

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2008

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. 2007AP1275

Cir. Ct. No. 2006FA625

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN RE THE MARRIAGE OF:
EVELYN E. FREITAG,**

PETITIONER-RESPONDENT,

V.

MARK E. FREITAG,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Mark Freitag challenges the property division in the judgment divorcing him from Evelyn Freitag. He also appeals from an order denying reconsideration. Mark argues that the circuit court erroneously valued the

marital home, failed to restore his inherited property to him, erroneously awarded Evelyn's pension to her as her separate property, and erroneously included Evelyn's student loan debt as marital debt. Because the circuit court properly exercised its discretion in dividing the parties' property and debts, we affirm the judgment and the order.

¶2 Property division is within the discretion of the circuit court. *Peerenboom v. Peerenboom*, 147 Wis. 2d 547, 551, 433 N.W.2d 282 (Ct. App. 1988). We will uphold the property division if the court gave rational reasons for its decision and based its decision on facts in the record. *Id.* The valuation of an asset is a factual determination which we will uphold unless the valuation is clearly erroneous. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). In addition, the weight and credibility to be given to testimony is within the province of the circuit court. *Siker v. Siker*, 225 Wis. 2d 522, 528, 593 N.W.2d 830 (Ct. App. 1999) (citations omitted). When the divorcing parties present conflicting testimony concerning the value of property, the circuit court must "determine the credibility of the witnesses, weigh the evidence, and resolve the dispute." *Schwartz v. Linders*, 145 Wis. 2d 258, 265, 426 N.W.2d 97 (Ct. App. 1988).

¶3 Mark argues that the circuit court erroneously valued the marital home. Property is valued as of the date of the divorce. *Holbrook v. Holbrook*, 103 Wis. 2d 327, 334, 309 N.W.2d 343 (Ct. App. 1981). The circuit court based its valuation on Evelyn's evidence at the property division hearing: the tax assessment of \$164,000. Mark suggested that the value was at least \$200,000 based upon an offer the parties received from a developer and rejected two to three years before. Mark did not provide any other valuation evidence at the hearing

despite the existence of a scheduling order setting deadlines for procuring such evidence.

¶4 Evelyn offered valuation evidence; Mark's evidence was not current, and the court did not place weight upon it.¹ The court properly valued the home at the time of the divorce using the most credible evidence presented. *See Siker*, 225 Wis. 2d at 528 (court determines the weight and credibility of evidence).

¶5 Mark next argues that the circuit court failed to restore his inherited property to him. Mark argues that his inheritance was used to purchase the marital home and those funds could be traced and accounted for in the property division. The court found that the home was titled jointly in the parties and was purchased using \$31,283 of Mark's inherited funds and a \$120,000 mortgage. During the marriage, Evelyn made the mortgage payments from her income. These findings are not clearly erroneous based upon the record.

¶6 That Mark contributed inherited property to the purchase of the marital home does not end the inquiry. An additional inquiry must be satisfied: did Mark intend to donate his inherited funds to the marriage, i.e., did Mark have donative intent? *See Derr v. Derr*, 2005 WI App 63, ¶23, 280 Wis. 2d 681, 696 N.W.2d 170. Donative intent is presumed when funds claimed to be the property

¹ The scheduling order required Mark to present valuation evidence at the property division hearing. He testified about the developer's offer, testimony to which the circuit court did not give weight. Thereafter, Mark sought reconsideration and offered a newly obtained appraisal. The circuit court declined to reconsider because Mark did not comply with the scheduling order. The response to a party's failure to comply with a scheduling order is within the circuit court's discretion. *Cf. Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991) (dismissal for failing to comply with a scheduling order is discretionary with the circuit court), *overruled on other grounds by Industrial Roofing Servs. Inc. v. Marquardt*, 2007 WI 19, ¶¶61-63, 299 Wis. 2d 81, 726 N.W.2d 898. The court properly exercised its discretion in declining to reconsider its valuation of the marital home.

of one spouse are used to acquire property used for the mutual benefit of the parties. *Id.*, ¶37. Mark did not rebut this presumption at the hearing. The focus of his testimony was that he contributed inherited funds to the purchase of the home, but his testimony did not rebut the presumption of donative intent. *See id.*, ¶39. Similarly, Mark’s arguments on appeal do not address the donative intent analysis. Mark did not meet his burden on this issue. *See id.*, ¶11 (party seeking to exempt property from division bears the burden to show nondivisibility).

¶7 Mark contends that the circuit court erroneously failed to divide Evelyn’s pension as a marital asset. This issue is governed by the marital property agreement Mark and Evelyn executed before they married. The agreement deemed as Evelyn’s separate property her residence, personal property, her bank accounts and stock, and “all [of her] earnings and accumulations ... together with the property acquired or income derived therefrom” Mark’s separate property included his earnings and accumulations and any property awarded to him in a prior divorce. Neither Mark nor Evelyn disputes the validity of the marital property agreement. The construction of a marital property agreement is a question of law that we decide independently. *Gardner v. Gardner*, 190 Wis. 2d 216, 240, 527 N.W.2d 701 (Ct. App. 1994).

¶8 It is beyond dispute that the pension funds derive from Evelyn’s earnings. The marital property agreement classified Evelyn’s earnings and property derived therefrom as Evelyn’s separate property. The circuit court did not err in its refusal to divide Evelyn’s pension.

¶9 Mark next argues that the circuit court should have excluded Evelyn’s student loan from the divisible marital debt. Evelyn testified that she took out a student loan for education expenses, but her employer later reimbursed

her for those expenses. Therefore, she used the loan proceeds to cover marital expenses. The court's finding that the loan constituted a marital purpose debt is not clearly erroneous based on this record.

By the Court.—Judgment and order affirmed.

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

