

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 2011

A. John Voelker
Acting 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. 2010AP2962

Cir. Ct. No. 2009FA142

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

KAYLEEN A. GAST,

PETITIONER-RESPONDENT,

V.

LARRY J. GAST,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Larry J. Gast appeals a divorce judgment that divided property and awarded attorney fees. Larry¹ contends that the circuit court erred in its property division by: (1) wrongfully invading Larry's exempt property; (2) equally dividing the marital estate; and (3) failing to take into account tax consequences of its distribution of assets and consequent equalization payment. Larry also contends that the circuit court erroneously exercised its discretion in awarding attorney fees. We disagree, and affirm.

Background

¶2 Larry and Kayleen married in September 1990. They have one child together. The parties separated in the mid-1990s, but the divorce action initiated at that time was not completed. Kayleen initiated this divorce action in April 2009.

¶3 At the time of the parties' marriage in September 1990, Larry owned a house in Clintonville and approximately \$30,000 in investments. Both parties worked during the first part of the marriage, although Kayleen became unable to work due to health problems some time after the parties separated, and Kayleen was the primary caretaker for the parties' daughter. In 2007, Larry received a \$20,000 life insurance payment following the death of his mother, and Larry's father transferred ownership of his house to Larry.

¶4 At the time of the final divorce hearing in May 2010, Larry was on medical leave from his employment and receiving no income; Kayleen was

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

unemployed and received social security benefits due to numerous health problems. The parties' financial disclosure statements indicated that Kayleen's monthly income for 2009 was \$740, for a total annual income of \$8,800. Kayleen's annual income had been about the same amount from 2004 through 2009. Larry's annual income over those years ranged from \$26,000 to \$33,000. Kayleen's total assets included two vehicles and a checking account totaling \$13,360, and her debts totaled \$26,414.56, for a total net worth of negative \$13,054.56. Larry's assets included his two homes, a nominally valued vehicle and sailboat, and accounts and investments, totaling \$255,214.78.

¶5 The circuit court found that both parties suffered from health problems limiting their ability to work, but that the court did not have enough information to determine whether maintenance would be appropriate. Accordingly, the court held maintenance open as to both parties. It found that Kayleen had established her need for a contribution as to attorney fees, because her social security income was not sufficient to pay attorney fees. It found that Larry had the ability to pay attorney fees based on his assets, and found that it would be reasonable for Larry to pay \$3,000 toward Kayleen's attorney fees. The court determined that the circumstances of the case warranted including the money Larry received upon his mother's death in the marital estate, but that the house Larry received from his father would be excluded. The court noted the parties' concern that liquidation of the investments would result in tax consequences, and ordered the parties to determine an equalization payment within six months. It also stated that no interest would accrue during that six-month period; and that interest would begin accruing at a rate of five per cent after the six-month period.

¶6 In October 2010, the circuit court entered its findings of fact, conclusions of law and judgment. It held maintenance open pending further order

of the court. It held that the house Larry received from his father, valued at \$59,300, was excluded from the marital estate, but that all of the remaining property in the parties' financial disclosure statements would be equally divided. The court found that Kayleen's total assets were \$13,360 and her debt was \$23,414.56, so that her total net worth was negative \$10,054.56. The court found that Larry's total assets, excluding the house he received from his father, were \$195,914.78, and his debts were \$7,333, so that his net worth was \$188,581.78. The court ordered an equalization payment of \$99,318.17, with an annual interest rate of five per cent beginning six months from the final divorce hearing. It also ordered Larry to pay \$3,000 of Kayleen's attorney fees. Larry appeals.

Discussion

¶7 Larry argues that the circuit court erred in including Larry's inherited property in the marital estate, ordering an equal division of the marital property, and failing to take into account the tax consequences of its property division. For the reasons set forth below, we disagree.

¶8 “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). 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.’” *Id.* at 119-20 (citation omitted). We review a court's decision to invade inherited or gifted property during a property division in three parts: first, we review the circuit 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 circuit court’s determination that the hardship warrants an invasion of the nonmarital property for an erroneous exercise of discretion. *Id.* at 121.

¶9 Larry argues that the circuit court applied the wrong legal test for “hardship” because it determined only that Kayleen would be left in a state of privation without a division of property, but did not specifically consider whether she would be in a state of privation “if the property division were limited to the marital property.” *See id.* at 119-20. Larry argues that Kayleen’s half of the marital estate absent the exempt property, which would equal \$88,897.92, would have been sufficient to alleviate any financial difficulty or privation. He contends that the circuit court’s decision to include the inherited property was therefore an erroneous exercise of discretion. We disagree.

¶10 The circuit court found that Kayleen has been unable to work for the past ten years due to her health problems, while Larry had been able to work over the years; that Larry was now unable to work due to his health problems, and it was unclear whether he would be able to return to work in the future; Kayleen had been primarily responsible for raising the parties’ daughter, while Larry had provided child support, and the daughter was now an adult; and that Kayleen’s current receipt of social security benefits was insufficient to meet her basic needs. The court reasoned that an equalization payment was necessary to alleviate Kayleen’s privation. Larry does not dispute that an equalization payment was necessary, but disputes that the equalization payment would have been insufficient absent inclusion of the additional \$10,000 from Larry’s inherited property. We determine, however, that Kayleen’s minimal income, inability to work due to health problems, and lack of assets are sufficient facts to establish privation

without including the additional amount in the marital estate. We do not agree that an \$88,897.92 equalization payment to Kayleen would have eliminated any financial difficulty or privation, such that the legal test for hardship was not met. Moreover, under these facts, we discern no erroneous exercise of the circuit court's discretion in including Larry's inherited \$20,000 in the marital estate.

¶11 Next, under WIS. STAT. § 767.61 (2009-10),² a circuit court must equally divide marital property unless it determines that an unequal division is warranted after considering the relevant statutory factors. Larry argues that an unequal property division in his favor was warranted because he had been the more financially responsible spouse and Kayleen had accumulated debts after the parties separated. However, the court considered that the parties had been separated for a majority of the marriage, but nonetheless had been married for twenty years, in dividing the marital estate. The court also considered the parties' assets, contributions to the marriage, their physical health, and their earning capacities, which are all appropriate statutory factors. *See id.* We are not persuaded that the circuit court erred in following the presumption of an equal property division under § 767.61.

¶12 As to the tax consequences of the equalization payment, Larry argues the circuit court simply directed an equalization payment without providing for tax consequences. However, Larry does not cite any authority for the proposition that the circuit court's failure to make a specific finding as to the tax consequences of an equalization payment renders its property division an

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

erroneous exercise of its discretion. Additionally, our review of the record indicates the court considered the potential tax consequences of an equalization payment before providing a six-month period, with no interest, for the equalization payment to be made; additionally, the court then ordered the annual interest rate on the payment at five percent after the six-month period. It appears, then, that the circuit court considered tax consequences in dividing property, and we discern no erroneous exercise of the circuit court's decision.

¶13 Finally, Larry contends that the circuit court erroneously exercised its discretion in ordering him to pay a portion of Kayleen's attorney fees. Larry contends that, under *Balaam v. Balaam*, 52 Wis. 2d 20, 187 N.W.2d 867 (1971), an award of attorney fees is only appropriate if one spouse is unable to pay attorney fees out of that spouse's income or assets. Here, Larry points out, neither party has sufficient income to pay the attorney fees, and the court awarded an equal division of property; thus, they have an equal ability to pay attorney fees out of those assets. However, according to the circuit court's decision, Larry had an additional nearly \$60,000 in assets not subject to division, and it was reasonable for the circuit court to determine that even the amount awarded to Kayleen would be insufficient to pay for her necessities and pay attorney fees. While Larry is correct that the record reveals he is currently not receiving any income, it also reveals that there is a possibility he will return to work. In sum, Larry has not provided any basis to disturb the circuit 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.

