

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2008

David R. Schanker
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. 2007AP2583

Cir. Ct. No. 2006FA76

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

SUE A. WORM,

PETITIONER-APPELLANT,

V.

GERALD W. WORM,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sue Worm appeals from a divorce judgment dividing marital property between Sue and Gerald Worm and from an order

denying her motion to reopen and reconsider that judgment. Sue argues that the trial court erred in dividing the marital property according to the appraised values because it resulted in the trial court unequally dividing the marital property without considering the required statutory factors. Sue also argues that the trial court erred in denying her motion to reopen and reconsider the judgment because the trial court relied on false and misleading testimony in dividing the property as it did. We conclude that Sue's arguments lack merit and therefore affirm.

Background

¶2 The trial court held a hearing in the divorce of Sue and Gerald Worm on the disposition of the parties' marital property, including a parcel of hunting land, the marital homestead, and an adjacent lot. R-49:70. Both parties requested the hunting land, and presented evidence as to their attachment to that land. A single appraisal of each parcel of property was entered into evidence, and the trial court adopted those values. The circuit court awarded the hunting land to Gerald and the home and the lot to Sue. After accounting for the division of all the marital property and debt, the trial court awarded Gerald an equalization payment of \$6,400.

¶3 Sue moved the trial court to reopen and reconsider the judgment pursuant to WIS. STAT. § 806.07 (2005-06).¹ Sue based her motion on her assertion that a witness for Gerald had provided false and misleading testimony regarding Gerald's personal attachment to the hunting land which led the circuit

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

court to make inaccurate factual findings upon which it relied in awarding Gerald the hunting land. The court denied the motion. Sue appeals.

Standard of Review

¶4 The division of marital property in a divorce case is a discretionary decision left to the circuit court. *Dutchin v. Dutchin*, 2004 WI App 94, ¶10, 273 Wis. 2d 495, 681 N.W.2d 295. A circuit court’s decision regarding a WIS. STAT. § 806.07 motion to grant relief from a divorce judgment is also discretionary. *Johnson v. Johnson*, 157 Wis. 2d 490, 497, 460 N.W.2d 166 (Ct. App. 1990). We will uphold a trial court’s discretionary determination as long as the circuit court “considered the pertinent facts, applied the correct law, and used a rational process to reach a reasonable determination.” *Dutchin*, 273 Wis. 2d 495, ¶10. The circuit court’s determination will not be disturbed merely because an appellate court may reasonably reach a different determination. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶5 A property valuation determined by the trial court is a finding of fact, which will be upheld on appeal unless clearly erroneous. WIS. STAT. § 805.17(2); *Noble v. Noble*, 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166. An appellate court must search the record for evidence to support the findings that the trial court made, and not to support findings that the trial court could have made but did not. *Noble*, 287 Wis. 2d 699, ¶15. It is the trial court’s job “to determine the credibility of the witnesses, weigh the evidence, and resolve the dispute.” *Id.*, ¶16. When reviewing fact-finding, appellate courts do not re-evaluate the credibility of the witnesses or reweigh the evidence. *Id.* Even where the evidence permits a contrary finding, a trial court’s finding of fact will be affirmed on appeal as long as the evidence in the record would allow a reasonable

factfinder to make the same finding. *See Lellman v. Mott*, 204 Wis. 2d 166, 171, 554 N.W.2d 525 (Ct. App. 1996).

Discussion

¶6 Sue argues that the trial court erred in unequally dividing the marital property between Sue and Gerald without considering the required statutory factors. Gerald responds that the circuit court was not required to consider the statutory factors because the circuit court divided the property equally. We agree with Gerald.

¶7 In Wisconsin divorce proceedings, there is a presumption that all property acquired during the marriage, not including gifts or inheritance, is to be divided equally. WIS. STAT. § 767.61 (2)(a), (3). The court may only deviate from this distribution after considering all thirteen factors listed in WIS. STAT. § 767.61(3).

¶8 Here, however, the circuit court did not deviate from an equal division of property. After dividing all marital property and subtracting all shared debts, the circuit court determined that Sue's awarded assets amounted to \$66,978.82 and Gerald's awarded assets amounted to \$51,634.81. The circuit court divided the sum of these and determined that an equal division would amount to \$59,306.82 for each party. After subtracting for other amounts Gerald owed to Sue, the circuit court ordered Sue to pay Gerald \$6,400 to create an equal division of property. The circuit court, therefore, was not required to consider the factors listed in WIS. STAT. § 767.61(3).

¶9 Sue argues, however, that the trial court erred in valuing the hunting land and the homestead, thus rendering the property division unequal. Sue asserts

that, because both parties were willing to pay more for the hunting land than the appraised amount, the trial court erred in relying on the appraisal amount in valuing the land. She claims that the trial court erroneously relied on “a stipulation on value which did not exist in the record,” and that by accepting the appraised value, the trial court unequally divided the assets. Regarding the valuation of the marital homestead, Sue argues that, since she wanted to sell the property and Gerald had no interest in keeping it, the market should have determined the homestead’s value. She asserts that the circuit court’s erroneous acceptance of the appraised value further unbalanced the property division in Gerald’s favor. We disagree.

¶10 Contrary to Sue’s assertions, the trial court made a proper factual determination of the valuation of the homestead and the hunting land. The record contained a single appraisal of each property. Sue testified that she would have no problem with the circuit court awarding the marital homestead at the appraised value, and both parties testified that the hunting land was worth at least the appraised value. Based on the land appraisals and the above testimony, a reasonable fact finder could find that the hunting land and the marital homestead had values equal to those of the appraisal values. *See Noble*, 287 Wis. 2d 699, ¶15 (holding that appellate courts need only search the record for evidence to support the findings that the circuit court made). The circuit court’s factual findings regarding the valuations of the hunting land and the marital homestead were not clearly erroneous and, therefore, must be upheld on appeal.

¶11 Sue argues next that the circuit court erred in denying her motion to reopen and reconsider the judgment. However, the record reveals that the circuit court properly exercised its discretion in denying the motion. After a hearing on the motion, the circuit court found that there had been no misrepresentation during

the trial. Sue has offered no basis to overturn the circuit court's factual findings and credibility determinations. Accordingly, we affirm.²

By the Court.—Judgment and order affirmed.

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

² In his response brief, Gerald asks that we find Sue's appeal frivolous. However, Gerald did not separately move this court to find the appeal frivolous, and we therefore cannot do so. See *Howell v. Denomie*, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621 (“[P]arties wishing to raise frivolousness must do so by making a separate motion to the court [A] statement in a brief that asks that an appeal be held frivolous is insufficient notice to raise this issue.”).

