

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP2329
STATE OF WISCONSIN

Cir. Ct. No. 2005FA54

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MICHAEL P. MULLEN,

PETITIONER-APPELLANT,

V.

DEBRAH A. MULLEN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Michael Mullen appeals a judgment divorcing him from Debrah Mullen and an order denying his motion for reconsideration. He argues that: (1) the circuit court erroneously exercised its discretion in awarding

maintenance; (2) the circuit court's valuation of his car was clearly erroneous; (3) the circuit court should have included money he gave Debrah for housing in the property division; and (4) Debrah over-tried her inheritance claim. We affirm.

¶2 Michael contends that the circuit court erroneously exercised its discretion in awarding Debrah \$1000 per month in maintenance. He contends that the circuit court failed to consider the fact that he lacks job security because the company he works for recently lost a large client. The record belies this argument. According to the testimony of Michael and his boss, Michael's company lost a large client and has had to lay off employees, but neither testified that the company was going to close or that Michael's job in particular was in jeopardy. The testimony also showed that Michael was an important employee, making it more unlikely that he would be laid off should the company be required to terminate more employees. More importantly, Michael would be able to return to court to seek an adjustment of the maintenance award if he were laid off because his job loss would likely constitute a substantial change in circumstances regarding his ability to pay maintenance. We reject Michael's challenge to the maintenance award.

¶3 Michael also argues that the maintenance award is unfair because he earns more than Debrah only because he works substantially more than forty hours a week, while Debrah works only forty hours a week. The problem with this argument is that, as Michael acknowledges, the amount of a maintenance award is committed to the circuit court's discretion and Michael cites no authority for the proposition that the circuit court must base a maintenance award on the hypothetical earnings of the parties had they worked the exact same number of hours per week. We conclude that the circuit court properly exercised its discretion in basing its maintenance decision on the amounts the parties actually

earned in their respective jobs, regardless of the fact that Michael's job is more demanding in terms of the number of hours he must work.

¶4 Michael next argues that the circuit court erred in valuing his Ford Explorer at \$11,500. “[T]he valuation of marital assets is a finding of fact which we will not upset unless clearly erroneous.” *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). “‘Fair market value’ is the proper method of valuing property in a divorce property settlement.” *Id.* at 138. “Fair market value is the price that property will bring when offered for sale by one who desires but is not obligated to sell and bought by one who is willing but not obligated to buy.” *Id.*

¶5 Michael contends that the valuation he provided of \$10,055 was the only reasonable valuation in the record so the circuit court should have accepted his valuation. This argument fails because there were other reasonable valuations in the record on which the circuit court could rely. Values for the vehicle ranged as high as \$14,935. Michael criticizes Debrah's valuation of \$11,150, contending that it is based on a source that does not establish the fair market value, but does not adequately explain *why* Debrah's valuation, which is from the National Automotive Dealers Association, is not indicative of fair market value. We conclude that the circuit court's determination that the fair market value of the car was \$11,500 is not clearly erroneous.

¶6 Michael next argues that the \$2800 he gave Debrah pursuant to the court commissioner's temporary order for her first month's rent and security deposit should have been considered an advance on the property division. The court commissioner's temporary order required Debrah to vacate their home and required Michael to borrow \$2800 for Debrah's first month's rent and security

deposit, leaving responsibility for the loan payments to be determined at a future date. The circuit court included the debt in the property division, but did not credit Debrah with having a \$1400 asset being held by her landlord in the form of a security deposit. The court reasoned that “[t]he security deposit is not an ‘asset’ of the marriage ... it is a sum of money controlled by a landlord with no guarantee and/or assurance that it will be paid to Ms. Mullen.” Debrah argued that she was entitled to the money on equitable grounds because she did not receive temporary maintenance. We conclude that the circuit court’s decision is sustainable on equitable grounds because Debrah did not receive temporary maintenance during the period when Michael was ordered to pay her security deposit and first month’s rent.

¶7 Finally, Michael argues that Debrah over-ried her claim that an inheritance she received was not marital property. He contends that Debrah should have known that her argument was meritless based on *Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170.

¶8 “Overtrial is a doctrine developed in family law cases that may be invoked when one party’s unreasonable approach to litigation causes the other party to incur extra and unnecessary fees.” *Zhang v. Yu*, 2001 WI App 267, ¶13, 248 Wis. 2d 913, 637 N.W.2d 754. “It may also involve abuse of judicial resources through the unnecessary over-utilization of those resources.” *Id.* “A party’s approach to litigation is unreasonable if it results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time.” *Id.* “A circuit court may sanction a party who has engaged in overtrial by ordering that party to pay the opposing party’s attorney fees.” *Id.* “Whether excessive litigation occurred is a question of historic fact to be determined by the circuit court.” *Id.*, ¶11. “We will not reverse that determination

unless it is clearly erroneous.” *Id.* “Whether the facts as found constitute unreasonably excessive litigation resulting in overtrial is a question of law.” *Id.*

¶9 The court found as a matter of fact that there was no excessive litigation, noting that both parties were well represented and this “was one of those cases ... that presented the facts [and] presented the required analysis” Based on our review of the record, this finding of fact is not clearly erroneous. The court also concluded that, given the award of maintenance and the equal property division, it would be fair for both parties to be responsible for their respective attorney’s fees. Implicit in the circuit court’s comments is the notion that Debrah’s inheritance argument, while weak under *Derr*, was not significant in the larger scheme of things. The circuit court properly concluded that there was no overtrial in this case.

By the Court.—Judgment and order affirmed.

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

