

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP2406

Cir. Ct. No. 2000FA2364

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

MARTHA E. DERR,

**JOINT-PETITIONER-RESPONDENT-
CROSS-APPELLANT,**

v.

MICHAEL J. DERR,

**JOINT-PETITIONER-APPELLANT-
CROSS-RESPONDENT.**

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: DAVID T. FLANIGAN, III, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Michael Derr and Martha Derr have filed cross-appeals from the maintenance and property division components of an order issued by the trial court following a remand from prior cross-appeals of their divorce judgment. For the reasons discussed below, we affirm the trial court’s decision in all respects.

BACKGROUND

¶2 As this is the second appeal in this matter, we will not repeat the background facts we set forth in our prior opinion. See *Derr v. Derr*, 2005 WI App 63, ¶¶3-6, 280 Wis. 2d 681, 696 N.W.2d 170. Rather, we will pick up where we left off.

¶3 At the conclusion of our prior opinion, we noted that the trial court had initially awarded Martha 75% of the divisible marital assets under the mistaken belief that the marital assets were worth \$388,469 and that Michael had a non-divisible apartment building with a net worth of \$622,065. *Id.*, ¶72. In actuality we concluded the marital assets were worth only \$105,534 and Michael’s non-divisible interest in the apartment building was worth \$905,000, because a \$282,935 outstanding mortgage should have been classified as a divisible marital debt. *Id.* Accordingly, we reversed and remanded with directions that “the circuit court should exercise its discretion to divide divisible property in light of our categorization of the mortgage debt as divisible.” *Id.*

¶4 The trial court held an evidentiary hearing upon remand, after which the parties briefed how the remaining divisible property should be divided and whether the court should invade Michael’s exempt property on the grounds of hardship. After reviewing those briefs, the court advised the parties by letter dated February 7, 2006, that “the court perceives a potential basis to re-visit the issue of

maintenance” because the initial denial of maintenance was based upon “a very different marital property picture.” The parties then submitted additional briefs on the issue of maintenance.

¶5 The issue of maintenance was not raised by the parties on the prior appeal and was not mentioned in our decision. The trial court had initially denied Martha’s request for maintenance. The court stated that it was reasonably clear that Michael’s income exceeded Martha’s, although Michael’s earnings could not be “discerned readily from the evidence offered at trial” due to the intermingling of personal and business accounts. Nonetheless, the court reasoned that the favorable division of the marital assets in Martha’s favor undercut her present need for a maintenance award. The court did, however, hold open the issue of maintenance to be reconsidered if Martha’s health were to significantly decline due to a recurrence of cancer.

¶6 After completion of the briefing on remand, the trial court issued a decision which: (1) awarded 100% of the divisible marital assets to Martha, based on the increased disparity between Michael’s exempt assets and the marital assets; (2) concluded Martha had not demonstrated a “hardship” sufficient to invade Michael’s exempt assets; (3) ordered Martha to make an equalization payment of \$140,818 to Michael, based on the difference between what she had been awarded under the reversed property division and the lesser amount she was due under the new property division; and (4) ordered Michael to pay Martha \$639 per month in maintenance, from March of 2003 (the first month after the effective date of the divorce) until Martha reached age sixty-five or remarried or either party died. The trial court explained that the maintenance award was based upon the significantly different property division, as well as consideration of the facts that Martha had essentially lost her ability to practice medicine when she left her native Mexico to

marry Michael and that Michael had an annual earning capacity of \$50,000. The court also noted there had been evidence presented at the remand hearing that Martha's thyroid cancer had spread, but decided to limit its analysis to information known at the time of the divorce.

¶7 Michael now appeals the maintenance award, while Martha cross-appeals the trial court's refusal to invade Michael's assets on the grounds of hardship.

DISCUSSION

Maintenance

¶8 Michael argues that the trial court exceeded its authority by ordering maintenance because: (1) the issue of maintenance was outside the scope of this court's remand to recalculate the property division; (2) Martha should be judicially estopped from requesting maintenance based on any hardship engendered by her need to repay the equalization payment because she represented to the court when opposing a stay pending appeal that she would repay the payment if Michael succeeded on appeal; (3) the revised maintenance order contravened the trial court's prior order because it was made for reasons other than Martha's health; (4) the initial maintenance order was the law of the case because Martha did not challenge it on the prior appeal; (5) the trial court had no basis to change its factual finding about Michael's income on remand; and (6) the maintenance award constitutes a de facto invasion of Michael's exempt property without a hardship finding. We reject each of these contentions.

¶9 First, as Michael himself acknowledges, a revised property division may also require reconsideration of maintenance when the new division impacts

either the payor's ability to pay or the payee's needs. See *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 479, 377 N.W.2d 190 (Ct. App. 1985). Both are the case here. Under the original property division, Michael needed to take out a loan to make an equalization payment. Under the revised division, Michael would have more money available because he would not need to be making those extra loan payments. The revised property division plainly left Martha with a much greater need because it gave her nearly two thirds fewer assets and would have required her to take out a loan to make equalization payments instead of having cash on hand, which might in turn have generated some income.

¶10 Furthermore, the trial court cited the favorable property division Martha would have received under its original order as a major factor in its initial decision to withhold maintenance. When the trial court awards a party a substantial amount of property in lieu of ordering maintenance, and that property award is subsequently reversed, the factual basis for the maintenance decision is of course affected as well. In short, the issue of maintenance was intricately related to the property division in this case, and the drastically different property division required after this court reversed the trial court's determination of the value of the marital estate also opened the door for a reconsideration of maintenance. Therefore, the trial court did not exceed the scope of this court's remand by revisiting maintenance in the context of revising the property division.

¶11 We next consider Michael's argument that Martha should have been judicially estopped from relying on any hardship arising from repayment of the original equalization payment as a basis for maintenance. The doctrine of judicial estoppel precludes a party from asserting one position during the course of litigation, only to later argue the opposite. *Mrozek v. Intra Financial Corp.*, 2005 WI 73, ¶22, 281 Wis. 2d 488, 699 N.W.2d 54. A party asserting judicial estoppel

must show: “(1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position.” *Id.* (citation omitted).

¶12 Here, it is not clear that Martha’s earlier position—that she would repay the equalization payment in the event Michael prevailed on appeal—is necessarily inconsistent with her subsequent position that the hardship associated with such repayment increased her need for maintenance. The estoppel argument would appear to be more aligned with the issue of whether Martha should be excused from making the repayment at all based on claims of hardship (by the mechanism of invading Michael’s otherwise non-divisible assets), when she could have avoided the alleged hardship by not spending the money pending appeal. In any event, the estoppel argument is still misplaced with regard to maintenance because, regardless of what arguments Martha made, the trial court did not in fact consider any hardship effect of Martha needing to repay the equalization payment Michael had already made to her when it redetermined maintenance. Instead, the court reconsidered the maintenance factors based on the facts before it at the time of the divorce, in light of the revised property division. In other words, Michael has no basis to claim the trial court erroneously failed to apply judicial estoppel when the trial court did not actually adopt the allegedly inconsistent position later asserted by Martha.

¶13 Michael’s third argument that the maintenance award was improperly made for reasons other than health grounds (i.e., the reason the court initially specified for leaving maintenance open) fails because the maintenance award was not based on a motion to reopen or to modify maintenance. The

maintenance award issued on remand *replaced* the original decision to deny maintenance under WIS. STAT. § 767.56 (2005-06);¹ it did not *revise* it under WIS. STAT. § 767.59. Therefore, it is irrelevant whether there would have been grounds to reopen or revise the court's initial maintenance decision, and the prohibition against retroactively dating maintenance revisions does not apply. The trial court properly based the award on the application of the statutory factors to the facts known at the time of the divorce.

¶14 Michael's fourth argument that the initial maintenance order was the law of the case fails because, as we have already explained, the issue of maintenance was interrelated with the property division. Once this court reversed the property division and sent the case back on remand, the trial court could properly consider all related issues.

¶15 Michael's fifth argument that the trial court "erroneously revisited its factual finding as to Michael's income" is also unpersuasive. Michael complains that the court found his annual income to be \$38,400 for child support purposes in the original judgment, but then found it to be \$50,000 for maintenance purposes on remand. However, the trial court stated that the \$50,000 figure represented Michael's earning *capacity*, not his actual income. Since the trial court did not make any finding as to Michael's earning capacity in its initial decision, there was no inconsistency between these figures. In addition, the trial court also explicitly stated in its initial decision that Michael's commingling of his personal and business accounts precluded a clear determination of his income. The court

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

further explained on remand that it had issued its initial order believing “that any continuing financial relationship between the parties could be problematic and that any reliance upon what appeared to be a substantial and available real property asset would likely be a less cumbersome mechanism to achieve an immediate and equitable resolution.” Under these circumstances, where the trial court had initially given somewhat cursory consideration to the maintenance factors because it had decided to rely upon a substantial property award in lieu of maintenance, we see no impropriety in the court’s giving a closer look to the facts relevant to the maintenance decision upon remand.

¶16 Finally, Michael has not developed a sufficient factual premise to support his claim that the maintenance award constitutes a de facto invasion of his exempt property without a hardship determination. Michael contends that, because the court awarded Martha 100% of the marital estate, the maintenance award “could only be paid from Michael’s individual assets.” However, the trial court issued the maintenance award based on a finding that Michael was capable of earning \$50,000 a year. That finding was supported by a loan application Michael had made representing his income to be \$50,000 at one point in time. Thus, the court’s order appears to contemplate that the \$639 monthly maintenance payments could be made from Michael’s future income, and does not suggest that Michael further encumber his rental properties. Michael has not pointed to any facts in the record which would compel the conclusion that he would need to invade his assets to make the ordered maintenance payments.

Hardship Determination

¶17 The trial court may include otherwise exempt assets in the property subject to division if the “refusal to divide the property will create a hardship on

the other party or on the children of the marriage.” WIS. STAT. § 767.255(2)(b) (2003-04). A hardship finding requires more than difficulty in meeting the standard of living enjoyed during the marriage; it requires a showing of privation, or a “lack of what is needed for existence.” *Doerr v. Doerr*, 189 Wis. 2d 112, 124, 525 N.W.2d 745 (Ct. App. 1994) (citation omitted). Once the facts are established, the existence of a hardship is a question of law. *Derr*, 280 Wis. 2d 681, ¶12. However, whether an identified hardship warrants invasion of non-divisible property is a discretionary determination. *Id.*

¶18 Martha argues that the trial court should have interpreted “privation” to mean no more than financial difficulty, and not the “rigorous” standard which it said it was applying, requiring more than a showing of equitable considerations or a lack of resources to maintain a pre-divorce standard. We agree with the trial court, however, that the “privation” standard is a rigorous one, and that the facts of record do not demonstrate that Martha has met it.

¶19 As a threshold matter, the parties dispute whether the hardship determination should be made on the basis of the record at the time of the divorce or at the time of the remand. We note that it is well established that marital assets are to be valued as they exist at the date of the divorce. *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Thus, in this case the trial court was specifically directed on remand to reconsider property division based on a marital estate valued at \$105,534, with Michael’s non-divisible interest in the apartment building being worth \$905,000. Those figures obviously do not reflect the fact that Michael took out an additional non-marital loan to make the erroneously ordered equalization payment, or that Martha spent most of the payment before it was reversed. Because valuation of the parties’ property does not take into account events that occurred after the effective date of

the divorce, it makes sense that the court should also focus on the parties' status as of the date of divorce when undertaking a hardship analysis for the purpose of property division. In other words, all aspects of the division of property should be based on the parties' financial positions at the end of the marriage.

¶20 Here, the record showed that Martha's income narrowly exceeded her expenses at the time of the initial divorce hearing. She did have some outstanding debts, such as her attorney fees and back real estate taxes and mortgage payments, as well as the need for a new car and house repairs. However, with the addition of \$639 in monthly maintenance payments, she would not have been facing "privation." Therefore, the facts do not support a finding that Martha faced a hardship at the time of divorce warranting invasion of Michael's non-divisible property.

By the Court.—Order affirmed.

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

