COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1479 **Cir. Ct. No. 2008FA15**

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

IN RE THE MARRIAGE OF:

JILL E. MAHLE,

PETITIONER-RESPONDENT,

V.

JAMES E. MAHLE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. James E. Mahle appeals from a judgment of divorce from Jill E. Mahle. James contends the trial court erroneously exercised

its discretion when it determined that the marital residence, purchased with Jill's money but titled jointly, was nondivisible property and awarded it solely to Jill. We affirm because the court's decision was rooted in its finding that Jill presented sufficient credible evidence to rebut a presumption of donative intent. That finding is not clearly erroneous. We also affirm the findings that James committed marital waste and that Jill was entitled to attorney's fees and other fees and costs.

¶2 The trial court made detailed findings.[1] The divorce at issue here is the parties' second from each other. No children were born of either marriage. James and Jill first were married in California in 2001 and divorced in April 2002. They moved separately to Wisconsin. In September 2002 Jill purchased a small house on Elm Street in East Troy, paying for it in cash with her own funds and, at James' insistence, titling it in both their names as tenants in common. In 2003 Jill sold a California house titled in her name that she had purchased with gifted funds. Jill deposited the proceeds in a Vanguard account titled in her name.

¶3 James and Jill remarried in October 2004. Jill brought assets worth approximately $700,000 to the marriage. James brought personal property of insignificant value. In May 2005, the parties bought a house as joint tenants using $400,000 cash from Jill's individual Vanguard account. They sold the Elm Street property and deposited the $100,000 proceeds into a joint savings account. A month later, James withdrew $63,000 from the joint account and deposited it into an IFMG Securities brokerage account titled in his name only.

[1] We commend the trial court for its comprehensive written decisions. Their thoroughness is especially valued where, as here, our review depends upon the findings of fact.

¶4 In January 2008 Jill filed for divorce and vacated the marital residence. Soon after being served with the petition, James withdrew $18,500 from the IFMG account. In February, the family court commissioner authorized James to withdraw up to $10,000 for living expenses, but deemed it to be an advance against his property division. James did not disclose that he already had withdrawn $18,500 and transferred the balance to an E*Trade account also titled solely to him. James made other E*Trade withdrawals for a down payment on a new vehicle and to join online dating services. Jill filed a contempt motion.

¶5 After a one-day trial in October 2008, the court granted the parties a divorce. It found that James, 49, was in college throughout most of the marriage, recently graduated with a degree in liberal studies, no longer operated a business he formed in 2007, reported a monthly gross income of $800 but indicated he expects to earn $55,000 annually as an over-the-road truck driver. The court also found that Jill, 50, was a social worker who grossed about $3,250 monthly, and had paid for many of James' business and college expenses. Jill waived maintenance and the court denied it to James. The court also ordered that the parties' personalty be auctioned, that the marital residence, listed for sale in May, remain so and that James vacate it within thirty days at which time Jill would have exclusive occupancy. It instructed the parties to submit trial briefs.

¶6 In April 2009, the trial court entered its Final Findings of Facts, Conclusions of Law and Judgment of Divorce, incorporating by reference its 2008 memorandum decision which, in turn, acknowledged that it had "adopted [Jill's] brief almost verbatim" because the facts and James' conduct made it "clear that [Jill's] brief should carry the day." Some of the findings included that a locksmith had to be hired to gain access to James' trucks, that he removed over $2,700 of personal property that should have been auctioned, that James was abusive and

coerced Jill into jointly titling assets by threatening to kill her father and "do away with" her brother and that, because of the problems James created, Jill hired a security firm to ensure that the auction proceed peacefully.

¶7 Jill sought an unequal property division due to the brevity of the marriage, the amount of assets she brought to it and her contributions during it. Specifically, she asked that the marital residence be awarded to her in its entirety. The court did so because it was satisfied that Jill had demonstrated that the marital residence was acquired with gifted funds, that she had no intent to gift it to James and that James wasted marital assets. Also, although the court heard the contempt motion on the day of trial, it elected not to address the contempt. It instead awarded Jill $3,500 as reasonable attorney's fees, plus costs, and ordered James to pay the cost of the security service. James filed this appeal.

¶8 James first contends awarding the marital residence solely to Jill was an erroneous exercise of discretion when it was held jointly with rights of survivorship. Jill acknowledges that transferring into joint tenancy property which had its source in gifted funds transmuted it to divisible property. *See* ***Trattles v. Trattles***, 126 Wis. 2d 219, 225-26, 376 N.W.2d 379 (Ct. App. 1985). She argues, however, that her action created a rebuttable presumption of donative intent, which she defeated by countervailing evidence. *See* ***id.*** at 224. We agree.

¶9 Generally, assets and debts acquired before or during the marriage are divisible upon divorce. *See* ***Derr v. Derr***, 2005 WI App 63, ¶10, 280 Wis. 2d 681, 696 N.W.2d 170. Absent a finding of hardship, however, gifted property or property acquired "[w]ith funds acquired" through gifting, is not subject to

division. *See* WIS. STAT. § 767.61(2), (3) (2007-08).[2] A trial court's decision on how to divide the divisible marital estate is discretionary. ***Derr***, 280 Wis. 2d 681, ¶9. But first the trial court must determine what assets comprise the "divisible marital estate"—specifically here whether the residence was a part of it.

¶10 A party asserting that an asset is nondivisible has the burden to provide evidence that permits tracing the asset to an original nondivisible asset. *See* ***id.***, ¶17. If tracing is possible, the issue becomes whether the owning spouse had a donative intent. ***Id.***, ¶23. Donative intent ultimately is a question of subjective donative intent, typically a question of fact. *See* ***id.***, ¶¶25, 27-29. Actions that normally would evince an intent to gift property to the marriage, such as by transferring non-divisible property to joint tenancy, lead to a presumption of donative intent. ***Id.***, ¶¶33, 35. The presumption is subject to rebuttal by "sufficient countervailing evidence." ***Id.***, ¶33. We accord deference to an express factual finding regarding a spouse's conscious intent to gift. ***Id.***, ¶40.

¶11 Thus, this issue depends on the trial court's findings of fact. We uphold factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Patrickus v. Patrickus***, 2000 WI App 255, ¶26, 239 Wis. 2d 340, 620 N.W.2d 205. We search the record for evidence to support findings the trial court reached, not for evidence to support ones it could have reached but did not. ***Id.*** James' hurdle, therefore, is very difficult to clear.

¶12 Jill and James were the only witnesses. The trial court accepted Jill's testimony that she was acceding to the pressure of James' demands of joint

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

titling and that James did not inform her that he was taking money from their joint account for his individual investments. It gave less credence to James who testified to the effect that their financial decisions were mutual ones. The court found that Jill's testimony rebutted any presumption of donative intent on her part.

¶13 James argues that under ***Steinmann v. Steinmann***, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, a trial court is not required to accept as credible a spouse's testimony regarding donative intent. *See* ***id.***, ¶56. That is absolutely true. Here, however, the trial court did. It has the superior opportunity to observe the witnesses' demeanor and gauge the persuasiveness of their testimony. ***Patrickus***, 239 Wis. 2d 340, ¶26. As the sole arbiter of credibility, it was entitled to accept Jill's testimony. *See* ***Noble v. Noble***, 2005 WI App 227, ¶27, 287 Wis. 2d 699, 706 N.W.2d 166. We, in turn, must accept its credibility determinations. ***Id.***

¶14 As part of its property-division consideration, the trial court found that James committed marital waste when he unilaterally withdrew $63,000 from the parties' joint bank account to open an IFMG brokerage account and, later, an E*Trade account, both in his own name. James argues that he could not have committed waste because the value of the account actually increased. Accordingly, he asserts, the trial court's finding and its reliance on that finding in the property division constitute an erroneous exercise of discretion. We disagree.

¶15 The trial court may deviate from the presumed equal division of property after considering various factors. WIS. STAT. § 767.61(3). One expressly proper consideration is what each party contributed to the marriage. Sec. 767.61(3)(d). This factor allows the court to consider each party's efforts to preserve marital assets. ***Anstutz v. Anstutz***, 112 Wis. 2d 10, 12, 331 N.W.2d 844 (Ct. App. 1983). "[R]ecompense [is] available when one spouse has mismanaged

or dissipated assets." ***Covelli v. Covelli***, 2006 WI App 121, ¶30, 293 Wis. 2d 707, 718 N.W.2d 260.

¶16 We conclude the trial court properly considered James' unauthorized withdrawals. Regardless of whether James' accounts flourished, WIS. STAT. §§ 767.61(3) and 767.63 contemplate preventing the unjustified depletion of marital assets. *See* ***Noble***, 287 Wis. 2d 699, ¶¶18-19 (discussing the identically worded predecessor statutes). The court explained that it divided the marital estate as it did after considering the statutory factors, James' waste of marital assets and for the reasons set forth in Jill's trial brief and in its October 2008 decision. We uphold the determination because the court examined the relevant facts, applied a proper standard of law and used a demonstrated rational process to reach a conclusion a reasonable judge could reach. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789.

¶17 The last issue is whether the trial court erred in awarding Jill $3,500 attorney's fees, plus costs and fees for hiring the security firm. These, too, are matters within the trial court's discretion. *See* ***Ably v. Ably***, 155 Wis. 2d 286, 292-93, 455 N.W.2d 632 (Ct. App. 1990). At the end of the trial, the court observed that it saw "absolutely no reasons for us to be sitting here at 5:00 at night on a divorce without children." James contends that displeasure over a long proceeding falls shy of a finding of "overtrial." Again we disagree.

¶18 The overtrial doctrine may be invoked in family law cases when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees. ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985). Whether excessive litigation occurred is a question

committed to the trial court's discretion. ***Zhang v. Yu***, 2001 WI App 267, ¶11, 248 Wis. 2d 913, 637 N.W.2d 754.

¶19 In addition to its comment at trial, the court stated in its post-trial memorandum decision:

> This matter should have been resolved long ago. There is no law requiring that the parties enjoy the process of divorce. [James] has the right to be heard and contest issues but he has no right to ignore court orders and the advice of his competent counsel and to frighten and obstruct [Jill].

It then specifically cited with approval to ***Ondrasek***.

¶20 By ignoring court orders, James prompted Jill's contempt motion. By frightening and obstructing her, he provoked the security service cost. The finding that James had "no right" to do either implies unreasonableness. The court thus at least implicitly found that James' "unreasonable approach" caused Jill "to incur extra and unnecessary fees." *See* ***Ondrasek***, 126 Wis. 2d at 484. Based on the trial court's reasoning and its opportunity to view the parties and assess their actions, we find no erroneous exercise of discretion. *See* ***id***.

By the Court.—Judgment affirmed.

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