

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2678-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

RITA MAE SCHILCHER,

PETITIONER-RESPONDENT,

V.

MICHAEL SCHILCHER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Michael Schilcher appeals those parts of a divorce judgment dividing the marital property and denying his requests for child support

and maintenance.¹ He argues that the trial court erroneously calculated the value of Rita's retirement plan and the equipment and inventory in Michael's service station. He also argues that the court improperly exercised its discretion by requiring him to pay interest on the equalization payment retroactive to the date of divorce and by denying his request for child support and maintenance. We reject these arguments and affirm the judgment.

Property division, child support and maintenance questions are committed to the trial court's discretion. This court must affirm the trial court's decisions if they are reasonable. *See Vier v. Vier*, 62 Wis.2d 636, 639-40, 215 N.W.2d 432, 434 (1974). The trial court's findings of fact must be affirmed unless they are clearly erroneous. *See* § 805.17(2), STATS.

The \$80,000 valuation of Rita's retirement account is not clearly erroneous. Rita's expert testified that her "employee account" balance (the amount she could receive if she terminated employment before retirement age in lieu of a monthly benefit) had a present value greater than the "monthly benefit formulas" Michael's expert used. Because Rita was twenty years from retirement age, using her employee account balance appeared more appropriate. The trial court found Rita's expert's testimony more credible than Michael's. The weight and credibility to be given the opinion of expert witnesses is uniquely within the fact-finder's province. *See Bauer v. Piper Indus., Inc.*, 154 Wis.2d 758, 764, 454 N.W.2d 28, 31 (Ct. App. 1990).

Likewise, the valuations of the service station's equipment and inventory are not clearly erroneous. The court valued the equipment and

¹ This is an expedited appeal under RULE 809.17, STATS.

inventory at \$20,000 and the gasoline inventory at \$12,000. Those figures are based on a depreciation schedule showing a cost basis for the machinery and equipment totaling more than \$86,000. Michael apparently considers items worthless if they have been fully depreciated for tax purposes. He presented an affidavit stating that the service station equipment and inventory equaled \$10,900, but never produced a list of the specific assets or inventory. The trial court noted that it was “almost necessary to have a sheriff arrest [Michael] and have him brought into Court with his inventory numbers.” While Rita possessed limited knowledge of the service station’s inventory and equipment, Michael did not present credible evidence challenging Rita’s valuations. Michael challenged Rita’s assertion that he had a \$12,000 gasoline inventory based on a debt he owed his supplier, but he never checked the amount of gasoline he had and could not accurately state its value at trial. The trial court could properly draw an adverse inference from Michael’s failure to produce a credible list of assets and inventory. *See Lubner v. Peerless Ins. Co.*, 19 Wis.2d 364, 371, 120 N.W.2d 54, 57 (1963). Because Michael was in the best position to provide this information and did not do so, the trial court reasonably accepted Rita’s estimates.

The trial court properly ordered retroactive interest on the equalization payment. The court’s final decision dividing the marital property did not occur until ten months after it granted the divorce. Unless Michael made the equalization payment within thirty days of its final decision, the court ordered retroactive interest from the date of the divorce. Michael argues that the court erroneously exercised its discretion because he could not compute the amount due until the court completed the property division and it would take Michael more than thirty days to liquidate assets in order to make the equalization payment.

Michael benefited from retaining the property from the date of the divorce until the court completed the property division. If the court had valued and divided the property in the same manner on the date the divorce was granted, Michael's equalization payment would have been due at that time. We perceive no injustice in requiring him to pay interest for retaining the property until the court completed the property division. To the extent Michael argues that he cannot liquidate the property within the thirty days allowed by the trial court, the record does not support that assertion. Michael received relatively liquid investment accounts in the divorce judgment that would allow him to make the equalization payment.

The trial court properly exercised its discretion when it refused to grant Michael child support. The court placed a seventeen-year-old son with Michael and a fifteen-year-old daughter with Rita. If the court had ordered each party to pay the other 17% of his or her income, Michael would have received \$170 per month based on Rita's higher income. However, when the seventeen-year-old turned eighteen, Michael would have to pay 17% of his income to Rita until the fifteen-year-old turned eighteen. In light of the parties' lack of cooperation and the difficulty in ascertaining Michael's true income, the court reasonably determined that it would not award Michael child support. The court noted that it would consider its refusal to award Michael child support if Rita ever asked for child support in the future.

In challenging the decisions to deny child support and maintenance, Michael contends that he only earns approximately \$10,000 per year. The trial court found that he could earn \$25,000 per year. That finding is not clearly erroneous. The court considered Michael's tax returns showing annual gross sales of \$250,000. The court also reviewed the depreciation schedules and allowances

made for bad debts as well as the wealth accumulated by the parties during the marriage. Rita presented evidence showing that Michael had an interest in nineteen different checking and savings accounts as well as mutual fund and money market investments. Michael admitted at trial that he failed to disclose \$17,000 that he had placed in his safe. The court reasonably rejected Michael's incredible and self-serving evidence and estimated his income potential at \$25,000 per year.

Finally, the trial court properly exercised its discretion when it refused to grant Michael maintenance. It awarded him the income-producing assets, including rental properties and most of the parties' investments. Michael and Rita had the same educational credentials at the time they married. Michael chose to forsake teaching to operate a service station. Diligently applying himself to that trade and receiving supplemental income from assets he received in the property division should allow Michael to maintain a standard of living reasonably comparable to that enjoyed during the marriage.

By the Court.—Judgment affirmed.

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

