

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 04-0788

Cir. Ct. No. 02-FA-172

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

ALICE J. HEISE,

PETITIONER-RESPONDENT,

v.

CARL P. HEISE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County:
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Carl Heise appeals that part of his divorce judgment ordering property division and child support. He argues that the trial court erroneously exercised its discretion when it relied upon a premarital agreement to exclude his excavating business from the marital estate.

Alternatively, Carl contends the trial court erroneously determined that certain debts were business debts, thereby excluding them from the divisible marital estate. As a second alternative argument, Carl claims that by failing to consider the interest he pays on business debt, the court erroneously calculated his income available for child support purposes. Because the record fails to support his arguments, we affirm the judgment.

BACKGROUND

¶2 Carl began working in the excavation business in 1966 and, in 1978, purchased the assets of Ailport Excavating Company. He continued to operate the business as a sole proprietorship. In 1985, Carl and Alice were married. Before their marriage, they entered into a marital property agreement that stated, “[T]he parties desire that all property owned by each of them at the time of their marriage shall be their separate property.”

¶3 The agreement further stated:

It is the intention of the parties that the assets reflected on Exhibits A and B shall remain their own separate, respective property subject to any indebtedness which shall also remain the separate obligation of the respective party

The parties agree, with the exception of the separate property as previously provided, all property acquired or income derived therefrom, by both parties, shall be, after the solemnization of the marriage, considered the same as though an Antenuptial Agreement had not been entered into between the parties.

Carl’s separate property included “All of Ailport Excavating Incorporated stock.” The agreement provided that it would be binding in the event of divorce.

¶4 During the marriage, Carl remained self-employed, operating the excavation business out of the home. Carl testified that over the past ten years, the business had been profitable and he had replaced equipment. Carl testified that Alice was “semi-active” in the business from 1988 to 1997. He said that she took care of phone calls and the mail.

¶5 Alice testified that she also helped with bookkeeping. She testified that Carl never took a paycheck, but would simply cash checks from customers to use for his expenses. In addition, they would deposit business income into a checking account that both she and Carl used to pay business and personal expenses. At the time of their divorce, they had accumulated significant amounts of property and debts.

¶6 At trial, Carl requested to be awarded his excavation business.¹ He also testified that he owed \$400,000 on the business. Alice, on the other hand, argued that she should be awarded a portion of the business assets or, alternatively, if she would not be awarded the business assets, that she would also not be held responsible for any of its debt.

¶7 The trial court made a number of fact-findings relating to property division. The court found that Carl “appears to be strong willed, devious and less than forthright about many things in the trial, particularly in property matters.”² The court noted the parties’ earning capacities, that neither had contributed to the other’s education and the length of their eighteen-year marriage.

¹ Carl was asked, “You’re asking to retain your business, correct?” to which Carl replied, “What there is of it. Yes.”

² The court also observed that Alice had committed a theft at a job other than the excavation business.

¶8 The court excluded from the divisible marital estate property found to be included within the meaning and contemplation of the parties' premarital agreement. *See* WIS. STAT. § 767.255(3)(L). The court determined the excavating business and its debts were not part of the marital estate, "because the Court construed it to be the intent of the parties to exclude that business from marital property by virtue of the antenuptial agreement even though [it was an] asset purchase not [a] stock purchase."³

¶9 The court ruled it would divide the balance of the marital estate equally. The court found that the parties' marital assets totaled \$597,866 and marital debts totaled \$134,211. The court awarded Alice \$39,966 in personal property. It awarded the balance of the property, consisting of real estate, savings and investments, along with the responsibility for the marital debt, to Carl. This resulted in a net award of \$423,689 to Carl. To equalize the property division, the court ordered Carl to pay Alice \$191,861, resulting in an award of \$231,828 to each party.

¶10 The trial court also awarded maintenance and child support; only child support is an issue on appeal. The court found that Carl's annual income, after paying \$18,000 per year maintenance, was \$77,000 and Alice's annual earning capacity was \$35,000. Based on a shared placement formula, the court ordered Carl to pay \$536 per month for the support of their two children and Alice to pay Carl \$269 per month. The net result was that Carl must pay Alice the difference of the two sums, \$267 per month.

³ Pursuant to WIS. STAT. § 767.255, the court also excluded gifts and inheritance from the divisible marital estate. This ruling is not challenged on appeal. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶11 Following the trial, the parties brought motions to clarify the court's ruling.⁴ The court explained:

Maybe the problem is trying to sort out what's business and what's investment property. ... Because, as you know, and as Mr. Heise knows, it's very sloppy here about what's business and what isn't.

And, of course, in a sole proprietorship, he likes it that way because he can kind of shift his expenses wherever it does the most good taxwise.

....

... [H]e's getting the business free and clear of any interest of hers. Regardless of how [he] secured it, it's his and not included. That's the only way to be fair and logical in how that's done.

DISCUSSION

¶12 The division of the marital estate is discretionary. *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). This court will sustain the decision if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* While reasons must be stated, they need not be exhaustive. It is sufficient that they indicate the trial court “undert[ook] a reasonable inquiry and examination of the facts” and “the record shows that there is a reasonable basis for the ... court’s determination.” *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991) (citation omitted).

¶13 Because the exercise of discretion is so essential to the trial court's functioning, we generally look to the record for reasons to sustain discretionary decisions. *Id.* The test is not whether we would have decided the matter

⁴ The court made some adjustments to the property division based upon evidence brought to its attention after trial, which are not challenged on appeal.

differently; “it is enough that a reasonable judge could have so concluded.” *Schneller v. St. Mary’s Hosp. Med. Ctr.*, 155 Wis. 2d 365, 376, 455 N.W.2d 250 (Ct. App. 1990), *aff’d*, 162 Wis. 2d 296, 470 N.W.2d 873 (1991). Underlying discretionary determinations may be findings of fact and conclusions of law. *See Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 153, 502 N.W.2d 918 (Ct. App. 1993). We will not overturn findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). We review questions of law de novo. *See Michael A.P.*, 178 Wis. 2d at 148.

¶14 Carl first argues that the trial court erroneously exercised its discretion when it excluded the “family excavating business” from the marital estate. Carl claims that the court did not explain why the premarital agreement excluded current business assets and debts, after eighteen years of “co-management and effort, joint financial contribution, and a complete commingling of marital and business income stream, expenses, debts and assets.” Carl also complains: “Nor did the trial court specifically articulate which assets and debts were in fact business related or how it made the determination.” Carl points out that he “had asked only that he be given a credit of \$79,877 for business equipment he originally purchased from the Ailport Excavating prior to the marriage.” He claims that the business was “clearly marital” and the parties agreed that both the assets and debts should be included in the marital estate.

¶15 Carl essentially argues that the court erroneously applied the agreement to business assets and debts acquired after the marriage.⁵ WISCONSIN

⁵ Carl does not challenge the validity of the premarital agreement. In his written closing arguments, Carl stated: “Mrs. Heise acknowledges the validity of the antenuptial agreement. ... Mr. Heise also acknowledges the validity of the antenuptial agreement.”

STAT. § 767.255(3)(L), permits the court to alter the presumed equal property division⁶ upon considering:

Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

In Wisconsin, premarital agreements are regarded with favor rather than disfavor and there is nothing inherently suspicious or bad about such agreements. *Jones v. Estate of Jones*, 2002 WI 61, ¶17, 253 Wis. 2d 158, 646 N.W.2d 280.

¶16 Carl's argument requires an interpretation of the premarital agreement. A premarital agreement is a binding contract. *Id.* Standard rules of contract construction apply, and we independently review the court's interpretation of it. *See Levy v. Levy*, 130 Wis. 2d 523, 528-29, 388 N.W.2d 170 (1986). It is a basic rule of contract interpretation that a court cannot redraft the agreement. *Id.* at 531. A valid premarital agreement controls the property division rather than serving merely as one of the several factors a trial court should consider in making the division. *Warren v. Warren*, 147 Wis. 2d 704, 711-12, 433 N.W.2d 295 (Ct. App. 1988). Thus, to the extent that the excavating business is included in Carl's separate property under the premarital agreement, the agreement presumably controls its disposition.

¶17 The trial court reasonably concluded that the excavating business was Carl's separate property under the premarital agreement. There is no claim

⁶ Under WIS. STAT. § 767.255, the court must presume that all property, other than gifted or inherited, should be divided equally between the parties.

that the agreement is ambiguous. The agreement provided that “Ailport Excavating Incorporated stock” would remain Carl’s “own separate, respective property subject to any indebtedness which shall also remain [his] separate obligation.” Carl testified, however, to the effect that his purchase of Ailport Excavating was an asset purchase, rather than a stock purchase, and that he never incorporated. He also testified that he wanted to retain his business. Based on Carl’s testimony, it was reasonable for the court to conclude that the parties intended the premarital agreement to exclude Carl’s excavating business in the form it was acquired from the divisible marital estate.

¶18 Further, the court reasonably concluded that the agreement applied to the excavating business’s equipment and debt acquired after the marriage. The agreement stated that “with the exception of the separate property as previously provided, all property acquired or income derived therefrom, by both parties, shall be, after the solemnization of the marriage, considered the same as though an Antenuptial Agreement had not been entered into between the parties.” This language specifically excluded the excavating business from its provision that property acquired or income derived from property acquired after the marriage would be owned jointly. Consequently, the court reasonably concluded that the agreement excluded from the marital estate the excavating business assets acquired and debts incurred after the marriage.

¶19 We reject Carl’s argument that the trial court committed reversible error by failing to “specifically articulate which assets and debts were in fact business related or how it made the determination.” If Carl had any question regarding which assets and debts belonged to the excavation business, he had an opportunity to seek clarification of this issue on motions after judgment. Carl fails to indicate he did so. *See State v. Franklin*, 228 Wis. 2d 408, 418-19, 596

N.W.2d 855 (Ct. App. 1999) (“[A] trial court cannot be said to have erroneously exercised its discretion in making a ruling when it was never asked to exercise that discretion in the first place.”). As the appellant, Carl has the responsibility to establish that he brought to the trial court’s attention the issues he now seeks to raise on appeal. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted) (A party who appeals has the burden to establish “by reference to the record, that the issue was raised before the circuit court.”). Because Carl fails to establish he requested the court specifically to articulate its reasoning, the court’s alleged failure to do so is not a ground for reversal.⁷

¶20 The record discloses a rational basis for the trial court’s determination. While commingling assets and making joint efforts may, in some instances, cause a premarital agreement to become inequitable at divorce, here the trial court concluded otherwise.⁸ The court concluded that the only fair and logical solution would be to find the entire business to be Carl’s separate property under the agreement. The court explained its reasons for its conclusion, stating, “it’s very sloppy here about what’s business and what isn’t.” The court found that Carl “likes it that way because he can kind of shift his expenses wherever it does the most good taxwise.” In addition, the court found that Carl was “strong

⁷ Later, in his second argument, Carl reiterates this claim, stating that the trial court did not disclose how it arrived at its figures and notes a mathematical error in the court’s calculation. This argument must be first made in the trial court before it is properly before us on review. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted) (A party who appeals has the burden to establish “by reference to the record, that the issue was raised before the circuit court.”). Because Carl does not establish, by reference to the court record, that he brought this discrepancy to the trial court’s attention, we do not address it on appeal.

⁸ For the first time, in his reply brief, Carl relies upon *Krejci v. Krejci*, 2003 WI App 160, 266 Wis. 2d 284, 667 N.W.2d 780, to support his argument that the premarital agreement should not apply. We do not address arguments made for the first time in a reply brief. *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

willed,” indicating Carl controlled the business decisions and Alice’s role in managing business affairs was minimal. Therefore, equitable considerations do not require the court to disregard the premarital agreement and award Alice a portion of business assets and liabilities.

¶21 Further, the record does not unequivocally support Carl’s claim that both parties sought to have the business included in the marital estate. While Carl stated that the Ailport Excavating assets were his separate property, he also requested that he retain the business, at least “what there is of it.” While Alice initially requested an award of a portion of the business assets, she objected to being held responsible for any of its debt. On appeal, Alice abandons any claim for business property and agrees that the trial court reached a fair and reasonable result. In any event, in the exercise of discretion, the trial court may reasonably reject both parties’ requests. Thus, Carl’s argument provides no ground for reversal.

¶22 Next, Carl contends that the trial court erroneously calculated business debt of \$454,754. He argues that the court excluded marital debts and included business debts in the divisible marital estate. However, Carl agrees that the total debt of \$589,211 is undisputed. He also concedes \$100,498 of that total was directly related to the business. He disputes that a consolidated loan of \$407,448 and a \$75,895 “Ag-Star” loan are business indebtedness.

¶23 In making its findings, the court apparently relied upon exhibit 41, titled “HEISE EXCAVATING ACCOUNTS PAYABLE 8/18/03.” This exhibit listed a total debt of \$589,211.43. Of that sum, one loan was \$407,448.70. In addition, the exhibit contains numerous other smaller debts. Some of these smaller debts were undoubtedly marital, such as doctor, legal and tuition bills. The court

undoubtedly subtracted the obviously marital bills from the \$589,211.43 total and arrived at the sum of \$454,754 debt to be attributed to the business.

¶24 At trial, Carl conceded that he owed \$400,000 on his business. Thus, his appellate argument that just \$100,498 reflects business debt is, at best, unpersuasive. Also, in its decision, the court expressed skepticism at the accuracy of Carl's testimony and evidence. See *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) (We do not overturn a trial court's credibility assessment unless it is inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts.). Based on Carl's concession at trial that he owed \$400,000 on the business, combined with the court's skepticism that Carl fully disclosed accurate information and the \$589,211 of debts listed as "HEISE EXCAVATING ACCOUNTS PAYABLE" on exhibit 41, we conclude that the trial court's finding that \$454,754 reflected business debt was not clearly erroneous.

¶25 Next, Carl argues that the trial court's award to him of \$133,321 in personal property, characterized as marital property, erroneously included \$122,450 in business assets. Carl argues, "The \$133,321 figure comes from adding all the items in exhibit 50 (\$218,321), minus the alleged value of the leased Caterpillar Extractor (\$85,000). More than \$122,450 of the \$133,321 assigned to Carl was for business equipment." (Footnote omitted).

¶26 Exhibit 50 is entitled "HEISE PERSONAL PROPERTY" and consists of six single-spaced pages listing numerous items of personal property and their values. Exhibit 50, on its face, does not indicate that \$122,450 in property listed

are business assets.⁹ Rather, the list includes property of all types, such as vehicles and equipment, dishes, kitchen appliances, a washer and dryer, household furnishings, recreational equipment and tools, as well as a few pieces of farm equipment, such as a milk house heater and a horse-drawn sleigh. The exhibit does not distinguish business from marital personal property, but combines the two indiscriminately. Exhibit 50 supports the court’s observation that “it’s very sloppy here about what’s business and what isn’t.”

¶27 In his closing argument, his attorney described exhibit 50 as a list Carl put into evidence of “personal property ... that he wishes to take *from the marital estate*.” (Emphasis added). Carl points to no trial testimony that identifies which property was business versus marital nor does he establish by record reference that he brought his contention to the trial court’s attention. *See Caban*, 210 Wis. 2d at 604. To the contrary, by combining the business and marital property in a single exhibit under one heading, exhibit 50 appears to invite the court to do the same.

¶28 On this record, Carl cannot now be heard to complain that the court failed to accurately discriminate his business from the marital property. The error-correcting function of the appellate court is to review issues actually tried and submitted. *See Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992). “[T]he appellant [must] articulate each of its theories to the trial court to preserve its right to appeal.” *State v. Rogers*, 196 Wis. 2d 817, 829, 539 N.W.2d

⁹ Carl does not itemize business versus marital property. Some, but not all of the items’ purposes are self-evident. Nonetheless, apparently the only way to determine the accuracy of Carl’s contention would be to parse through the scores of items on the six-page list to decipher the use of the property and then infer which items would be business property. This exercise requires fact-finding functions not within the province of the appellate court. *See In re Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).

897 (Ct. App. 1995). Because Carl fails to demonstrate that at trial he separated business from marital property, the record fails to support his claim of error.

¶29 Finally, Carl argues that the trial court erroneously calculated child support. He contends that the court erroneously failed to consider the interest on \$454,754 in business debts for the purpose of determining his income available as child support. We conclude that the record fails to support Carl's claim of error.

¶30 Carl's annual income and the existence of various claimed expenses are facts to be determined by the trial court based upon the evidence presented. *See Lellman v. Mott*, 204 Wis. 2d 166, 173, 554 N.W.2d 525 (Ct. App. 1996). Factual determinations made by the trial court are reviewed under a clearly erroneous standard. *Id.* at 170-71. As long as the determination of fact could be achieved by a reasonable fact-finder based upon the evidence presented, a reviewing court is required to accept the facts found by the trier of fact. *Id.* at 171.

¶31 The credibility of witnesses and the weight to be attached to that evidence is a matter uniquely within the discretion of the fact finder. *Id.* at 172. Appellate courts search the record for evidence to support the findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. *In re Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *Id.* at 151-52.

¶32 At trial, Carl presented "Heise Excavating Financial Statements and Compilation Report of Independent Certified Public Accountants," for years 2000, 2001 and 2002. Carl stated that he had not filed tax returns for those years, despite

having the information available in those reports. When the court asked Carl why he had not filed them yet, Carl responded that a partial reason was that his accounting firm had not yet been paid. Carl provided no other explanation.

¶33 The reports indicate gross excavating income of \$378,433 in 2000, \$231,504 in 2001 and \$289,471 in 2002. They showed that after costs and operating expenses, Heise Excavating's net income was a negative \$63,567 in 2000, a negative \$47,390 in 2001 and \$1,714 in 2002. Expenses included depreciation and interest payments.¹⁰ The exhibits also reported an item entitled "Draw, Carl Heise" of \$67,407 in 2000; \$2,132 in 2001; and \$25,313 in 2002.

¶34 The accountants prefaced their reports with the following cautionary note:

A compilation is limited to presenting in the form of financial statements information that is the representation of the owner. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

The owner has elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the income tax basis of accounting. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's assets, liabilities, capital, revenues and expenses. Accordingly, these financial statements are not designed for those who are not informed about such matters.

¶35 Faced with a lack of "disclosures ordinarily included in financial statements," the trial court made the following findings of fact:

¹⁰ Depreciation was \$40,272 in 2000, \$38,296 in 2001 and \$29,238.99 in 2002. Interest was \$84,196 in 2000; \$99,129 in 2001; and \$110,953 in 2002.

The incomes and earning capacities of the parties are very difficult to determine because the evidence was murky and filled with unsubstantiated innuendo. Since the burden of proof is by a preponderance of the evidence, the Court determines that the following is more likely the income or earning capacities of the parties [than] not: [Carl]: Historical income based upon tax returns and business records produced at trial = \$95,000 per year.

¶36 Given our deferential standard of review, we conclude that the record provides a basis for the court's finding. *See* WIS. STAT. § 805.17(2).¹¹ Carl testified that his business had been profitable over the last ten years and that he had been replacing equipment. The court could have determined that Carl's draw of \$67,407 in the year 2000 reflected the sum that he would be able to draw from his company on an annual basis. The court could have also included depreciation expenses, that ranged from close to \$30,000 to \$40,000 each year, to determine that \$95,000 was a reasonable approximation of Carl's annual income. *See* WIS. ADMIN. CODE § DWD 40.02(13)(a)(9).¹²

¶37 The fact that Carl, by his omitted disclosures, frustrated an accurate calculation of his net income does not preclude the trial court from making the appropriate findings of fact. *See Lellman*, 204 Wis. 2d at 172-73. "The trial court may make its finding based upon the available evidence when a party's intentional conduct precludes a precise determination of that annual income." *Id.* Because Carl failed to present complete disclosure, the trial court was left to determine a

¹¹ In his reply brief, Carl challenges the court's credibility assessment that he was "less than forthright" about property matters. The lack of disclosure noted in the accountant's reports supports the court's determination. The trial court, not the appellate court, determines credibility. WIS. STAT. § 805.17(2).

¹² Although the court made a reference to tax returns that are not in the record, Carl fails to show how this reference caused him any prejudice. Therefore, it fails to support a claim for reversal. *See* WIS. STAT. § 805.18.

reasonable figure attributable to Carl based upon the income presented. Carl now cannot be heard to complain that this approximation was erroneous when the precise information available to make that determination was in his exclusive control. *See id.*

By the Court.—Judgment affirmed.

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