COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2010

David R. Schanker
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. 2008AP1943 **Cir. Ct. No. 2005FA93**

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

IN RE THE MARRIAGE OF:

ELIZABETH COURTNEY RAYALA,

PETITIONER-APPELLANT,

V.

DANIEL ROBERT RAYALA,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Elizabeth Rayala appeals the property division portion of a judgment dissolving her marriage to Daniel Rayala. Specifically, Elizabeth argues the trial court erred by concluding Daniel's partnership interest in

Rayala Cranberry Company is nonmarital property. Elizabeth also claims the trial court erred by failing to include earnings arising from the 2006 harvest in the marital estate. We reject Elizabeth's arguments and affirm the judgment.

BACKGROUND

¶2 Elizabeth and Daniel were married in August 1986. The couple had four children and were guardians for a fifth child. During the marriage, Elizabeth did not work outside the home, with the exception of some sporadic part-time work in 2000, 2001 and 2002. Daniel worked as an employee of his parents' cranberry marsh business until February 1993, when they gifted him a 30% partnership interest in the company, while each retained a 35% interest. Daniel's interest was later reduced to 28.74% as a result of capital contributions made by Daniel's parents and draws taken by Daniel.

¶3 In September 2005, Elizabeth filed for divorce. Although most of the divorce matters were resolved by a marital settlement agreement, a few issues were left for the trial court to address. Relevant to this appeal, Elizabeth asserted she had gained a marital interest in the Rayala Cranberry Company. After a hearing, the court determined that Elizabeth had no interest in the company or in undistributed partnership income. Elizabeth now challenges that determination.

DISCUSSION

¶4 The division of property in divorce actions is entrusted to the circuit court's discretion, and will not be disturbed on appeal unless the court has erroneously exercised its discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We generally look for reasons to sustain the circuit court's discretionary decisions, *see* ***Loomans v. Milwaukee Mutual Insurance***

Company, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and "may search the record to determine if it supports the court's discretionary determinations." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. This court will sustain discretionary decisions if the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[1] The circuit court is also the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶5 Gifts are not subject to division upon divorce unless hardship is shown. WIS. STAT. § 767.61(2); *see also* ***Wright v. Wright***, 2008 WI App 21, ¶9, 307 Wis. 2d 156, 747 N.W.2d 690. The burden of showing that property should be excluded from the marital estate, however, is on the party asserting the claim. ***Brandt v. Brandt***, 145 Wis. 2d 394, 408, 427 N.W.2d 126 (Ct. App. 1988). In order to satisfy the burden, Daniel must establish: (1) the original gifted or inherited status of the property; and (2) that the character and identity of the property has been preserved. *See* ***id.*** at 408. The character inquiry examines "whether the owning spouse intended to donate non-divisible property to the marriage" and, therefore, may accurately be described as "donative intent." ***Derr v. Derr***, 2005 WI App 63, ¶23, 280 Wis. 2d 681, 696 N.W.2d 170. Because the identity inquiry addresses "whether the gifted or inherited asset has been preserved

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

in some present identifiable form," it is more a matter of tracing the asset. ***Id.***, ¶15.

¶6 Here, Elizabeth concedes that Daniel's interest in the company was gifted to Daniel alone. Elizabeth recounts, however, that because of poor economic times in the cranberry business, Daniel did not take the full income draws to which he was entitled or which he reported as income on the couple's joint tax returns for 2000, 2001, 2002 and 2003. Rather, Daniel left a portion of what Elizabeth characterizes as marital income in the business to allow its continued operation. Elizabeth argues that because Daniel reinvested this marital income back into the company, the commingling of that income with the business's assets effectively altered what was initially a gift into divisible marital property. We are not persuaded.

¶7 Elizabeth's argument depends on her assertion that the retained earnings were marital income. To support this underlying premise, Elizabeth cites ***Metz v. Keener***, 215 Wis. 2d 626, 573 N.W.2d 865 (Ct. App. 1997), in which this court determined that the retained earnings fund of a wife's inherited corporation was properly included in the marital estate. Before her marriage to Theodore Keener, Dorothy Metz inherited her late husband's estate, including all the stock in a Subchapter S corporation that operated a McDonald's franchise. ***Id.*** at 628. The corporation retained some of its earnings in an accumulated adjustment account, and Metz used funds from the account to purchase two additional McDonald's restaurants—one purchased before her marriage to Keener and one purchased during the marriage. ***Id.*** at 629.

¶8 The ***Metz*** court acknowledged that while the appreciated value of a gift is nonmarital, income generated by an exempt asset should not be excluded

from the marital estate. ***Id.*** at 632-33. In determining whether the retained earnings fund constituted divisible income generated by the asset, the court focused on whether Metz controlled distribution of the fund. ***Id.*** at 633-34. There, as here, the retained earnings did not pass through Metz's hands for further use or reinvestment because they were always held by the corporation. ***Id.*** at 633. Further, as in the present case, Metz paid income tax on the retained earnings. ***Id.*** In determining that the retained earnings represented divisible income, however, the court emphasized that Metz "had full ownership and possession of all the corporate shares and was the sole managing force behind the corporation." ***Id.*** at 634.

¶9 In contrast, here, the court found that Daniel had only a minority interest in the partnership. The court noted:

> [Daniel] is unable to call any of the shots, and the court really understands that either adjoining management decisions made by he and his parents, or as the court … had the opportunity to see from … the testimony of Don Rayala, his father, ultimately Don calls the shots if he feels that he needs to in order to preserve the assets and to follow his intentions as to how the marsh is going to operate.

Elizabeth nevertheless asserts that by virtue of the partnership agreement, Daniel had full access and control over his taxed income. The partnership agreement provided: "The profits and losses of the partnership shall be determined in the manner in which the partnership reports its income and expenses for federal income tax purposes." Emphasizing that under federal income tax law, all profits are distributed and taxed to the individual partner, Elizabeth asserts Daniel had full control over his portion of the reported income. However, as Daniel points out, under the partnership agreement he could not have unilaterally withdrawn income

from the partnership. Daniel's parents, as the majority interest holders, determined if distributions would be made based upon the business climate.

¶10 Under the present facts, it appears the retention of any "guaranteed payments" was really more about cash flow than about retained earnings. The court acknowledged that like any other business, "when the money isn't there to do it, the option is either take the money that you want as income and turn it around and borrow to keep things stitched together, or don't take the money in the first place." In any event, based on the trial court's finding that Daniel did not control the distribution of retained earnings, we conclude those earnings did not constitute divisible marital income. *See* ***Metz***, 215 Wis. 2d at 633-34; *cf.* ***Weis v. Weis***, 215 Wis. 2d 135, 572 N.W.2d 123 (Ct. App. 1997) (where partner with 50% interest did not have authority to individually exercise control over retained earnings, the earnings were not considered gross income available for child support). Because we reject Elizabeth's underlying premise, we need not address her commingling argument.

¶11 Elizabeth alternatively argues the trial court erred by failing to include payments Daniel received for the 2006 crop in the marital estate. Elizabeth notes that the company sold its crop to Ocean Spray exclusively. Each year's crop is harvested in October, with payment for a crop doled out over the following eighteen months. Because the 2006 crop was harvested during the marriage, Elizabeth claims entitlement to any payments made for that crop after the couple divorced. To the extent Elizabeth asserts an interest in any retained earnings that arose from the 2006 crop, as noted above, under the facts of this case, retained earnings do not constitute divisible marital income.

¶12 With respect to future distributed income arising from the 2006 harvest, accounts receivable are usually assets subject to property division. *See* ***Hubert v. Hubert***, 159 Wis. 2d 803, 812, 465 N.W.2d 252 (Ct. App. 1990). The trial court, however, has discretion to exclude accounts receivable from the marital estate if the evidence indicates a link "between the receivables and salary and that dividing the receivables would adversely affect the ability to pay support or maintain professional and personal obligations." ***Sharon v. Sharon***, 178 Wis. 2d 481, 495, 504 N.W.2d 415 (Ct. App. 1993). Here, Daniel's family support obligation of $3,750 per month was based on his income, including, presumably, income arising from the 2006 harvest. Generally, it is error to double count an account receivable as both an asset and as anticipated income. *See* ***Peerenboom v. Peerenboom***, 147 Wis. 2d 547, 553, 433 N.W.2d 282 (Ct. App. 1988). Because Elizabeth has failed to establish that the subject income was not considered when setting Daniel's family support obligation, we reject her claimed entitlement to that income as divisible marital income.

By the Court.—Judgment affirmed.

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