *Id.* Once the assets subject to division have been identified, the circuit court has discretion as to how to allocate those assets between the parties. *Id.*, ¶9.

Categorization Of Texas Property

¶5 Curtis acquired the Texas property in 1998, and it remained titled in her name only throughout the marriage. The property cost about \$192,000 and was worth about \$250,000 at the time of the divorce. Curtis had made a \$40,000 down payment on the property prior to the marriage with funds from a Fidelity investment account, which she claimed she had inherited from her second husband. She also made \$36,801 worth of improvements to the property prior to the marriage. Clay moved into the house prior to the marriage and started contributing toward the household expenses, as well as paying \$3,000 to have a spa installed.

¶6 During the marriage, Curtis made some large extra payments on the mortgage. Of those payments, \$99,000 was traceable to the investment portion of Curtis's Fidelity account. Most of the rest of the mortgage payments could be traced both to rental income the Texas property generated after the parties moved to Wisconsin, and the cash portion of the Fidelity account—which contained all of the dividends and interest generated from the investment portion of the account, as well as the proceeds from the sale of various investments. Curtis regularly transferred funds from the cash portion of the Fidelity account into the parties' joint Wells Fargo account, from which automatic mortgage payments were made and into which Clay also deposited his salary.

¶7 Curtis testified that the Fidelity account had been placed solely in her name following her second husband's death, and that she had added to it the proceeds of her second husband's life insurance plus an insurance settlement. On cross-examination, Curtis clarified that the Fidelity account had been jointly titled with her second husband, so it did not have to go through probate. She also sold a jointly titled house from her second marriage and put those proceeds in the Fidelity account. Curtis could not remember how much was in the investment account at the time of her husband's death. However, aside from a \$2,000 transfer to the account to cover a check, Curtis said she did not add additional funds after marrying Clay. She indicated that any increase in the value of the investment portion of the account during the marriage was solely due to market appreciation.

¶8 The trial court found that Clay had made only nominal contributions to the improvement and management of the Texas property, the largest of which was the \$3,000 for a spa. The court concluded that only \$10,000 of the mortgage had been paid off with marital funds, which had come from a tax refund. The court awarded Curtis the entire Texas property, but ordered Curtis to compensate

Clay \$3,000 for the spa contribution and \$5,000 for his half of the marital contribution toward the mortgage.

¶9 Although Clay’s argument headings do not precisely correspond to his actual arguments, we understand him to be raising the following issues on appeal: (1) Curtis did not “acquire” the house until the last mortgage payment had been made; (2) Curtis did not meet her burden of showing what portion of the Fidelity account was inherited; (3) even if the entire investment portion of the Fidelity account was inherited, the amount of the mortgage paid off with inherited funds could not be accurately traced after going through the cash portion of the Fidelity account, where it was commingled with marital interest and dividends; (4) even if some of the mortgage payments could be traced back to inherited funds in the investment portion of the Fidelity account, Curtis evinced an intent to donate those funds to the marriage by transferring them into the joint Wells Fargo checking account before making the mortgage payments; (5) at the very least, the rental income used to make mortgage payments after the parties moved to Wisconsin was marital income; and (6) regardless of the source of the mortgage payments, Clay contributed to the increased value of the property during the marriage through his various improvement, maintenance, and management activities. We have reorganized Clay’s arguments somewhat. We deal with a few threshold issues first, then address the tracing issues, and, finally, address donative intent.

Timing Of Acquisition

¶10 Clay provides no legal authority for his contention that Curtis did not “acquire” the Texas house when she obtained the title to it prior to the marriage, and we are aware of none. Moreover, Clay’s ensuing argument that the whole

Texas property is subject to division because most of the mortgage payments were made during the marriage appears to rest on the erroneous assumption that an asset must be either entirely divisible or entirely non-divisible. We have previously held, however, that a portion of an asset's value may be divisible even if another portion can be traced to a non-divisible source. *See, e.g., Torgerson v. Torgerson*, 128 Wis. 2d 465, 467-70, 383 N.W.2d 506 (Ct. App. 1986) (where wife used inherited funds to make a down payment on a duplex titled in her name alone, and subsequent payments on the duplex mortgage were made from a variety of sources, including marital funds, the court properly deemed the value of the duplex in excess of the down payment to be a marital asset). In other words, the proper inquiry does not ask whether Curtis acquired the Texas property before or after the marriage but, rather, asks whether the source of the funds used to pay for the property or increase its value during the marriage was divisible.

Sufficiency Of Trial Court's Written Decision

¶11 Clay next complains that the trial court did not make explicit factual findings or adequately explain the basis for its legal conclusion that most of the Texas property was not subject to division. We agree. The trial court's decision does not adequately explain its factual findings or rationale. However, when a trial court fails to make express factual findings, an appellate court can infer that the trial court made findings in a way that supports its decision. *State v. Wilks*, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App. 1984). Furthermore, in the interest of judicial economy, an appellate court may affirm a trial court's holding on a legal theory or reasoning different than that relied on by the trial court. *Bence v. Spinato*, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995); *see also State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

¶12 Here, in order to reach its conclusion that all but \$10,000 of the value of the Texas property was non-divisible, we can infer that the trial court, at a minimum, must have accepted Curtis's testimony that she obtained full title to the Fidelity investment account by reason of her second husband's death; that she used funds from the investment portion of the Fidelity account to make the down payment and subsequent extra mortgage payments on the Texas property; that she did not add anything to the investment portion of the account during her marriage to Clay; and that the subjective reason she transferred funds from her Fidelity account and the separate rental income account into the joint Wells Fargo account before making mortgage payments was because automatic payments had been scheduled from that account prior to the marriage—not because she ever intended to give Clay any interest in her Texas property. We can further infer that the trial court drew the legal conclusions that rental income generated from the Texas property, and interest and dividends generated from the investment portion of the Fidelity account, were also, in turn, derived from the death of Curtis's second husband. We will consider whether these implicit factual findings were clearly erroneous or the legal conclusions were incorrect in the context of discussing the other issues raised on appeal.

The Investment Portion Of The Fidelity Account

¶13 The logical starting point for tracing the source of funds used to acquire the Texas property is the investment portion of the Fidelity account. Clay argues that Curtis did not meet her burden of showing what portion of the value of the investment account she received when her second husband died; what portion she already owned prior to her second husband's death because the account was jointly titled; what portion came from the sale of the Oregon house, in which she already had some interest prior to her second husband's death; and what portion

may have come from life insurance proceeds or an insurance settlement of any liability claims following her second husband's death.

¶14 It is true that Curtis could not recall how much the Fidelity investment account itself was worth at the time of her second husband's death, and how much was added from the sale of the Oregon house or insurance proceeds. Curtis did testify, however, that her second husband was a bond trader while she had stayed at home after their children were born; that she acquired all of the funds in the Fidelity investment account by reason of her second husband's death; and that she never put more funds into the investment account during her marriage to Clay. The trial court could properly rely on Curtis's testimony, as well as the Fidelity statements and other documents which were put into evidence, and make factual inferences as described below.

¶15 The earliest Fidelity account statement we find in the record shows that the account was worth \$452,714.86 in October of 1998, which would have been after Curtis had already sold the Oregon residence and purchased the Texas property. A letter dated April 29, 1999, shows that Curtis had at some point received a net payment of \$254,432 to settle any liability claims from her husband's death. Since none of the subsequent Fidelity statements show any value increase remotely close to a quarter of a million dollars, it may be fairly inferred that the settlement proceeds of \$254,432 were added to the account by at least October of 1998. There is nothing to contradict Curtis's testimony that these funds were already in the account when she made the down payment on the house in April of 1998.

¶16 Clay did not develop any argument as to why the proceeds for an insurance settlement of any wrongful death claim could not properly be considered

to have been acquired “[b]y reason of the death” of Curtis’s second husband. *See generally State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (noting we need not consider undeveloped arguments). Given the record and legal arguments made by the parties, the trial court could have reasonably treated the insurance settlement as non-divisible under WIS. STAT. § 767.255(2)(a), and we will do so for the purposes of this appeal.

¶17 Another reasonable inference is that, prior to the down payment on the Texas property, the Fidelity account was worth something in the neighborhood of half a million dollars, with the insurance settlement accounting for about half of that amount. Based on Curtis’s undisputed testimony, the other quarter of a million dollars would have included the value of the account at the time of her second husband’s death, life insurance proceeds, and the proceeds from the sale of the Oregon house.

¶18 Clay does not dispute that any life insurance proceeds Curtis received would have been acquired by reason of the death of her second husband. However, since Curtis failed to specify what amount of life insurance she received, we agree with Clay that Curtis failed to meet her burden of showing what portion of the Fidelity account was traceable to non-divisible life insurance proceeds.

¶19 We further agree with Clay that, because Curtis acknowledged that she was already listed on the titles to the Fidelity account and the Oregon house prior to the death of her second husband, she failed to show that she obtained her *entire* interest in those assets by reason of her second husband’s death. However, given Curtis’s testimony that she received full title to those assets upon her second husband’s death, the trial court could still reasonably have found that her interest

in those assets increased in some degree upon her second husband's death. Since Clay himself argues that Curtis would have owned half of each asset prior to her second husband's death, we will take it as conceded for the purposes of this appeal that Curtis obtained the other half of the value of the Fidelity account and the Oregon house by reason of her second husband's death.

¶20 Although Curtis failed to specify exactly how much the Fidelity account and Oregon house were worth at the time of her second husband's death, she did testify that the proceeds from the sale of the house, the insurance settlement, and life insurance proceeds were the only things added to the Fidelity account after her second husband's death. Therefore, even without testimony about exact figures, it is reasonable to infer that at least \$125,000 in the Fidelity account was traceable to either life insurance proceeds or the increased interests in the Fidelity account and Oregon house that Curtis obtained by reason of her second husband's death. This means that Curtis had, at a minimum, about \$375,000 worth of non-divisible assets in her half-million dollar Fidelity account when she made the \$40,000 down payment on the Texas property.

¶21 By similar logic and reference to the Fidelity account statements, Curtis still had, by conservative estimate, nearly \$300,000⁴ of non-divisible assets in her Fidelity investment account in April of 2003 when she transferred \$99,000 from a matured bond to the parties' Wells Fargo account, which was subsequently used to pay-down the mortgage on the Texas property. Because the record shows

⁴ Three quarters of the investment portion of the Fidelity account on the statement ending March 31, 2003, would be \$294,964. Because the parties agreed in one of their partial property settlements that they would each keep the investment accounts titled in their name, we need not engage in a more refined analysis of what portion of the Fidelity account might otherwise have been subject to division.

that Curtis had ample non-divisible funds available in the investment portion of her Fidelity account to cover both the \$40,000 down payment and the \$99,000 mortgage pay-down, we cannot conclude that it was clearly erroneous for the trial court to accept Curtis's testimony that she made those payments with funds acquired from the death of her second husband. In other words, we conclude that it was proper for the court to determine that \$139,000 worth of the value of the Texas property that could be directly traced to the investment portion of the Fidelity investment account was not subject to division in the divorce.

The Cash Portion Of The Fidelity Account

¶22 The next logical step in tracing the source of funds used to acquire the Texas property is the cash or money market portion of the Fidelity account. Curtis testified that she did not reinvest interest and dividends from her Fidelity investments. Instead, these funds went into the cash portion of the account, from which Curtis wrote checks to the parties' joint Wells Fargo account on a monthly basis.

¶23 We agree with Clay that the interest and dividend income produced by a non-divisible source during a marriage is itself divisible. *See Arneson v. Arneson*, 120 Wis. 2d 236, 242-43, 244, 355 N.W.2d 16 (Ct. App. 1984). We further agree that, aside from the \$99,000 matured bond discussed above, Curtis did not meet her burden of showing that any particular funds in the cash portion of the account could be reliably traced to the periodic sale of investments, rather than to interest or dividends. As a result of this commingling, the cash portion of the Fidelity account should have been characterized as divisible property. *See Brandt v. Brandt*, 145 Wis. 2d 394, 411-13, 427 N.W.2d 126 (Ct. App. 1988). Therefore, any mortgage payments that could be traced back to transfers from the cash

portion of the Fidelity account to the joint Wells Fargo account were made from marital funds, and no portion of the value of the Texas property that could be attributed to such payments should have been categorized as non-divisible.

The Rental Income

¶24 The trial court accepted Curtis’s testimony that, once the parties moved to Wisconsin, the rental checks from the Texas property covered the mortgage payments on the Texas property. The court then treated the rental income as traceable to Curtis’s non-divisible asset. This was error.

¶25 Essentially the same analysis that applies to the interest and dividends produced by the non-divisible portion of the Fidelity account also applies to the rental income produced by the Texas property. That is, even if the property had been acquired entirely with funds that could be traced to the death of Curtis’s second husband, any income stream the property subsequently generated was not generated as a result of his death. Thus, the rental income was marital income, notwithstanding Curtis’s attempts to keep separate accounting for it. Therefore, no portion of the value of the Texas property that is attributable to mortgage payments made with rental income should have been categorized as non-divisible.

Clay’s Contributions To The Property

¶26 Clay disputes the trial court’s finding that his contributions to the maintenance and improvement of the Texas property were only “nominal.” Clay testified that he contributed both money and physical effort for various improvements and maintenance projects for the Texas property, and he introduced canceled checks he had written to Curtis and credit card statements to support his

position. The checks did not, however, include any memos indicating what they were for, and Curtis testified that she had made all of the financial payments for improvements and maintenance of the property, other than \$3,000 Clay had given her for a spa. She also testified that the property manager she hired did most of the actual upkeep.

¶27 It is apparent from the trial court's decision that it found Curtis's account of the parties' respective contributions to the upkeep of the property to be more credible. 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.

¶28 However, even accepting the trial court's finding that Clay's only direct financial contribution was the \$3,000 toward the spa, it appears that the contributions the court attributed to Curtis again came from either the cash portion of the Fidelity account or the rental income from the Texas property. Therefore, any value to the Texas property which could be traced to those contributions should have been categorized as divisible in the marital estate. We emphasize that the calculation for such improvements should be based on the increased equity, if any, which could be attributed to the improvements, and not the actual amount of money which was spent on them. If neither party presented any evidence relating to the effect of the improvements on the value of the property, the trial court was not required to take that into account.

Money That Flowed Through The Wells Fargo Checking Account

¶29 Clay testified that he and Curtis had discussed putting his name on the title to the Texas house once the mortgage was paid off, and he argues that

transferring funds into the joint Wells Fargo checking account demonstrated Curtis's intent to donate mortgage payments to the marriage. Because we have already held that the cash portion of the Fidelity account and rental income from the Texas property were both divisible, this donative intent analysis applies only to the \$99,000 that came from the *investment* portion of the Fidelity account, was deposited in the Wells Fargo checking account, and was then used to make mortgage payments.

¶30 We agree that transferring funds into the Wells Fargo account created a legal presumption of donative intent. See *Derr*, 280 Wis. 2d 681, ¶36 (citing *Finley v. Finley*, 2002 WI App 144, ¶¶38, 42, 256 Wis. 2d 508, 648 N.W.2d 536). Curtis, however, adamantly denied ever discussing putting Clay on the title or intending to give him any interest in the Texas property. Again, we can infer from the trial court's decision that it found Curtis's testimony to be more credible. Because subjective intent is ultimately a question of fact, the trial court could properly rely on Curtis's testimony to rebut the presumption that she intended to donate any non-divisible funds from the investment portion of the Fidelity account that flowed through the Wells Fargo checking account.

Remand

¶31 Because a substantial portion of the mortgage payments were made with funds traceable to divisible sources, we conclude it is necessary to reverse and remand to have the trial court reconsider the property division. On remand, the court may begin by considering \$139,000 of the value of the Texas property to be non-divisible, if we have accurately inferred that the court meant to make factual findings that Curtis acquired the bulk of the Fidelity investment account by reason of her second husband's death. Because it was Curtis's burden to prove

what portion of the value of the house could be traced to non-divisible assets, the trial court need not calculate what portion of the remaining mortgage payments came from the cash portion of the Fidelity account or rental income. It should, however, allocate any increased value of the house due to market forces versus any improvements made with divisible funds from the cash portion of the Fidelity account.

Wedding Rings

¶32 Curtis’s wedding rings were stolen not long before the divorce. Clay claimed that \$8,560 in insurance proceeds covering that loss should be part of the marital estate. Curtis testified that there were no insurance proceeds—instead, the insurance company arranged to have replacement rings made. One of the partial marital settlement agreements the parties signed specified that each party would keep the “household items of personal property” already in their possession, with a few specified exceptions. Clay conceded that the wedding rings were not listed as an exception to the personal property within the possession of each party, but testified that he did not believe the wedding rings were “household items.” The trial court accepted Clay’s argument that the rings were outside the scope of the parties’ settlement agreement, and it ordered Curtis to reimburse Clay for half of the insured value of the wedding rings.

¶33 We are satisfied that the trial court could reasonably construe the wedding rings as outside of the parties’ partial property settlement. The issue was decided on credibility determinations about the parties’ intent. Such credibility determinations by a fact finder are not reviewable by this court. *State v. Oswald*, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238.

Advance On The Property Settlement

¶34 The trial court found that Curtis had taken a \$2,200 advance on the property division from a joint account, and included that entire amount in her equalization payment to Clay. Clay does not dispute Curtis's contention that she should only have been required to repay half of that amount, representing Clay's share. We therefore direct the trial court on remand to reduce the itemization for the advance on the property settlement by \$1,100.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

