

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP1072

Cir. Ct. No. 2008FA451

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DOUGLAS K. ISAACSON,

PETITIONER-APPELLANT,

V.

ANDREA L. ISAACSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Grant County:
ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Douglas K. Isaacson appeals a divorce judgment that divided property and set child support and maintenance. Douglas¹ contends that the circuit court erred in its property division by: (1) wrongfully invading Douglas's exempt property; and (2) erroneously valuing that property. Douglas also contends that the court erroneously exercised its discretion in setting child support and maintenance. We disagree, and affirm.

Background

¶2 Douglas and Andrea married in July 2002. Douglas petitioned for divorce in July 2008. Douglas and Andrea stipulated to an equal shared placement schedule, but disputed property division, child support and maintenance.

¶3 At trial, Andrea testified that she gave up her career approximately six years earlier to be a stay-at-home mom for the parties' children, while Douglas was able to focus on his career and further his education. She testified that she is now unable to obtain full-time employment despite her efforts to do so. She testified that Douglas lost a lot of money gambling at casinos during the marriage, while Douglas disputed that he lost very much money.

¶4 The parties disputed the value of 320 acres of land in South Dakota held in trust and shared equally between Douglas and his sister, Mary. Mary testified that similar land in the area had recently sold for \$1000 an acre, which would value Douglas's half at \$160,000. Douglas presented the 2009 tax

¹ Because the parties share a last name, we refer to the parties by their first names for clarity.

assessments for the trust property, which valued Douglas's portion of the trust land at \$218,958.50.²

¶5 Andrea presented testimony by Charles Liebe,³ a realtor and real estate broker in South Dakota. Before trial, Liebe wrote a letter stating that land in the area of the trust property was valued at \$2300 to \$5000 per acre, and that he valued the trust property at \$3200 to \$3600 per acre. According to that estimation, Douglas's portion of the trust property would be valued at \$508,160 to \$571,680. At trial, Liebe testified that the market was much higher than it had been when he wrote that letter several months earlier. He stated that similar land had recently sold for \$4750 an acre, and that he would expect to sell the trust property for \$4000 to \$4200 an acre. He also testified that the land should rent for \$100 to \$150 an acre, although up to 15% of the land might not be tillable and thus would not be included in the rented land. Douglas's sister, Mary, testified that land had recently sold in the area for \$1000 an acre.

¶6 Other items in dispute included a diamond slide necklace, a Coke machine, Douglas's pet Macaw, and a group of missing items of personal property. Andrea testified that Douglas sold the diamond slide necklace at a pawn shop for \$5000 in December 2007, while Douglas stated he sold it for less and that he used the money for marital expenses. The Coke machine was valued by one appraiser at \$8000, and by another for \$10,000. Douglas's pet Macaw was

² Douglas's trust property was assessed at \$102,409; the two parcels of trust land shared equally by Douglas and his sister, Mary, were assessed at \$120,543 and \$112,556.

³ In the parties' briefs, the motion to the circuit court, and the witness' report, the name is spelled "Liebe." In the transcripts, the name is spelled "Lieve." We will use the spelling on the witness' report and used by the parties.

appraised for \$15,000, and Douglas disputed that it was worth that much, asserting it was worth \$10,000. Douglas testified that Andrea took numerous items of personal property from his storage unit. Andrea testified that she did not have the items, and that Douglas had taken the items.

¶7 The circuit court found that Douglas brought considerable gifted or inherited assets into the marriage, but had also lost a significant amount of assets through gambling. The court found Douglas's inherited interest in property held in trust was valued at \$600,000. It valued other disputed items of property Douglas claimed as gifted at a combined value of \$93,070. The court found that Andrea would suffer a hardship if the court did not include Douglas's gifted and inherited property in the marital estate because the marital estate had been significantly depleted by Douglas's gambling, Andrea is unemployed after leaving her career to raise the parties' children and does not currently have any job prospects, and Andrea has mental health issues.

¶8 The circuit court awarded Douglas: (1) one half of the change in value of one of Douglas's retirement accounts during the marriage, valued at \$72,988; (2) the change in value of Douglas's other retirement account, valued at \$74,283; and (3) personal and real property valued at \$693,070, for a total value of \$840,341. It awarded Andrea: (1) one half of the change in value of one of Douglas's retirement accounts, valued at \$72,988; (2) the change in value in Andrea's retirement account, valued at \$21,043; and (3) personal property valued at \$19,856, for a total value of \$113,887. The court assigned debts to Douglas in the amount of \$84,322.34, and to Andrea in the amount of \$43,783.34. Thus, the court valued Douglas's net estate at \$756,018.66, and valued Andrea's net estate at \$70,103.66. It ordered an equalization payment from Douglas to Andrea of

\$95,120.80, which resulted in 80% of the total value of the property being awarded to Douglas and 20% to Andrea.

¶9 The circuit court found that Douglas’s annual income is \$76,336, consisting of his full-time employment income, a side contract, and \$12,000 in trust income. The court found that Andrea is unemployed due to the parties’ joint decision for Andrea to stay home with their minor children, but is capable of working full time and has a college degree. The court imputed income at federal minimum wage for thirty-five hours per week to reach a weekly income for Andrea of \$253.75. It set child support at \$978.98 per month and ordered maintenance of \$100 per week for a period of three years. Douglas appeals the court’s property, child support and maintenance decisions.

Discussion

¶10 Douglas argues that the circuit court erred by invading Douglas’s exempt property in the court’s property division. For the reasons set forth below, we disagree.

¶11 “Nonmarital property may be subject to division in cases where to do otherwise would impose a ‘hardship’ on one of the parties, and we have defined the term ‘hardship’ as a condition of financial privation or difficulty.” *Doerr v. Doerr*, 189 Wis. 2d 112, 119, 525 N.W.2d 745 (Ct. App. 1994) (citation omitted). We have explained that “[w]e allow such an invasion into a party’s separate estate where inclusion of the exempt assets [in the division] is necessary to eliminate or alleviate a financial difficulty or privation which would otherwise exist if the property division were limited to the marital property.” *See id.* at 119-20 (citation omitted). We review a circuit court’s decision to invade inherited or gifted property during a property division in three parts: first, we review the

court's factual findings under the clearly erroneous standard; next, we review whether the facts meet the legal test for "hardship" de novo; and finally, we review the court's determination that the hardship warrants an invasion of the nonmarital property for an erroneous exercise of discretion. *Id.* at 121-22.

¶12 Douglas argues that the circuit court's factual findings do not support its decision because the only factual finding the court made was that Douglas had committed marital waste through gambling. Douglas asserts that marital waste alone is insufficient to meet the legal test for "hardship" set forth in *Doerr*. He asserts further that other evidence in the record is insufficient to support a finding of hardship, pointing to the following: the marriage lasted only six years; Douglas brought substantial gifted and inherited property into the marriage; Andrea is only thirty-six years old, is college educated and healthy with a sufficient earning capacity to support herself; Andrea was awarded both child support and maintenance; and Andrea has left the marriage with more assets than she had when she entered it. Douglas asserts that the court's decision to invade his exempt assets was based on bias, evidenced by the court's frequent reliance on Andrea's testimony as credible despite a psychiatric evaluation prepared by a court-appointed psychologist indicating that Andrea was not credible, and despite support in the record for many of Douglas's contrary assertions.

¶13 Andrea responds that the circuit court properly considered that Andrea is unemployed due to leaving work to care for the parties' twins and that the marital estate had been depleted through Douglas's gambling, in determining that hardship required an invasion of Douglas's personal assets. Andrea also points out that, under the court's property division, Andrea received approximately \$20,000 in personal property and approximately \$44,000 in debt. Andrea notes that she also received approximately \$94,000 in retirement assets, but asserts that

it is not reasonable to expect her to use her retirement accounts for her living expenses. Thus, Andrea asserts, invasion of Douglas's exempt property was necessary to alleviate the financial hardship Andrea would face based on her unemployment, debt, and lack of funds to pay her basic living expenses for herself and the twins. Andrea also asserts that the court made specific credibility findings that supported its factual findings, that the court was not required to accept the findings of the court-appointed psychiatrist, and credibility findings do not amount to judicial bias.

¶14 We discern no error in the circuit court's decision to invade Douglas's exempt assets in its property division. First, contrary to Douglas's assertion, the court's factual findings were not limited to a finding that Douglas committed marital waste. Rather, in addition to its finding that Douglas had depleted the marital estate through gambling, the court found that, absent invading the exempt property, the marital estate would be nominal. The court also found that Andrea is unemployed after leaving her employment to care for the parties' twins. These factual findings were supported by Andrea's testimony at trial and the trial exhibits, and thus were not clearly erroneous, and we reject Douglas's argument that the court could not deem Andrea's testimony credible merely because Douglas testified to the contrary or a court psychologist deemed Douglas more credible. See *Schreiber v. Physicians Ins. Co. of Wis.*, 223 Wis. 2d 417, 426, 588 N.W.2d 26 (1999) (factual findings not clearly erroneous if supported by the record); *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979) (circuit court is ultimate arbiter of witness credibility).

¶15 We next examine whether the facts, as found by the circuit court, meet the legal test for "hardship" to support invading the exempt property. As we explained in *Doerr*, "hardship" is defined in terms of "privation," that is, "lack of

what is needed for existence.” *Doerr*, 189 Wis. 2d at 124. We noted that “the definition requires something more than an inability to continue living at the predivorce standard.” *Id.* Thus, in *Doerr*, we concluded that the test for “hardship” was not met by the circuit court finding that without invading one spouse’s exempt property the other spouse would have difficulty living at the standard of living she enjoyed during the marriage. *Id.* at 124-25. We said that the circuit court’s decision to invade the exempt property on that fact was undoubtedly fair, but did not meet the test for “hardship” in that inclusion of the property was not necessary to eliminate or alleviate a financial difficulty or privation which would otherwise exist. *Id.* We contrasted the facts in *Doerr* with the facts in *Hughes v. Hughes*, 148 Wis. 2d 167, 173-74, 434 N.W.2d 813 (Ct. App. 1988), where we concluded the facts supported a determination of hardship. *Id.* at 124 n.11. We noted that the relevant circuit court findings in *Hughes* were:

(1) [the court’s] concern for [the wife’s] comfort and convenience; (2) [the wife’s] age and health problems; (3) [her] meager income, lack of education and bleak job future; (4) [the husband’s] concealment and diversion of marital assets to the detriment of the marital estate; (5) [his] commingling of marital funds with [other] property to the detriment of the marital estate; (6) [his] inability to pay present or future maintenance; (7) the necessity for [the wife] to live off her property division if only marital assets were considered; and (8) [her] inability to provide herself a proper lifestyle were the inherited property not divided....

Doerr, 189 Wis. 2d at 124 n.11 (quoting *Hughes*, 148 Wis. 2d at 173-74).

¶16 We conclude that, under *Doerr* and *Hughes*, the facts found by the court are sufficient to meet the legal test for “hardship” because inclusion of the exempt property was necessary to avoid financial difficulty or privation. The court found that the marital estate was minimal, absent nonmarital property, and that Andrea is unemployed because she left her employment to care for the

parties' twins, and does not have any current job prospects. Additionally, under the court's divorce judgment, Andrea receives child support in the amount of \$978.98 per month; she also receives maintenance in the amount of \$100 per week, for a total annual amount of \$16,947.76, although the maintenance award is limited to three years. Andrea also reports her net monthly income of \$641 from nominal part-time work, with a monthly budget of \$2,955. Her budget did not include her debt payments. And when her net monthly income is added to the monthly maintenance and child support payments, her total monthly income will still be short of her monthly budget by approximately \$900. It is clear that, absent the non-marital property, Andrea will suffer financial difficulty, meeting the legal test for hardship to support an invasion of the exempt property. Based on the facts of record, and the court's finding that Douglas was not credible and that he lost significant assets through gambling, thereby making it difficult to make an accurate assessment of marital assets, we conclude the court's decision to invade the exempt property was not an erroneous exercise of the court's discretion.

¶17 Next, Douglas contends that the circuit court erred in valuing the property in its property division. He asserts that the court erred in valuing the trust property at \$600,000 because that valuation is not supported by the record. Douglas points to the 2009 tax statement for his property valuing the land at \$218,958.50, and his sister's testimony that the land is worth \$1,000 per acre, which would total \$160,000. Douglas asserts the court should have found the value of the property within that range. He asserts that the court erred in allowing Liebe to testify as to the value of the trust property over his objection because Liebe was not properly identified as a witness, depriving Douglas of the opportunity to prepare a response to that testimony. He also asserts that Liebe's testimony was not reliable because it was not a sufficient appraisal. *See Waste*

Mgmt. of Wis., Inc. v. Kenosha Cnty. Bd. of Review, 184 Wis. 2d 541, 556-58, 516 N.W.2d 695 (1994) (setting forth real property assessment methodology). Finally, Douglas asserts that the \$600,000 value the court reached was higher than the \$508,160 to \$571,689 value Liebe provided.

¶18 First, we do not agree that the circuit court erred in allowing Liebe to testify. The court entered a scheduling order on February 5, 2009, requiring the parties to disclose all witnesses by May 8, 2009. In October 2009, Andrea moved to supplement her witness list, identifying Charles Liebe as a potential witness and providing his contact information. On the morning of trial, December 28, 2009, the court found that the motion to amend the witness list provided proper notice to Douglas. It was clearly within the court's discretion to amend its scheduling order. *See Parker v. Wisconsin Patients Comp. Fund*, 2009 WI App 42, ¶10, 317 Wis. 2d 460, 767 N.W.2d 272 (“Consistent with its inherent and statutory powers to manage its docket, a trial court has broad discretion in deciding how to respond to untimely motions to amend scheduling orders because that broad discretion is essential to the court's ability to manage its calendar.” (citation omitted)). Moreover, Douglas does not explain why he could not have understood the nature of Liebe's potential testimony and prepared a response in the two months between Andrea's motion and trial. In short, Douglas has not shown prejudice. We discern no erroneous exercise of discretion on these facts.

¶19 We also disagree that Liebe's testimony was insufficiently reliable to be considered by the circuit court. While Douglas points to insufficiencies in Liebe's testimony, the only counter evidence Douglas provided was the tax statement and his sister's testimony. It was the court's function to weigh all the evidence and determine the value of the property. Additionally, while Douglas is correct that Liebe initially valued the property at \$508,160 to \$571,689, Liebe

testified at trial that the value had increased to up to \$4200 an acre, which would equal \$672,000. The court's finding that the property was worth \$600,000 is supported by this testimony. Thus, we conclude that the court's finding that Douglas's trust property was worth \$600,000 is not clearly erroneous. *See Schreiber*, 223 Wis. 2d at 426.

¶20 Douglas also asserts that the circuit court's findings as to the value of the diamond slide necklace, Coke machine and his pet Macaw are clearly erroneous. He asserts that the uncontroverted testimony was that the money obtained from the sale of the diamond necklace was used for household items, and thus the court erred in attributing that money to Douglas; that the parties agreed at an earlier hearing that they were unable to sell the machine; and that he testified the bird is worth \$10,000. Douglas also asserts that the court's decision to attribute the missing items of property to Douglas in its property division was an erroneous exercise of discretion because of the lack of any corroborating evidence as to what happened to those items. We disagree.

¶21 The circuit court valued the diamond necklace according to the testimony, and we do not agree that the court was required to accept Douglas's assertion that he used the money for household expenses, in light of other evidence as to Douglas's spending at casinos during the same time period. The court valued the Coke machine according to the values provided by the appraisers, and we do not agree that the fact that the parties stated they had been unable to sell the machine means that the appraiser's value could not be accepted. The court was entitled to accept the value provided by the appraiser for the Macaw rather than accept Douglas's testimony. Finally, the court was entitled to resolve conflicts as to the value and location of missing items according to Andrea's testimony. We therefore have no basis to disturb the court's findings.

¶22 Douglas also contends that the circuit court erred in awarding child support and maintenance. Again, we disagree.

¶23 We review a circuit court's decision on child support and maintenance for an erroneous exercise of discretion. *Ladwig v. Ladwig*, 2010 WI App 78, ¶15, 325 Wis.2d 497, 785 N.W.2d 664. "We will uphold the circuit court's discretionary decision if the 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.* (citation omitted).

¶24 Douglas contends that the circuit court erred in reaching its child support decision because it attributed an income of \$12,000 per year from trust income to Douglas. Douglas asserts that the trust provisions state that income from the trust may not be considered in determining child support. He asserts that the court erred in determining the trust income was \$12,000 because the court failed to deduct property taxes and other business expenses from the income. *See* WIS. ADMIN. CODE § DCF 150.02(16). He also asserts the court erred in attributing income to Andrea at federal minimum wage level, because Andrea earned \$37,000 per year before she left work to raise their children, and she had most recently worked part-time for \$8.50 per hour.

¶25 We are not persuaded that the circuit court was required to disregard the income Douglas received from the trust in determining child support based on language in the trust itself. Moreover, we are not persuaded that the court's finding as to Douglas's income from the trust did not take into account deductions for taxes and expenses. The evidence as to Douglas's trust income was conflicting, and the court explained that it found that Douglas received \$12,000 in trust income after trust expenses such as real estate taxes had been paid. The court

also found that Andrea's decision to leave work to care for the parties' children was reasonable, and that her current employment prospects are questionable. These findings are supported by the record and support the court's decision to impute income to Andrea at federal minimum wage. We have no basis to disturb the court's exercise of discretion in setting child support.

¶26 Finally, Douglas contends that the circuit court erred in awarding maintenance according to the factors set forth in WIS. STAT. § 767.56 (2009-10). He points out that the marriage was only six years long, Andrea has a college degree, and again asserts the court erred in its income determinations. Douglas also disputes the court's finding that Douglas's conduct contributed to Andrea's increased legal fees and resulting debt. We conclude that Douglas has not established that the court erroneously exercised its discretion in awarding maintenance at \$100 per week for three years. In sum, Douglas has not provided any basis to disturb the court's decision. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

