**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 8, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP2773** **Cir. Ct. No. 2005FA1654**

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

---

**IN RE THE MARRIAGE OF:**

**DANIEL J. HAMILTON,**

**PETITIONER-RESPONDENT,**

**V.**

**CHERYL A. HAMILTON,**

**RESPONDENT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Cheryl Hamilton appeals the property division portion of a judgment dissolving her marriage to Daniel Hamilton. Cheryl also

appeals that part of the judgment awarding Daniel $1,000 in attorney's fees. Cheryl argues the circuit court erroneously exercised its discretion when dividing certain aspects of the marital estate and when awarding attorney's fees. We reject Cheryl's arguments and affirm the judgment.

## BACKGROUND

¶2 Cheryl and Daniel were married for twenty-five years and have two adult children. Daniel petitioned for divorce in August 2005, and a trial on contested issues was initially scheduled for August 30, 2006. The trial date was rescheduled for October 12, 2006, based on Cheryl's desire to obtain additional discovery. On October 2, Cheryl requested a second postponement of the trial date, claiming Daniel had failed to provide responses to her first discovery request. During an October 5 telephone status conference, Daniel agreed to the second set-off request in exchange for Cheryl stipulating that the couple's house would be valued at $350,000. The trial was rescheduled for December 8, 2006.

¶3 On October 17, 2006, Cheryl's counsel moved to withdraw, citing a breakdown in communication. The court ultimately granted counsel's motion to withdraw, noting it would react "cautiously" to any duplicative discovery done by new counsel. The court further noted that Cheryl's dispute with her counsel notwithstanding, the matter appeared ready for trial based on the record before it. The court rescheduled the trial for December 22, 2006. After the trial, the court granted the divorce, denying maintenance to either party, dividing the marital property and awarding Daniel $1,000 in attorney's fees. This appeal follows.

## DISCUSSION

¶4 Cheryl raises numerous challenges to the circuit court's division of the marital property. The division of property rests within the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain discretionary decisions if the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach." ***Id.*** (citation omitted). We generally look for reasons to sustain the circuit court's discretionary decisions, *see* ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and "may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Additionally, findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).[1] The circuit court is also the ultimate arbiter of a witness's credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶5 Cheryl argues that the circuit court erred by holding her to the stipulation regarding the value of the marital residence. At the November 2, 2006 hearing on her then-counsel's motion to withdraw from representation, Cheryl attempted to withdraw from the stipulation, claiming she never authorized her attorney to agree on the value of the couple's home. Both attorneys recounted that Daniel had agreed to Cheryl's second request to postpone the trial in exchange for her stipulation, and the court noted that it "seem[ed] to recall the agreement on the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

value of the homestead." The court ultimately held Cheryl to the stipulation regarding the value of the marital residence.

¶6 Cheryl argues she was free to withdraw from the stipulation "with impunity" up until the time it was incorporated into a judgment. Once a court approves a stipulation under WIS. STAT. § 767.10(1), however, the right of the parties to withdraw from the stipulation comes to an end. ***Hottenroth v. Hetsko***, 2006 WI App 249, ¶30, 298 Wis. 2d 200, 727 N.W.2d 38, *review denied*, 2007 WI 59, 299 Wis. 2d 325, 731 N.W.2d 636. Here, the court recalled the parties' agreement and, by ultimately holding Cheryl to the stipulation, implicitly found that it had approved of the stipulation at the October 5, 2006, status conference.

¶7 The record does not include a transcript of the October 5, 2006, proceedings, and Cheryl, as the appellant, bore the responsibility of ensuring that all relevant transcripts were in the record. *See* WIS. STAT. RULE 809.11(4). When the record is incomplete, "we must assume that the missing material supports the trial court's ruling." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). Without the subject transcript, we assume the circuit court approved the stipulation and, therefore, properly exercised its discretion by holding Cheryl to that stipulation. To the extent Cheryl contends the court erred by failing to consider the cost of needed repairs to the roof and resulting impact on the value of the home, Daniel argues that Cheryl provided no proof or appraisals to counter the $350,000 assessment submitted to the court. Cheryl did not file a reply brief which responds to this argument, and we therefore deem Daniel's argument admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶8 Next, Cheryl argues the circuit court erroneously exercised its discretion by limiting her ability to present evidence of the parties' financial circumstances during their twenty-five year marriage to the last five years. As an initial matter, we note this argument is not fully developed, as Cheryl does not identify what evidence she was foreclosed from presenting nor how its absence resulted in prejudice. Generally, this court does not consider conclusory assertions and undeveloped arguments. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56. In any event, as Daniel points out, the court considered the length of the marriage, the relative contributions of each party and other economic factors before concluding there was no reason to depart from the presumptive equal division of the marital property. We discern no error.

¶9 Cheryl also contends the circuit court erred by failing to hold a hearing on her motion to compel discovery. Cheryl argues that since July 2006, she "has been concerned about receiving full responses to her discovery requests." Specifically, Cheryl claimed there was outstanding information regarding Daniel's business. Cheryl filed a motion to compel discovery in September 2006. Daniel's counsel consequently wrote the circuit court and explained that a first set of interrogatories prepared by Cheryl's initial counsel was withdrawn after both parties agreed that the parties' respective interrogatories called for a vast amount of irrelevant material. The parties agreed to proceed with "an informal discovery process" and Daniel offered Cheryl's initial and subsequently retained counsel access to inspect the business records.

¶10 Cheryl's second retained attorney served Daniel with a second, third and fourth set of interrogatories. In his letter to the court, Daniel's counsel indicated that answers were provided to all three sets. Cheryl's counsel, however,

opted to reactivate the first set of interrogatories. Daniel's counsel further notified the court: "By the time you read this letter, all interrogatories and information will have been answered by [Daniel] and once again, his business records made available to counsel for counsel's inspection." At a November 2006 hearing on a motion to withdraw filed by Cheryl's second attorney, counsel recounted that there had been four sets of discovery on Cheryl's behalf. Counsel continued:

> We did do all of the discovery, and this is relating to all the business and the policies and whatnot, and she refuses to accept those answers as valid. And now she didn't take our advice, and … we had an understanding if she didn't take our advice, we couldn't in good faith go into court with the arguments she wants because it exposes us to sanctions and a frivolous action, and we don't want that type of exposure.

In turn, Daniel's counsel reiterated that Daniel had responded to discovery both formally and informally, and Cheryl had been provided with all of the information requested. The record does not support Cheryl's claim that she was deprived of additional discovery. Moreover, Cheryl fails to establish how she was prejudiced by the court's failure to hold a hearing. We therefore reject her argument that the court erred in this regard.

¶11 Cheryl next argues that the circuit court erred by awarding the couple's jewelry business to Daniel at a value of $1.00. Cheryl claims the circuit court barred her from obtaining additional discovery regarding the business, as well as an evaluation of the fair market value for the business. As noted above, Daniel claimed he answered all of Cheryl's discovery requests and made his business records available for her counsel's inspection. At the November 2, 2006 hearing, the parties discussed appraisals of Daniel's business. Cheryl's counsel informed the court that Cheryl had authorized William Pellino to evaluate the business. The court consequently held that Pellino was the named expert for

Cheryl, and further noted that if the evaluation was to be completed, it was to be completed by Pellino.

¶12 At a December 22, 2006 evidentiary hearing, Daniel's expert, CPA James Hostert, testified that the business had a negative value of approximately $80,000. Cheryl claims that at a March 22, 2007 hearing, her expert, CPA Robert Roth, challenged Hostert's testimony and opined that the business had a positive value. Roth, however, was unable to determine that value from the records reviewed. Roth apparently indicated more time was needed to obtain and review additional documentation before assessing the fair market value of the business. From the record, it is unclear why Roth, rather than Pellino, testified as Cheryl's expert. Moreover, Cheryl failed to ensure that the March 22, 2007 hearing transcript was included in the record on appeal. Therefore, the only evidence in the record regarding the worth assigned to the business is a negative value. Accordingly, we conclude that Cheryl has failed to establish that the court erred by awarding the business to Daniel at a value of $1.00.

¶13 Next, Cheryl claims the circuit court erred by finding that a $60,000 promissory note from Daniel's brother had no value for property division purposes, effectively leaving Cheryl responsible for paying a second mortgage. According to Cheryl, Daniel took out a second mortgage on the couple's home in order to loan $60,000 to Peter. Cheryl argues that because Daniel was "clearly impeached" by conflicting testimony he gave regarding the note, the circuit court erred by accepting Daniel's testimony that there was no consideration for the note. Cheryl, however, failed to provide this court with a transcript from the hearing at which his contradictory statements were allegedly made.

¶14 According to Cheryl, Daniel "admitted" at the March 22, 2007 hearing that "the note as an asset was not reflected on any of his financial information submitted at trial." Cheryl also claims that at that hearing, Daniel stated he had received payments from Peter under the terms of the note. At a subsequent hearing on May 10, 2007, however, Daniel denied receiving any payments. Daniel explained that he needed to take out a $60,000 home equity loan in order to help out his business. Daniel further testified that Cheryl would not cosign the home equity loan unless Peter agreed to sign the promissory note.

¶15 Daniel insisted, however, that no consideration was given for the note and, to his knowledge, Peter did not think he would have to make a payment on the note. Daniel testified that the $60,000 home equity loan was used for business purposes and Daniel made payments on the loan, while telling Cheryl that the payments were being made by Peter. Daniel explained that Cheryl insisted Peter sign the note because she did not like Daniel's family and "wanted to get even" with Peter. Daniel further stated that he let Cheryl believe Peter was making the payments "to make things happy" in the couple's household.

¶16 In the absence of the subject transcript, the only evidence in the record supports the circuit court's conclusion that the note "was a ruse generated by the husband, demanded out of spite by the wife," and, ultimately, "a meaningless piece of paper for which no consideration … was given." Even assuming Daniel's contradictory statements were part of the record on appeal, the circuit court is the ultimate arbiter of witness credibility. ***Cogswell***, 87 Wis. 2d at 250. We therefore reject Cheryl's claim that the circuit court erred by finding that the promissory note had no value for property division purposes.

¶17 Cheryl also claims the circuit court erred by failing to credit her with one-half of the proceeds from a 2000 real estate sale. In denying this request, the court concluded there was insufficient proof regarding disposition of the funds. Daniel contends the money was deposited in the parties' joint accounts, while Cheryl argues that no proceeds were deposited. Neither party specifies where testimony on this issue may be found in the record, and this court was unable to locate the testimony during its review of the record. Cheryl cites a trial exhibit showing Daniel's figures for the sale of the subject property. An exhibit sticker indicates the document was presented at the March 22, 2007 hearing. Because it appears the parties' testimony was offered at that hearing, we assume the missing transcript supports the circuit court's decision on this issue. *See* ***Fiumefreddo***, 174 Wis. 2d at 27. Further, to the extent Cheryl simply challenges the circuit court's apparent acceptance of Daniel's testimony regarding the sale proceeds, the circuit court is the ultimate arbiter of witness credibility. ***Cogswell***, 87 Wis. 2d at 250. We therefore reject this argument as well.

¶18 Next, Cheryl contends the circuit court erred by finding that approximately $35,000 received over time from her mother, Arlys Stark, was not a gift. Cheryl claims the money received from her mother was used to purchase a 2004 Trailblazer that should have been awarded to Cheryl as non-marital property. At a May 10, 2007 evidentiary hearing, Stark testified that she gave her daughter approximately $35,000 over time, but the most she gave at any one time was $8,000. Stark further testified that she didn't know what Cheryl bought with the money. Cheryl testified that she purchased the vehicle with funds from her mother, but was unable to produce any documentation to support her claim. Ultimately, the court concluded that Stark's testimony "was far short, almost frivolous, … as to her meeting the burden of [proving] that [the 2004 Trailblazer]

should be excluded from the marital estate due to gifting." The circuit court is the ultimate arbiter of witness credibility, ***id.***, and we conclude that the court did not err in concluding that these funds were not non-marital property.

¶19 Cheryl, in very conclusory fashion, additionally argues that the circuit court erroneously exercised its discretion by allocating the parties' 2005 federal and state income tax refunds to her. Daniel argues that the refunds would have been mailed to the marital home after Daniel moved out. Daniel further argues he never received his half of the tax refunds. Cheryl testified she did not remember receiving what would have been a total refund of $5,126, nor did she remember giving half of the refund to Daniel. The circuit court expressed its belief that Cheryl received the refunds, but nevertheless concluded that if Cheryl could provide proof that the refunds were received and placed "in either her or his checking account and used for family necessaries," it would consider a modification of the property division. Again, the circuit court is the ultimate arbiter of the witness's credibility. ***Id.*** We discern no error in this ruling.

¶20 Cheryl also contends the circuit court erred by deviating from an equal division of the parties' season Badger sports tickets without a factual basis for doing so. Cheryl testified the parties were able to obtain the tickets by virtue of her status as a University of Wisconsin alumnus. Daniel testified, however, that his business paid for the tickets and Cheryl had not been to a game in at least four years. An adequate basis exists in the record to support the court's discretionary decision. Additionally, to the extent Cheryl argues the circuit court erred by failing to credit her for expenses she incurred during the pendency of the divorce, her argument is not sufficiently developed and, therefore, fails to establish an erroneous exercise of the circuit court's discretion.

¶21 Finally, Cheryl challenges the circuit court's decision to award Daniel $1,000 toward his attorney's fees. We review a circuit court's decision regarding attorney's fees for an erroneous exercise of discretion. ***Franke v. Franke***, 2004 WI 8, ¶84, 268 Wis. 2d 360, 674 N.W.2d 832. Here, the court was "sympathetic" to Daniel's request for attorney's fees based on the lengthy delays in bringing the matter to trial. The court continued:

> And I think based upon what everybody knows happens, every time you get ready for trial, you get ready for trial but then you're not ready for trial if the case gets postponed. There are intervening cases and intervening facts and you have to go back and re-prepare in order to do a competent job the next time, and she was the cause of set overs here. That's undisputed. Her reneging on the agreement as to the valuation of the homestead was but one example, so I'm going to award [Daniel] $1,000 towards his attorney's fees ….

Because an adequate basis exists in the record to support the court's discretionary decision, we reject Cheryl's challenge to the circuit court's award of attorney's fees.

*By the Court.*—Judgment affirmed.

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