

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2009

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. 2008AP1589

Cir. Ct. No. 2008SC230

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SHIRLEY TRAVNICEK,

PLAINTIFF-APPELLANT,

V.

JODY M. TRAVNICEK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Shirley Travnicek (Shirley) appeals an order dismissing her small claims action against her ex-daughter-in-law, Jody

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Travnicek, n/k/a Jody Fletcher (Jody). Shirley seeks repayment from Jody of \$5,000 she gave to Jody and her son, Troy Travnicek (Troy), during the couple's marriage, contending the payment was a loan and not a gift. The circuit court found that Shirley failed to prove that the payment was a loan, and dismissed her claim. We affirm.

¶2 Troy and Jody were married on January 19, 2007. On May 15, 2007, Shirley gave Troy and Jody a check in the amount of \$5,000. It is undisputed that Troy and Jody requested the money for improvements to the couple's home, which was titled in Jody's name only. The couple divorced on April 18, 2008. Jody retained sole ownership of the home in the divorce agreement, which did not include a payment to Troy for equity in the house.

¶3 At trial, Shirley testified that she told Jody and Troy that they could pay back the \$5,000 "whenever," and they agreed to pay her back. Jody testified that Shirley told her that she and Troy should consider the \$5,000 check to be a gift for "birthdays, anniversaries and holidays." At the conclusion of testimony, the circuit court found that Shirley failed to prove that the \$5,000 payment was a loan and not a gift and dismissed the case.

¶4 Shirley makes one argument on appeal. She contends that the circuit court's factual finding that the \$5,000 check was not a loan was clearly erroneous. She contends that Jody's testimony that the money was for future birthdays, anniversaries and holidays is inherently incredible because "[n]o one gives money to someone for future birthdays and holidays." We reject Shirley's argument.

¶5 We may not set aside a circuit court's findings of fact unless they are clearly erroneous. *Acuity Mut. Ins. Co. v. Olivas*, 2007 WI 12, ¶24, 298 Wis. 2d 640, 726 N.W.2d 258. "The trial court is the ultimate arbiter of both the

credibility of the witnesses and the weight to be given to each witness' testimony.” *Pries v. McMillon*, 2008 WI App 167, ¶13, __ Wis. 2d __, 760 N.W.2d 174 (citation omitted).

¶6 We conclude that the circuit court's finding that the \$5,000 check was not a loan was not clearly erroneous. The circuit court, faced with the conflicting testimony of Jody and Shirley, assessed the relative credibility of the witnesses and concluded that Shirley failed to prove that her transfer of property to Troy and his then-wife, Jody, was a gift. We note that a parent's transfer of property to a child without explanatory words is presumptively a gift. *See Rohde v. Skomski*, 8 Wis. 2d 50, 51, 98 N.W.2d 440 (1959). Such a presumption would not have applied if the court had chosen to believe Shirley's testimony that she had an oral agreement (i.e., “explanatory words”) with Troy and Jody establishing that the money was a loan. However, Shirley's testimony was the only evidence of such an agreement, and the court chose to give little weight to her testimony. We do not question the circuit court's assessments regarding witness credibility and weight of the evidence that are at the heart of its decision.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

