

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 98-1952

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE ESTATE OF
CYNTHIA M. STOCKING, DECEASED:**

ESTATE OF CYNTHIA M. STOCKING,

APPELLANT,

v.

JAMES STOCKING,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
THOMAS P. DOHERTY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Peterson, JJ.

¶1 PER CURIAM. The Estate of Cynthia M. Stocking appeals from an order of the circuit court determining the authenticity of a document and its legal

effect in the course of probate proceedings. We accepted interlocutory appeal by order of this court dated April 12, 1999. The Estate claims the trial court erred when it: (1) allowed testimony by James Stocking in violation of the deadman's statute; (2) concluded that the challenged document was a valid marital property agreement; and (3) found James's testimony and that of his brother, Daniel Stocking, to be credible. Because the trial court properly applied the deadman's statute consistent with recent case law, because the trial court reasonably concluded, under the circumstances, that the challenged document served as a marital property agreement, and because the trial court's findings of fact are not clearly erroneous, we affirm.

I. BACKGROUND

¶2 James and Cynthia Stocking were married on August 30, 1975. It was a second marriage for both. By James's testimony, the marriage was not a close, loving relationship, although it lasted many years until the parties separated in October 1994. At that time, Cynthia moved into an apartment in Milwaukee. James remained in the River Hills home that he owned prior to the marriage. In June 1996, the parties filed a joint petition for divorce. The petition was later dismissed in hopes of reconciliation.

¶3 Nonetheless, a second divorce proceeding was commenced in November 1996. On January 19, 1997, James left Milwaukee for a vacation. During the time he was gone, his brother Daniel, or his nephew Thomas Stocking, visited the River Hills home to collect the mail and check phone messages. When James and his girlfriend, Ms. Buerosse, returned to the River Hills home on February 2, 1997, they found Cynthia's car in the driveway. Cynthia was found in the garage of James's home; she was unconscious in Ms. Buerosse's car and the

motor was running. The police were called immediately and they determined that Cynthia's death was an apparent suicide. The police discovered a key to James's home on Cynthia's person. The divorce proceeding was still pending at the time of Cynthia's death.

¶4 During a search of Cynthia's apartment, the police discovered a will dated January 20, 1996. The will left personal bequests to nieces, nephews and friends. The balance of the estate was bequeathed to Cynthia's two sisters. The will was admitted to probate and the co-personal representative petitioned for an order pursuant to WIS. STAT. § 857.01 (1997-98)¹ to determine the classification of the property of James and Cynthia.

¶5 During the course of discovery in the probate action, James produced a document, which he alleged was a copy of an individual income agreement. He testified that he had prepared the document shortly after the death of his father in November 1985, because he was concerned that income generated from gifts or inheritances would be affected if his marriage failed. He was also concerned about individual income interest being affected by the recently enacted Marital Property Act, which would go into effect on January 1, 1986. James indicated that he drafted the document so that any income earned on his or Cynthia's individual assets would not be classified as marital property. He claimed that the original document was signed on December 21, 1985, by both himself and Cynthia, in the presence of Daniel, who notarized the document.²

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² The document was drafted on the letterhead from James's former law firm and dated December 19, 1985. It provided:

(continued)

James indicated that Cynthia retained a signed original of the document and that he took a signed original of the agreement and placed it in his will file. James also testified that he put a copy of the original in his 1985 income tax file. James stated that he last saw the original document during an annual audit of his files as late as November or December of 1996.

¶6 After Cynthia's death, James checked his will file and could not find the original agreement. He testified that he thoroughly searched his files, but the original could not be located. He did find the photocopy of the original in his 1985 income tax file.

INDIVIDUAL INCOME AGREEMENT

The undersigned, James L. Stocking and Cynthia M. Stocking, pursuant to the new Wisconsin Marital Property laws to become effective on January 1, 1986 and because of the recent death of Lewis A. Stocking, wish to continue the classification, nature and definition of all income we individually receive or acquire from property that we individually own at this time or receive by inheritance, gift, purchase, transfer, trade or exchange in the future as our own individual property and not marital property.

Dated at River Hills, this 21 day of December, 1985.

/s/
James L. Stocking

/s/
Cynthia M. Stocking

Personally came before me, James L. Stocking, Cynthia M. Stocking this 21 day of December, 1985 to me known to be the persons who executed the foregoing document and acknowledged the same.

/s/
Daniel E. Stocking, Notary Public
My commission is permanent

JLS/pc

¶7 Both sides agreed that the agreement's authenticity and legal effect were critical to classification of James's and Cynthia's property. Therefore, the parties entered into a stipulation bifurcating the issues of the authenticity and legal effect of the document from the probate proceedings. During the trial on the authenticity and legal effect of the document, both James and Daniel testified. The Estate objected to James testifying in any respect to the document, claiming that his testimony was barred by the deadman's statute. The trial court ruled that the deadman's statute prohibited James from testifying with respect to any "communications or transactions which are, 'personal' with the deceased." However, the trial court determined that "James is not incompetent to testify regarding either his preparation, retention or search for the originals or his confirmation of their subsequent absence. All such testimony relates to activities other than direct communications or transactions between James and Cynthia." The trial court determined that the document produced was the best evidence of a valid marital property agreement.

¶8 The Estate appeals from the trial court's order.

II. DISCUSSION

A. *Deadman's Statute.*

¶9 The Estate argues that the trial court erred in allowing James's testimony with regard to the agreement. It contends that the deadman's statute prohibits James from offering any testimony relative to the agreement. The deadman's statute is codified at WIS. STAT. § 885.16. It provides:

Transactions with deceased or insane persons. No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness

in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives the party's interest or title, shall be so examined, except as aforesaid.

¶10 Application of a statute to a set of facts is a question of law that we review independently. *See State v. Vennemann*, 180 Wis. 2d 81, 93, 508 N.W.2d 404 (1993). In applying the statute to the facts here, we do so with the knowledge that recent case law expresses disdain for the deadman's statute, and requires courts to construe it narrowly and restrict its application whenever possible. *See Havlicek/Fleisher Enters., Inc. v. Bridgeman*, 788 F. Supp. 389 (E.D. Wis. 1992).

¶11 It is undisputed that the statute precludes James from testifying about any actual communications with Cynthia regarding the agreement, and precludes him from testifying about the transaction of executing or entering into the agreement because James certainly stands to benefit from the agreement. However, the parties dispute whether the statute precludes James from making any reference to the agreement at all. The trial court ruled that the statute did not preclude James from testifying as to the preparation of the agreement, his retention of the agreement, or his search for the original of the agreement. The trial court

explained that this testimony did not constitute any personal communication or transaction with Cynthia and, therefore, was not barred by the statute.

¶12 We agree with the trial court's interpretation. Wisconsin case law clearly provides that the deadman's statute must be strictly construed and, whenever possible, not be applied to bar testimony. *See Hunzinger Constr. Co. v. Granite Resources Corp.*, 196 Wis. 2d 327, 538 N.W.2d 804 (Ct. App. 1995). The trial court's construction and narrowing of James's testimony conforms with the current treatment of the deadman's statute. Limiting James's testimony to his actions with respect to drafting, retaining and searching for the document is consistent with the plain language of the statute and a narrow application. The trial court did employ the deadman's statute to preclude James from testifying "to communication or transactions had between [him] and Cynthia prior to, at the execution of, or subsequent to the execution of the agreement." The distinction drawn by the trial court clearly gives proper effect to the statute itself, and the case law disfavoring its application.

¶13 The Estate contends that allowing James to testify in such a manner implied the existence of the agreement which, in effect, allowed James's testimony to operate as authenticating the document. The Estate suggests then that the trial court relied on James's testimony to allow admission of the agreement. The trial court, however, based its admission of the document on the testimony of Daniel, relying exclusively on Daniel's testimony to establish that James and Cynthia signed the originals of the agreement on December 21, 1985.

¶14 The Estate contends that because Daniel had a criminal record and because he could not attest that the agreement produced exactly matched the one he had reviewed in December 1985, Daniel's testimony could not serve to

authenticate the document. We disagree. The trial court clearly noted its consideration of Daniel's criminal history in assessing the credibility of his testimony:

With regard to Daniel Stocking's testimony, the court is, of course, aware of his criminal history and considers how it may impact the credibility of his testimony in this case. However, again the court finds the testimony of Daniel Stocking to be credible, as well. Indeed, if this was, again, an effort to support his brother by perjured testimony, the court would expect testimony from Daniel that was much stronger, much more affirmative. There would be no testimony from Daniel to the effect that he did not closely read the document and, therefore, cannot testify that Exhibit 1 is substantively, absolutely the same as the document that he notarized in December of 1985 but, rather, "appears" to be substantially the same. Were Daniel Stocking attempting to perpetuate a fraud by perjured testimony, it would be, in the court's judgment, testimony with a great deal more clarity and less ambiguity.

¶15 The trial court's ruling depended in part on this and other credibility determinations. Such determinations are more appropriately left to the trial court. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824, 825 (1975) (The trial court is the arbiter of the credibility of the witnesses and its findings will not be overturned on appeal unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts.). The trial court's findings are reasonable, and supported by the evidence. Therefore, we will not overturn its credibility determinations.

B. Status of Challenged Document.

¶16 The trial court determined that the challenged document was a valid marital property agreement. The Estate argues that the trial court erred in reaching this determination, and that the document should not affect the classification of

income because it does not comply with certain statutory requirements. First, the Estate claims that the document, which was titled “Individual Income Agreement,” cannot be construed to be a Unilateral Statement as set forth under WIS. STAT. § 766.59 because the document purports to be an agreement *between* the spouses, rather than an individual declaration.

¶17 WIS. STAT. § 766.59(1) provides, “A spouse may unilaterally execute a written statement which classifies the income attributable to all or certain of that spouse’s property other than marital property as individual property.” We agree with the Estate that the document cannot be construed to be a unilateral statement under this statute. It clearly involved an agreement by both spouses rather than individual action. However, the trial court did not construe the agreement to be a unilateral statement. Rather, it found that the Agreement constituted a marital property agreement.³

¶18 Second, the Estate contends the trial court erred in finding that the Agreement created an enforceable marital property agreement pursuant to WIS. STAT. § 766.58. The trial court’s decision on this issue provides in pertinent part:

[WIS. STAT. §] 766.58 ... clearly states, “A marital property agreement shall be a document signed by both spouse[s].” That’s what happened here. Both spouses have signed the document.

In analyzing the document under Section 766.58 ..., the court must find ... that the document was signed by both spouses. This is supported by the uncontradicted testimony of Daniel Stocking which the court has previously found to be credible. While the court finds that there is consideration by reason of the mutual benefits to each party

³ The Estate also contends that the Agreement cannot be labeled a unilateral statement because it does not comply with notary requirements. However, we need not address any additional argument on this point because we agree the document was not a unilateral statement.

in retaining their [sic] own income, nevertheless, the court does note that “a marital property agreement is enforceable without consideration”.

The court further finds that the agreement does not violate any public policy or a statute imposing a criminal penalty under Section 766.58 (3) (h). Subsection 6 sets forth the burden the proponent (petitioner) must carry in order to invalidate the marital property agreement. The court is satisfied that the evidence fails to support the petitioner in this regard. The court finds no evidence that the agreement was unconscionable, sub 6(a), no indication that it was executed by the deceased involuntarily, sub 6(b), nor has the petitioner established that there was a failure to fairly and reasonably disclose James Stocking’s property or financial obligations, nor that Cynthia did not have notice of James’ property or financial obligations, sub 6(c) (1) (2).

¶19 The Estate argues that the trial court’s findings are erroneous because the document did not comply with certain statutory requirements. Specifically, the Estate argues that the document did not make a fair and full disclosure of the spouse’s financial obligations as required by WIS. STAT. § 766.68(6)(c). The trial court, as noted above, found otherwise, and that finding is supported by the record. The record demonstrates that Cynthia was fully knowledgeable about the couple’s assets and financial status. She assisted in preparation of joint income tax returns, had access to James’s checking account, and was fully aware of James’s parents’ comfortable financial status. The record also provides that Cynthia served as James’s secretary and was familiar with his document filing system.

¶20 The Estate also protests the trial court’s validation of the document, arguing that the document does not contain any words of agreement, but rather uses the word “wish.” The Estate continues, therefore, that the document, without any further action, cannot constitute a valid marital property agreement. We are not persuaded.

¶21 The circumstances in this case are unique. The evidence presented to the trial court demonstrated that the document was created shortly after James's father's death and shortly before the enactment of the marital property law. James's mother was elderly and James wanted to protect future income generated by his gifted and inherited property. Thus, he drafted the document challenged in this case. It is not unreasonable, given the circumstances presented here, that the document failed to comply with all of what would become the requirements of the marital property law under WIS. STAT. § 766.58. Given the mutuality of the document, and the evidence that both James's and Cynthia's individual ownership of inheritances and income derived therefrom was included, the document could reasonably be interpreted to constitute a marital property agreement. Accordingly, we conclude that the trial court's determination was reasonable and we affirm the order.

C. Credibility Determinations.

¶22 The Estate also challenges several of the trial court's credibility determinations. This challenge focuses both on the trial court's finding that James's and Daniel's testimony was credible, and on the trial court's finding that Cynthia had access to James's home. We conclude that the trial court's findings of fact are not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶23 We have already set forth the trial court's reasoning relative to finding Daniel's testimony credible. We have no basis to overturn that credibility assessment. The trial court similarly found James's testimony to be credible. The trial court recognized that James had a substantial interest in the outcome of the ruling, but found that the creation of the Agreement was consistent with the

history of the relationship between James and Cynthia, and James's anticipated substantial inheritance. The trial court ruled:

Were this entire scenario of the preparation of the Agreement, its execution and the subsequent loss of the originals a total effort to fabricate, it indeed would be a bad one. If this was an effort to fabricate, the court would expect to be looking at a clear, unilateral document, literally conforming to the requirements of Sec. 766.59 W.S. There would be no necessity or showing of the mutuality set out in the Exhibit 1.

The trial court's assessment of credibility was reasonable. Why go to the trouble of creating an imperfect mutual document, when one could create a perfectly conforming unilateral statement?

¶24 The trial court's findings in this regard were also supported in part by the evidence submitted relative to Cynthia's access to James's home and certain missing items that were discovered at Cynthia's apartment. During the trial, Cynthia's sister, Corrine Hein, testified that certain Wedgewood china plates and a wooden salad bowl had been in Cynthia's Milwaukee apartment since Cynthia had separated from James in October 1994. James had earlier testified that the plates and bowl were in their normal places in his home just before he left on vacation on January 19, 1997, but that he noticed that these items were missing when he returned from vacation on February 2, 1997. James stated that he next saw the missing items when he visited Cynthia's apartment in April 1997, to do a property inventory. After Hein's testimony contradicting his, James introduced a videotape of Christmas dinner in 1996 at James's home, which showed the missing Wedgewood plates on his dining room table. The trial court found that the videotape supported James's testimony. The trial court also found that the videotape supported the inference that Cynthia had recently accessed James's

residence and was taking items from the residence, which arguably could have included the original marital property agreement.

¶25 This evidence supported James's testimony, thereby lending credibility to James's version. The trial court's findings are not clearly erroneous. Therefore, we affirm the order.

By the Court.—Order affirmed.

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

