COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP33 **Cir. Ct. No. 2008FA865**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

SUSAN M. SOKOL,

PETITIONER-RESPONDENT,

V.

JEFFREY S. SOKOL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed and cause remanded for determination of costs for frivolous appeal.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Jeffrey S. Sokol, *pro se*, appeals from the "divided assets of the parties, and set placement schedule and support" in the judgment of divorce from his former wife, Susan M. Sokol. On appeal, Jeffrey, an attorney,

argues that: (1) the trial court improperly allocated $25,481 attributed to a closed bank account to Jeffrey; (2) the trial court calculated child support based on Susan's part-time employment; and (3) the trial court improperly removed jewelry from the marital estate. We affirm. We also note that Susan asked this court to find Jeffrey's appeal frivolous. Because we conclude that the appeal is frivolous, we also remand to the trial court for a hearing on costs, fees and reasonable attorney's fees to be awarded to Susan.

BACKGROUND

¶2 Susan and Jeffrey were married on July 25, 1998. The parties had two children together: Andrew, born December 1, 1999, and David, born October 12, 2001. On February 8, 2008, Susan commenced an action for divorce. The parties signed a stipulation as to child support and agreed to have the division of personal property determined by arbitration; however, the action proceeded to trial on July 8, 2010, on the issues of division of the marital estate and maintenance. Both parties testified at trial as to their employment histories, respective incomes, and various financial accounts. Both parties also provided financial disclosure statements to the court.

¶3 Both parties had been employed for a substantial period of time before their marriage; Susan as a registered nurse; Jeffrey as an engineer and a patent attorney. Each had earned significant income, had a home, and had accumulated various assets, including retirement accounts, before their marriage. In 1995, Susan was seriously injured in an automobile accident. Susan testified that as a result of her injuries, her employer allowed her to work flexible hours and to work from home on multiple occasions. Susan testified that the parties married

three years after her accident, at which point the parties sold their homes, pooled many of their resources, and bought a marital home.

¶4 Susan and Jeffrey were the only trial witnesses. Their testimony focused primarily on their individual interpretations of their financial disclosure statements, including which accounts were marital, premarital, gifted or inherited. The parties also testified as to their—and each other's—employment histories, including the large fluctuations in Jeffrey's income during the marriage. Jeffrey conceded his income over his time as a lawyer ranged from a high of $290,000 to $120,000 in the year before the divorce. During the divorce, Jeffrey's income dropped to approximately $64,000.

¶5 Susan also testified about her employment history and income. Susan testified that she now works part-time as a nurse because, as a result of her accident, she endures pain when standing or sitting for long periods of time. Susan testified that she permanently switched to part-time employment in 1999, after the birth of her first child, in part because of the injuries sustained from the accident and in part because of child-care responsibilities. Susan stated that she works approximately fifteen to twenty hours a week, at a rate of $33.69 an hour.

¶6 Jeffrey disputed much of Susan's testimony, describing active family vacations taken after Susan's accident that involved skiing, diving and hiking, to support his contention that Susan was capable of earning a higher income by working full-time. Jeffrey also disputed Susan's testimony describing activity from various joint and individual financial accounts, and testified as to jewelry purchases made during the course of the marriage.

¶7 The trial court issued an oral decision on the issues of the division of the marital estate and maintenance and later issued written findings of fact and

conclusions of law. Relevant to this appeal, the trial court allocated $25,481 to Jeffrey, adopting Susan's calculation that $25,481 was the balance remaining on joint accounts after Jeffrey removed money from those accounts to make a court-authorized home purchase. The trial court also accepted the parties' stipulation as to child support, made findings of fact as to the income of both parties with regard to maintenance, and found that certain jewelry items were gifts to Susan not belonging to the marital estate.

¶8 In July 2010, Jeffrey filed a motion for reconsideration with the trial court, arguing that the record does not support the trial court's allocation of $25,481 to him and that a full-time employment salary should have been imputed against Susan for purposes of determining child support and maintenance payments. Jeffrey withdrew his motion for reconsideration. This appeal follows. In response to Jeffrey's appeal, Susan asked this court to find Jeffrey's appeal frivolous and to award costs, fees, and reasonable attorney's fees pursuant to WIS. STAT. § 809.25(3) (2009-10).[1]

DISCUSSION

I. Standard of Review.

¶9 "The division of property … and [the] determination of maintenance in divorce actions are decisions entrusted to the discretion of the [trial] court, and are not disturbed on review unless there has been an erroneous exercise of discretion." ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. "'[A] discretionary determination must be the product of a rational mental

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Id.*** (citation omitted; brackets in ***LeMere***). We will sustain a discretionary decision if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶10 We discuss the issues on appeal separately while keeping in mind both this standard, and the standard for determining whether Jeffrey's appeal is frivolous. Whether an appeal is frivolous is a question of law that we review *de novo*. *See* ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. To award costs and fees, we must determine that the entire appeal is frivolous. ***Id.*** We must therefore find each of Jeffrey's arguments frivolous in order to grant Susan's motion. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶27, 277 Wis. 2d 21, 690 N.W.2d 1. "The standard to be applied is an objective one: what should a reasonable person in the position of this *pro se* litigant know or have known about the facts and the law relating to the arguments presented." ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998) (emphasis added).

II. The $25,481 Allocation.

¶11 At trial, Susan asked the court to allocate an amount of $25,481 to Jeffrey. Susan testified that prior to the commencement of the divorce, she and Jeffrey had two joint bank accounts, one with Associated Bank and one with North Shore Bank. Susan testified that the parties agreed to move $150,000 from the

Associated Bank account into a money market account. Susan also testified that six months after the divorce proceedings began, the accounts were closed and she believed Jeffrey removed the money from both accounts. Susan testified that she believed Jeffrey used a substantial portion of the money from these accounts for the purchase of a home.[2] Susan further stated that the amount in the accounts prior to Jeffrey's home purchase, minus the amount used for the home purchase and Jeffrey's upkeep of the home, should have equaled $25,481. The calculation appears on a personal finance report entered into evidence by Susan. Susan's proposed division of the estate asked the court to assign the balance to Jeffrey.

¶12 Jeffrey did not object to the admission of Susan's personal finance report. However, he testified that he was not aware of Susan's claim until the day of trial, that the amount did not exist as the account had been closed, and that he did not have that money. Jeffrey corroborated Susan's testimony as to the original amount in the marital accounts and as to the amount withdrawn for the purchase of his home. He further testified that funds from those accounts were used to pay taxes on both his and Susan's homes and to put new flooring and carpeting in his home. Given all of the expenditures, Jeffrey stated, $25,481 did not remain from those funds.

¶13 Jeffrey did not provide the trial court with documents showing withdrawals for the various expenditures Jeffrey testified to making. The trial court then accepted Susan's personal finance report and allocated the amount in question to Jeffrey. The trial court expressly found Susan's testimony "more credible" than Jeffrey's and stated:

[2] The home purchase was approved by the court.

> And this money … he was allowed to take out to buy the home and so on, it was some real confusion there for a while because he said she took it out. Yes, she did, but it eventually got [back] to him. So it was very clear that that's what happened.
>
> … But what happened to the excess? I think it is fair to put in that number, [$]25,481. I don't know what happened to all that. He said ["] I had to change carpeting, I paid her taxes, I paid mine.["] Well, again, give me the exact proof so I can do the numbers. *This number is as good as any number I can find based on what has been presented*.

(Emphasis added.)

¶14 Where the trial court is the finder of fact and there is conflicting evidence, the trial court is the ultimate arbiter of the credibility of witnesses. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). "[T]he weight to be attached to [the credibility of witnesses] is a matter uniquely within the discretion of the finder of fact." ***Lellman v. Mott***, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). Accordingly, this court will "not reweigh the evidence or reassess the witnesses' credibility, but will search the record for evidence that supports findings the trial court made, not for findings it could have made but did not." ***Dickman v. Vollmer***, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202.

¶15 The trial court explicitly stated that it found Susan the more credible witness and accepted both her testimony and the $25,481 figure as it appeared in her personal financial report. On numerous occasions during the trial, the trial court asked Jeffrey to provide documentation supporting his assertions. Jeffrey did not do so, claiming he was surprised by Susan's calculation and did not prepare for defending against it. We find it difficult to believe that tax statements and receipts for home improvements had not been exchanged in this contentious divorce and were not easily available at trial. The trial court could only consider

the parties' financial reports as well as their conflicting testimony in the absence of supporting documentation. In relying on Susan's testimony and her financial documents, the trial court properly exercised its discretion and made a credibility finding that we will not reweigh.

¶16 We also conclude that Jeffrey's appeal of the $25,481 allocation is frivolous. Jeffrey's argument, in essence, challenges the credibility determination made by the trial court. We held in ***Lessor v. Wangelin***, 221 Wis. 2d 659, 586 N.W.2d 1 (Ct. App. 1998), that asking us to reweigh the testimony of witnesses and to reach a conclusion regarding credibility contrary to that reached by a trial judge was frivolous under those set of facts. *See* ***id.*** at 669. Further, Jeffrey, through counsel, filed a Motion for Reconsideration with the trial court alleging that $25,481 was actually the balance in an account held by Susan and her mother. Jeffrey's counsel withdrew the motion. Because the motion was withdrawn, the trial court was deprived of the opportunity to consider Jeffrey's claim. Obviously, it was not erroneous for the trial court not to consider information it never had the opportunity to consider. Because we cannot reweigh the trial court's credibility determination or find the trial court in error for not considering information in Jeffrey's withdrawn motion, we conclude that the appeal of the $25,481 allocation is frivolous.

III. Child Support.

A. The Stipulation.

¶17 Jeffrey argues that the trial court should have considered Susan's ability to work full-time when making determinations as to child support. However, the issue of child support was not disputed before the trial court as the parties stipulated to the terms prior to trial. On the day of trial, Jeffrey, through

his attorney, stipulated to the child support calculation method. Child support for the two children was calculated based on the shared placement formula in WIS. ADMIN. CODE § DCF 150.04. Before any testimony was taken, the following colloquy regarding child support occurred:

> [Court]: Let me ask you. The issue as to support also involved here, support payments?
>
> [Susan's counsel]: The support number is not included in the Partial Marital Settlement Agreement related to custody and placement. [Jeffrey's counsel] and I were working on all financial matters separately. We did run a FIN Plan in my office. [Jeffrey's counsel] used Mac Davis, and since we have the same number, it is about $674 a month which is per the guidelines. We are also asking that the premium differential for the children on the medical and dental insurance be split equally between the parties pursuant to statute. I add those two numbers together and provide that to [Jeffrey's counsel]. Again, our numbers on FIN Plan and Mac Davis were I think about $4 apart.
>
> [Jeffrey's counsel]: *I agree.*
>
> [Court]: That's part of it also. [Guardian ad litem], any issues about that?
>
> [Guardian ad litem]: None
>
> [Court]: All right, *that will be part of the order, too, then*. Thank you.

(Emphasis added.)

¶18 Having stipulated on the record to the child support calculations (which included Susan's income on a part-time basis), and the trial court having included those calculations in the divorce judgment, Jeffrey is now equitably estopped from claiming that the court erred in the manner in which child support was calculated. *See* ***Lawrence v. Lawrence***, 2004 WI App 170, ¶6, 276 Wis. 2d 403, 687 N.W.2d 748 ("When the court approves … a stipulation and incorporates it into the divorce judgment, the doctrine of equitable estoppel is applied against

the party seeking relief from the provision."). Because Jeffrey stipulated to the terms of child support that are now a part of the divorce judgment, Jeffrey's attempt to appeal the child support calculation based on his dissatisfaction with Susan's part-time employment is frivolous.

B. Failure to Raise the Issue Before the Trial Court.

¶19 At the conclusion of the trial, the trial court found that Susan:

> is 40 years old.… She is an RN, works 20 hours a week at Aurora…. She works in the area where they prep people or deal with people with certain issues.… She is doing this type of work because … as she said, she was hit by a Mack truck and had an accident, and she had various injuries, and she has lifting restrictions.

¶20 Jeffrey's motion for reconsideration raised, for the first time, the claim that "[a]bsent medical evidence or testimony to the contrary, [Susan] should be imputed full[-]time employment and *child support* … should be calculated from that imputation." (Emphasis added.) However, Jeffrey withdrew the motion to reconsider. Having deprived the trial court of the opportunity to rule on his specific claim, either by objection during trial or by motion to reconsider, Jeffrey has forfeited the right to raise that issue on appeal. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right…. In other words, some rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review.") (Citation and one set of quotation marks omitted; some formatting altered.).

¶21 Because Jeffrey: (1) stipulated to the method of calculating child support, which included reliance on Susan's part-time employment; (2) did not

object to either the trial court's acceptance of the stipulation, or its findings of fact pertaining to Susan's injuries; and (3) withdrew his motion for reconsideration, we consider Jeffrey's challenge to the child support calculation to be without a basis in law or fact. Therefore, Jeffrey's challenge is frivolous.

IV. Jewelry.

¶22 Finally, Jeffrey argues that the trial court erred when it failed to include the value of certain jewelry items purchased during the marriage as part of the marital estate. Specifically, Jeffrey argues that the trial court erroneously found a tanzanite ring, given to Susan by Jeffrey, and a tennis bracelet, bought by Susan, to be gifts.

¶23 The trial court, having previously found Susan to be the more credible witness, also found Susan's jewelry to be gifts and did not include her pieces of jewelry in the marital estate.[3] The trial court characterized Jeffrey's effort to have the jewelry included as part of the divisible estate as "revisionary history" which the trial court described as: "We did this during the marriage, but now we are getting divorced. Oh, those are different facts. I [see] it differently now.… Give it back to the estate, and I want half of it in my account." The trial court found:

> That's her jewelry.… It's out of the case. It's out of the [personal property] arbitration.[4] It's hers. It has nothing to do with this estate as far as this Court's concerned.… It's a gift. It's something she acquired as a gift, or as a

[3] Susan's wedding jewelry was also excluded. Jeffrey does not dispute the wedding items on appeal.

[4] The parties were unable to agree on how to divide the tangible personal property. They stipulated to have division of that property, and the value of the items, submitted to arbitration. The arbitration award was included in the judgment and is not a part of this appeal.

> token of their marriage, and it is not going to get back to the estate.

¶24 As stated, we will not upset a trial court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). We will also uphold the trial court's discretionary determinations if the trial court examined the relevant facts, applied the correct law, and reached a reasonable conclusion based on credible evidence. *See* ***Liddle***, 140 Wis. 2d at 136. Here, the trial court: (1) considered the testimony from both parties as to how the jewelry was acquired; (2) applied the relevant law, WIS. STAT. § 767.61(2)(a)1.,[5] which excludes gifted property from the marital estate; and (3) found Susan's testimony more credible.

¶25 Also as stated, we have previously held that challenges to a trial court's credibility determinations can be held frivolous. *See* ***Lessor***, 221 Wis. 2d at 669. Jeffrey does not dispute the applicable law in this case. His argument assails only the trial court's decision to believe Susan over him. In the context of this case, we conclude that this is a frivolous argument.

V. Costs for Frivolous Appeal.

¶26 Susan moved this court for costs based on her contention that this appeal was frivolous under WIS. STAT. § 809.25(3)(c). We have determined that each issue raised in this appeal is frivolous. We therefore conclude that the entire appeal is frivolous. *See* ***Baumeister***, 277 Wis. 2d 21, ¶27. As required by

[5] WISCONSIN STAT. § 767.61(2)(a)1. provides:

> PROPERTY SUBJECT TO DIVISION. (a) Except as provided in par. (b), 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.

Lucareli v. Vilas County, 2000 WI App 157, 238 Wis. 2d 84, 616 N.W.2d 153, we remand to the trial court to determine the amount to be awarded as costs for a frivolous appeal pursuant to § 809.25(3)(c). *See* ***Lucareli***, 238 Wis. 2d 84, ¶8.

By the Court.—Judgment affirmed and cause remanded for determination of costs for this frivolous appeal.

Not recommended for publication in the official reports.