COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1257-FT **Cir. Ct. No.** 2005FA1810

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

IN RE THE MARRIAGE OF:

STEVEN WAYNE LIVINGSTON,

PETITIONER-APPELLANT,

V.

ABBY MARIE LIVINGSTON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Steven Livingston appeals from a judgment in a family law matter. Specifically, he appeals from the trial court's property

division, which awarded a large number of items to Steven over his objection that the items did not belong to him or his wife, Abby.[1] The result of the judgment was to increase the amount of the equalization payment Steven was ordered to pay Abby. Steven argues that the trial court erred by not requiring Abby to implead Steven's mother, who claimed that she owned or had gifted the items to Steven. We conclude that Steven has failed to cite authority for this assertion. We also conclude that the trial court made a credibility determination when it found that the disputed items of property belonged to Steven and Abby and not to Steven's mother, all of whom testified. It is not our function to review questions as to weight of testimony and credibility of witnesses. We therefore affirm.

¶2 Steven raises two issues. He titles the first: "The trial court erred in adjudicating the property rights of petitioner's mother without requiring that she be made a party."[2] Steven testified that items of property located on the marital homestead were his mother's or had been gifted to him by his mother. Steven's mother testified similarly. Abby testified that she disbelieved some of her mother-in-law's affidavit which claimed ownership of some items of personal property because Steven would go to farm auctions and "bring home stuff." Sometimes, she testified, items would just appear.

[1] At trial, Steven also argued that many items were gifted to him by his mother. Neither of Steven's arguments on appeal focuses on his trial court assertion that some of the disputed property was gifted. Steven does not argue that the trial court erred by not addressing his assertion that some of the disputed property was gifted.

[2] Steven titles this issue differently in his statement of the issues, where he asserts: "Did the trial court err when it adjudicated the property rights of a non-party who claimed ownership under oath, of property awarded to petitioner as marital?" We see no difference between the two, and in any event, Steven does not explain the difference, if any.

¶3 Steven argues this issue in the context of joinder. He cites WIS. STAT. § 803.03(1) (2005-06),[3] and asserts that once his mother claimed ownership of the disputed property, Abby was obligated to join the mother as a party. He then argues that when the trial court recognized that his mother was not a party, the court was obligated to require the mother's joinder. His only authority for these assertions is ***Caldwell v. Caldwell***, 5 Wis. 2d 146, 92 N.W.2d 356 (1958), and ***Poindexter v. Poindexter***, 142 Wis. 2d 517, 419 N.W.2d 223 (1988). Because Steven fails to give pinpoint cites, as required by WIS. STAT. RULE 809.19(1)(e) and THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.10.8.3, at 96 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005), we are unsure where in these cases he believes the supreme court decided that a party to a divorce action must join a non-party asserting property ownership, and where the supreme court obligated a trial court to require joinder if a party to a divorce action did not do so. In ***Caldwell***, 5 Wis. 2d at 158, the recipient of substantial gifts from a divorce litigant

[3] WISCONSIN STAT. § 803.03(1) (2005-06) provides:

> (1) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process shall be joined as a party in the action if:
>
> (a) In the person's absence complete relief cannot be accorded among those already parties; or
>
> (b) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:
>
> 1. As a practical matter impair or impede the person's ability to protect that interest; or
>
> 2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.

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

was joined as a party to the action, and the supreme court said: "Where such a transfer [of a husband's property] has been made, the court has power in the divorce action to make the transferee a party and to cancel the transfer, at least to the extent necessary to protect the rights of the wife and minor child." ***Caldwell*** says nothing about either party to a divorce being required to join a third party claiming ownership or donor status of property alleged to be marital, and nothing about the trial court's obligation to require joinder if a party does not do so.

¶4 ***Poindexter*** also says nothing about the issues Steven raises. ***Poindexter*** is a maintenance case, though it involved property transferred to a second wife. In a footnote, the court said:

> Our decision today does not preclude the circuit court from considering on remand whether Dr. Poindexter intended to defraud his former spouse by such transfers. A circuit court has the power to make the transferee a party to cancel the fraudulent transfer to the extent necessary to protect the rights of the former spouse.

Poindexter, 142 Wis. 2d at 538 n.3.

¶5 We note that the failure to join Steven's mother is of little consequence. In ***Hoppmann v. Reid***, 86 Wis. 2d 531, 535, 273 N.W.2d 298 (1979), the court said: "A court may proceed even though an indispensable party has not been made a party to the suit. Failure to join an indispensable party does not deprive the court of jurisdiction." We also note that Steven's attorney did not ask the trial court to require Abby to join Steven's mother, though he now complains that the trial court erred by failing to do so.[4] "As a general rule, we do

[4] Appellate courts do not look with favor upon claims of prejudicial error when no action was requested by counsel. ***State v. Williquette***, 180 Wis. 2d 589, 603, 510 N.W.2d 708 (Ct. App. 1993).

not address issues raised for the first time on appeal." ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶45, 264 Wis. 2d 318, 667 N.W.2d 14. We decline to do so here, particularly in the absence of any authority supporting Steven's position.

¶6 Secondly, Steven argues that the trial court erred in the determination of the gifted/non-gifted status of the contested assets. His attorney asserts: "I am not sure why the court had difficulty in believing that these items were gifts from petitioner's mother because most substantial gifts do come from parents." We explained the futility of attempting to overturn trial courts' credibility determinations in ***Teubel v. Prime Development, Inc.***, 2002 WI App 26, ¶13, 249 Wis. 2d 743, 641 N.W.2d 461:

> When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses, and of the weight to be given to each witness's testimony. This is especially true because the trier of fact has the opportunity to observe the witnesses and their demeanor. This court will not reverse a trial court's credibility determination unless we could conclude, as a matter of law, that no finder of fact could believe the testimony.

(Citations omitted.)

¶7 The trial court was faced with a classic credibility determination. Abby testified that "stuff" appeared at her home because Steven attended farm auctions and brought it home. She testified that she did not believe her mother-in-law. Steven and his mother testified that the contested items either belonged to her or were gifted to Steven. Faced with this conflict in testimony, the trial court chose to believe Abby, who testified that farm auctions that Steven attended were probably the source of the contested property. The court said:

> The personal property is reflected in Exhibit 3. I have a hard time with property that is located on the premises, on the marital premises and is not documented as anything other than marital property suddenly becoming something other than marital property because a witness testifies, a family member, the mother of the petitioner testifies that oh, as a matter of fact, these were gifted or inherited items. I can't accept that. I think that what I have to go on is the property as it is located at the marital residence at the time of separation. And in the absence of any other documentary evidence to the contrary, that is what I'm going to assume that it is.

¶8 Steven could have avoided this problem by producing documentary evidence showing that at least some of the sixty-five disputed items were either gifted or belonged to his mother. Instead of producing testimony that a $1300 Angus cow and calf were registered to "Derrell Livingston and Sons," he could have produced the registration documentation. A $3000 Oliver tractor with a loader was undoubtedly purchased somewhere, as was a skidsteerer valued at $8000. He was notified that he should produce that sort of evidence when Abby faxed a "Request for Production of Documents" to his attorney seven weeks before trial. The request put Steven on notice that Abby doubted his assertion that the disputed property was not marital. Coming up with nothing other than his mother's testimony meant that the trial court had to choose between believing Abby or Steven and his mother, and that credibility determination was for the trial court to make.

By the Court.—Judgment affirmed.

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