COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2142

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

NANCY M. WHITE,

PETITIONER-RESPONDENT,

v.

JEFFREY A. WHITE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK T. SHEEDY, Reserve Judge. *Affirmed.*

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

¶1 PER CURIAM. Jeffrey White appeals from a judgment, entered pursuant to a contempt motion brought by his ex-wife, Nancy White, ordering him to pay delinquent child support and spousal maintenance, as well as attorneys' fees, to her. Mr. White claims that the trial court erred when it: (1) determined

that payments he made to his ex-wife constituted property division and not child support; (2) determined that he failed to make maintenance payments to his ex-wife; and (3) awarded attorneys' fees to his ex-wife without first making the necessary findings. We affirm.

I. BACKGROUND

¶2 Jeffrey and Nancy White were divorced in California in 1992.[1] The parties entered into a Marital Settlement Agreement. This agreement provided, among other things, that Mr. White would: (1) make three $80,000 payments of spousal maintenance; (2) pay child support in the amount of $2,000 per month; and (3) pay Mrs. White $1,000,000 in property division, to be paid in three essentially equal installments over a three year period.[2] The agreement also allowed for attorneys' fees should one of the parties "be required to resort to the Court to enforce any provision of this Agreement."

¶3 It is undisputed that Mr. White made child support payments at least through May 1997. It is also undisputed that Mr. White made only the first property-division payment of $333,333, fell into financial hardship, and, in January 1997, still owed Mrs. White $666,667. Mr. White sent a letter to his ex-wife on January 21, 1997, that discussed the possible reconstruction of their property division agreement. This letter stated, in pertinent part:

> I would very much appreciate your assistance in reconstructing the note due to you by converting $667,000 principal balance into a five-year note payable monthly at a

[1] Mrs. White moved to Wisconsin in 1993.

[2] Mr. White agreed to pay $333,333 on August 1st of 1995 and 1996, and $333,334 on August 1, 1997. The parties agree that these obligations were nondischargeable in bankruptcy. Child support was later modified to $1,000 per month.

> rate of 10 percent. *Your monthly check from me would total $14,171.78* of which the sum of $11,116.67 would be nontaxable and the remainder would be interest. If this is acceptable you could notify me by phone.

(Emphasis added.) Mr. White claimed that, although he sent the January 21, 1997 letter, the parties did not "reach an agreement consistent with the terms of this letter" and never "actually set up a restructuring or a repayment plan for the property division that was outstanding." Mrs. White claimed that the parties had agreed to restructure the payments prior to the January 21st letter. According to Mr. White, he sent another letter to Mrs. White on January 29, 1997, which stated that the $14,171.78 payments would be prepayments of child support. According to Mrs. White, she never received the second letter.[3] In early 1997, Mr. White made three payments of $14,171.78 to Mrs. White. Mr. White filed for bankruptcy in the fall of 1997 and listed Mrs. White as a creditor.[4]

¶4 In 1999, Mrs. White moved the trial court to find that Mr. White was in contempt for failing to pay child support and maintenance pursuant to the terms of their settlement agreement. Mr. White claimed that the checks for $14,171.78 were prepayments of child support; Mrs. White claimed they were property-division payments. After considering the testimony of both parties, the trial court believed Mrs. White and held that the $14,171.78 checks were property-division payments. The court remarked, "I think it is a fraud upon creditors to prepay [child support]." Although Mr. White provided partial income tax returns as

[3] According to Mr. White, the letter stated: "Dear Nancy in the absence of a written agreement I enclose two checks for child support beginning June 1997. Should we agree on terms for extending the divorce settlement, these payments can be re-characterized at that point." Mrs. White testified that the first time she saw this second letter was in October 1998, when Mr. White's lawyer sent it to her.

[4] The checks were dated February 1, 1997, March 2, 1997, and March 14, 1997. Mr. White claims that the first two checks were included with the letter he allegedly sent Mrs. White on January 29, 1997.

evidence that he made the spousal maintenance payments, he did not provide the cancelled checks. The trial court determined that Mr. White had failed to pay $108,333 in maintenance, noting that tax audits require more than "the word of the accountant and the person involved … They want to see the checks themselves." In addition, the trial court granted Mrs. White's request for $27,244.68 in attorneys' fees.

II. DISCUSSION

A. Trial court's finding that Mr. White's payments were for property division, not child support.

¶5 The trial court's determination that the three checks for $14,171.78 made by Mr. White were property-division payments is a finding of fact. A trial court's finding of fact will be upheld on appeal unless it is clearly erroneous. WIS. STAT. § 805.17(2); *see* ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987) ("the valuation of marital assets is a finding of fact which we will not upset unless clearly erroneous").[5] The trial court is the sole arbiter of the witnesses' credibility. Thus, when more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the trial court. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647, 650 (1979). For the reasons set forth, we conclude that the trial court's findings of fact are not clearly erroneous.

¶6 Mr. White asserts that the trial court's comment, that prepayment of child support is a fraud on creditors, reflected an error of law that was "plainly an essential foundation underlying its conclusion that the money was paid as property division." Accordingly, he argues that the determination that the $14,171.78

[5] All further references to the Wisconsin Statutes are to the 1999-2000 version.

payments were property division cannot be upheld. *See* ***Posnanski v. City of West Allis***, 61 Wis. 2d 461, 465–466, 213 N.W.2d 51, 53 (1973) (neither credibility nor other factual findings may be premised on an error of law). But as Mr. White readily acknowledges in his reply brief, "there are other components to the court's decision."

¶7 Indeed, the "other components" of the decision support the trial court's finding. First and foremost, each check was for $14,171.78—the exact amount of the restructured monthly property-division payment stated in the January 21, 1997 letter. Mr. White also agreed that the checks were written in accordance with the calculations for these monthly property-division payments. The trial court remarked that it was bothered by the "similarity of the figures on the checks as indicated by the letter of January 21, 1997." In addition, it is undisputed that, at the time of these payments, Mr. White was current on his child support obligations but owed money on the property division aspect of the agreement. Further, the child support obligations were round numbers that Mr. White had previously paid in multiples of $1,000.

¶8 Although the January 29th letter arguably supports Mr. White's position that the checks were sent as prepayments of child support, Mrs. White denied receiving this letter. ***Noll v. DiMiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575, 577 (Ct. App. 1983) ("When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact."); *see also* ***State v. Friday***, 147 Wis. 2d 359, 370–371, 434 N.W.2d 85, 89 (1989) (where the evidence supports the drawing of either of two conflicting inferences, the trial court and not this court must decide which inference to draw). Indeed, *Mr.* White's trial lawyer argued, "[T]his is a case where credibility is important," and the court agreed, replying, "Very

important." The trial court, however, resolved this credibility question in Mrs. White's favor. *See* ***Bahr v. Bahr***, 107 Wis. 2d 72, 77, 318 N.W.2d 391, 395 (1982) (weight of evidence and the credibility of witnesses are best measured by the trial court). Accordingly, we uphold the trial court's finding that the $14,171.78 payments were property division.[6] The trial court's finding that the checks for $14,171.78 were property-division payments is not clearly erroneous.

B. Maintenance.

¶9 Mr. White next argues that the trial court erred by finding that he failed to make maintenance payments. He further claims that the trial court would only accept cancelled checks as proof of payment, and that the court improperly relied on its personal dealings with tax audits. As noted, the Marital Settlement Agreement provided that Mr. White would make three $80,000 payments of maintenance to Mrs. White. Mrs. White testified that she received the first payment, part of the second payment ($51,667), and did not receive the last payment. Mr. White, on the other hand, claimed that "all of the maintenance with the exception of the payment that was discharged in bankruptcy has been paid."

¶10 The record supports the trial court's finding. Although Mr. White claimed to have made the payments, he failed to locate the cancelled checks that

[6] In a related argument, Mr. White asserts that the Marital Settlement Agreement prohibited the parties from orally modifying the terms of the agreement, and thus, the trial court erred by enforcing a modified property-division payment structure without a writing executed by both parties. In response, Mrs. White argues that Wisconsin law permits the parties to orally modify the contract and they did so through their conduct in this case. *See* ***Wiggins Constr. Co. v. Joint Sch. Dist.***, 35 Wis. 2d 632, 638, 151 N.W.2d 642, 645 (1967) (construction contract provision requiring written changes may be avoided where the parties evidence an intent to waive or modify such provision with words or conduct); *see also* WILLISTON ON CONTRACTS, § 1828 (3rd ed. 1972). Mr. White does not respond to this contention. We thus take it as admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted deemed admitted).

could have easily substantiated his claim. Instead, Mr. White provided the court with partial tax returns. The trial court gave little weight to the incomplete tax returns, noting: "In this case the Court finds it very difficult to understand why Mr. White is unable to support [*sic*] those checks." Moreover, the trial court weighed the credibility of the witnesses and found Mrs. White's account to be more credible. *See* ***State v. Yang***, 201 Wis. 2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996) (reviewing court must give due regard to the trial court's opportunity to judge the credibility of witnesses). Accordingly, the trial court's finding that Mr. White failed to pay maintenance is not clearly erroneous.

¶11 Mr. White's related arguments—that the trial court would only accept cancelled checks as proof of payment and that the trial court improperly based its finding on personal experience—are without merit. The trial court did not *require* that Mr. White prove payment by producing the checks. Rather, the court merely found Mr. White to be less credible without such evidence, which the court believed was not difficult to produce. This was a credibility—not evidentiary—determination, and the record amply supports it. Indeed, it was entirely within the trial court's discretion to find Mr. White's uncorroborated testimony to be less credible than Mrs. White's. Moreover, the trial court did not improperly base its finding on personal experience by stating that tax audits require more than "the word of the accountant and the person involved … They want to see the checks themselves." The trial court simply remarked that a tax return proves only that a taxpayer *claimed* something, and that an audit would likely require more than Mr. White's mere claim of payment.

C. Attorneys' fees.

¶12 Finally, Mr. White argues that the trial court erroneously exercised its discretion "by failing to consider or apply mandatory standards" prior to awarding Mrs. White her attorney's fees.[7] As noted, the trial court awarded $27,244.15 to Mrs. White for attorneys' fees she incurred trying to collect outstanding maintenance and support since 1997. "The award of attorney fees is within the discretion of the trial court, and we will not reverse absent an [erroneous exercise] of discretion." ***Ably v. Ably***, 155 Wis. 2d 286, 293, 455 N.W.2d 632, 635 (Ct. App. 1990).

¶13 Mr. White did not challenge the reasonableness of the attorneys' fees before the trial court and has therefore waived the issue. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (appellate court will generally not review issue raised for first time on appeal). His sole argument on attorneys' fees before the trial court was that they should not be awarded at all because, he claimed, he had satisfied his maintenance and support obligations.[8] Indeed, after finding that the attorneys' fees incurred by Mrs. White were reasonable, the trial court remarked, "There's been no great argument on these. I will allow $27,244.68."

[7] The "mandatory standards" to which Mr. White refers is the three-prong test found in ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 496 N.W.2d 660 (Ct. App. 1992). This standard directs a trial court to award attorneys' fees upon a showing of need, ability to pay, and the reasonableness of the fees. ***Id.***, 173 Wis. 2d at 499, 496 N.W.2d at 666.

[8] In his reply brief to this court, Mr. White admits that he "did not draw the court's attention to the three-prong test."

¶14 Moreover, while Mr. White complains that Mrs. White does not need the fees and that he does not have the ability to pay, as we recently stated in ***Benn v. Benn***, 230 Wis. 2d 301, 602 N.W.2d 65 (Ct. App. 1999):

> While findings of one spouse's need and the other spouse's ability to pay are generally necessary to an award of attorney fees in a divorce proceeding, a different standard applies in contempt proceedings. There, a circuit court is permitted to impose the payment of money sufficient to compensate a party for the loss suffered as a result of the contempt of court, as a sanction. *See* [WIS. STAT.] § 785.04(1)(a). The attorney fees incurred in pursuing a contempt of court action are recoverable under § 785.04(1)(a). Therefore, *there is no requirement that the circuit court make findings in regard to need and ability to pay before exercising its remedial contempt powers*.

Id., 230 Wis. 2d at 315, 602 N.W.2d at 71 (emphasis added, citations omitted). In this case, Mrs. White testified regarding the nature of her request for attorneys' fees and provided the court with a summary of the fees she incurred to resolve the financial issues of the divorce. Accordingly, the trial court's award of attorneys' fees was well within its discretion.

By the Court.—Judgment affirmed.

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