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IN THE
COURT OF APPEALS OF INDIANA

RICHARD M. DAVIS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 31A01-0802-CV-80
	)	
JUDITH K. DAVIS, now known as	)	
JUDITH K. GUNTHER,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HARRISON CIRCUIT COURT
The Honorable R. Michael Cloud, Special Judge
Cause No. 31C01-0306-DR-101

April 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Richard Davis appeals the trial court's second amended dissolution decree issued following a prior remand with instructions from this court. For our review, Richard raises two issues, which we restate as: 1) whether the trial court abused its discretion when it calculated the added value of an oil and gas lease to a 110-acre farm owned by the parties during the marriage; and 2) whether the trial court abused its discretion when it calculated Richard's 2003 farming expenses. Finding no error, we affirm.

Facts and Procedural History

Richard appealed the trial court's first dissolution decree, and this court affirmed in part, reversed in part, and remanded with instructions. The instructions on remand relevant to this appeal were:

> (2) hold a hearing on the amount of 2003 farming expenses, reach a total based upon the evidence presented therein, and amend the dissolution decree accordingly;
>
> . . .
>
> (5) amend the dissolution decree by removing the award to Judith of one-half of the future royalty payments under the oil and gas lease on the 110-Acre Farm, order Judith to reimburse Richard for any royalty payments he has made to her that accrued following the final date of separation, and require her to relinquish her interest in that lease;
>
> (6) clarify whether the valuation of the 110-Acre Farm included the value of the oil and gas lease, and if the lease was not taken into consideration, hold a hearing regarding the value of the lease and amend the valuation of the 110-Acre Farm if necessary;
>
> . . .
>
> (8) recalculate the amount of the marital estate to which each party is entitled pursuant to the above instructions.

Davis v. Davis, No. 31A01-0602-CV-59, 2006 WL 3703262, at *10 (Ind. Ct. App. Dec. 18, 2006).

Following remand, the trial court held hearings on June 1, and July 20, 2007, and issued an amended dissolution decree on October 23, 2007. Richard filed a motion to correct error on November 21, 2007, which the trial court denied in part. After a hearing on the remainder of the motion on January 14, 2008, the trial court issued its second amended decree of dissolution finding, in pertinent part:

> 3. The Court finds that it was instructed by the Indiana Court of Appeals to receive evidence and hear argument to determine the amount of the 2003 farming expenses. Pursuant to [Richard's] Exhibit #3 and undisputed by [Judith], the Court finds that the 2003 farm gross receipts totaled Seventy-Two Thousand Nine Hundred Forty Dollars ($72,940.00)[.]
>
> The Court finds that pursuant to [Richard's] 2003 tax return, schedule [F], Profit or Loss from Farming, marked as [Richard's] Exhibit #1 lists expenses of Thirteen Thousand One Hundred Sixty-Six Dollars ($13,166.00) for depreciation, Three Thousand One Hundred Four Dollars and Sixty-Five Cents ($3,104.65) and Three Thousand One Hundred One Dollars and Twelve Cents ($3,101.12) for interest, and the Court finds that these three (3) amounts should be eliminated as farming expenses, as the value on these items has been previously determined by the Court.
>
> Therefore, the Court finds that the 2003 farming proceeds totaled Seventeen Thousand Four Hundred Eighty Dollars and Ninety-Seven Cents ($17,480.97) in income greater than the 2003 farming expenses. As [Judith] was awarded Thirty Thousand Seventy-Six Dollars and Eighty-Nine Cents ($30,067.89) for the total amount of 2003 crop proceeds, [Richard] is entitled to a credit of Twelve Thousand Five Hundred Ninety-Five Dollars and Forty-Two Cents ($12,595.42).
>
> 4. Pursuant to the instructions of the Indiana Court of Appeals, the Court clarifies that the valuation of the 110 acre farm used by the Court in the original decree of dissolution did not include the value of the oil and gas lease. The trial court was further instructed to amend the decree to remove the award to [Judith] of one half (1/2) of the future royalty payments under the oil and gas and relinquish her interest in said lease. The trial court was instructed to receive evidence and hear argument regarding the value of the oil and gas lease

> for the purpose of amending the valuation of the 110 acre farm and to determine any credit amount to [Richard] for royalty payments made to [Judith] since the date of separation.
>
> The Court finds that pursuant to [Richard's] Exhibit #7, page three (3), [Judith] received a total of Ten Thousand Five Hundred Ninety-Seven Dollars and Seventy Cents ($10,597.70) in royalties from Quicksilver Resources Inc. from October of 2003 to October of 2006, which sum includes amounts awarded to her in the original decree and which sum shall be credited to [Richard].
>
> The Court finds that [Richard's] submitted appraisal of the 110 acre farm performed by Larry Harmon on July 14, 2003 with a value of $220,000.00 used by the Court for valuation of this asset did not include any value regarding the oil and gas lease. The Court finds that according to the testimony of Marvin Schmidt, as there was no income stream or royalties paid by Lessee, Quicksilver[,] until October of 2003, and as there was no actual physical intrusion onto the farmland, itself, that the lease had no negative impact in regard to its value at that time.
>
> The Court finds that pursuant to [Judith's] Exhibit #1 and the testimony of W. Issac Orwick, C.P.A., the present value of the future cash flows of royalties from the oil and gas lease totaled Sixty Thousand Four Hundred Dollars ($60,400.00). Therefore, the Court finds that the value of the 110 acre farm should be increased by this amount, and that [Judith] should receive credit of one-half (1/2) of this amount or Thirty Thousand Two Hundred Dollars ($30,200.00), as this asset was not included in the original distribution amounts.

Appellant's Appendix at 64-66. Richard now appeals.

Discussion and Decision

I. Standard of Review

The distribution of marital property is committed to the sound discretion of the trial court. Breeden v. Breeden, 678 N.E.2d 423, 427 (Ind. Ct. App. 1997). Therefore, we review such decisions only for an abuse of discretion and will reverse only if the judgment is clearly against the logic and effect of the facts and the reliable inferences to be drawn from those facts. Leonard v. Leonard, 877 N.E.2d 896, 900 (Ind. Ct. App. 2007). When, as here, the trial court enters special findings, we review the judgment by determining, first, whether the

evidence supports the findings and, second, whether the findings support the judgment. Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007). We may not reweigh the evidence or assess the credibility of witnesses, and we consider only the evidence most favorable to the trial court's disposition of the marital property. Leonard, 877 N.E.2d at 900. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Schmidt v. Schmidt, 812 N.E.2d 1074, 1080 (Ind. Ct. App. 2004).

II. Oil and Gas Lease

Richard first argues the trial court incorrectly determined the added value of the oil and gas lease to the 110-acre farm based on the projection of future income evidence presented by Judith. Specifically, Richard argues the original appraisal included the value of the oil and gas lease, the expert witness's appraisal is based on speculation, and the trial court improperly doubled the expert witness's appraisal in its valuation of the 110-acre farm including the oil and gas lease.

Our research has not uncovered any instructive authority on the proper method to determine the value of an oil and gas lease in the context of a dissolution decree's distribution of property. However, in the context of condemnation, this court has previously held, "[t]he value of minerals may not be determined separately from the land, but in all cases must be considered as part of the land and valued together with the land as a unit." State Highway Comm'n v. Jones, 173 Ind. App. 243, 250, 363 N.E.2d 1018, 1023 (1977). The Jones court discusses three commonly used methods to determine the value of real estate:

> (1) the current cost of reproducing the property less depreciation from all sources; 2) the "market data" approach or value indicated by recent sales of comparable properties in the market; and 3) the "income-approach," or the value which the property's net earning power will support based upon the capitalization of net income."

Id. at 251, 363 N.E.2d at 1024. All three methods have been judicially approved. Id. at 252, 363 N.E.2d at 1024. We see no reason why these same methods should not apply in the context of a distribution of property during dissolution proceedings.

The reproduction method would not work here because land is not a fungible good. The market data method could work here and may even be a preferable method; however, neither party provided any evidence to support a valuation under the market data approach.[1] The evidence submitted by the parties can only support the income approach method.

Generally, in valuing property, courts should not look to business profits as an indicator of the value of the land because estimation of future profits is considered too speculative and consideration of past profits is considered to be an inaccurate indicator of profits in future years. Id. at 251, 363 N.E.2d at 1023-24. However, income from property is an element to be considered in determining the market value of the property when the income is derived from the intrinsic nature of the property itself. State v. Williams, 156 Ind. App. 625, 635, 297 N.E.2d 880, 886 (1973). Therefore, "where income is produced from the sale

[1] Although the appraisal report lists "Gas rights leased" in the Comments section, it does not appear the appraiser considered the oil and gas lease in the value of the 110-acre farm. See Appellant's Appendix at 147(a). The Comments section contains a parenthetical stating "favorable or unfavorable including any apparent adverse easements, encroachments, or other adverse conditions." Id. Therefore, even if the appraisal included consideration of the oil and gas lease, we could not discern whether it added or subtracted value from the 110-acre farm. None of the comparable properties makes any mention of having an oil and gas lease despite having similar adjusted property values. In addition, the appraisal comments that the "income approach [is] not applicable." Id. This also indicates that the oil and gas lease was not factored into the overall value of the 110-acre farm.

of minerals or other soil materials, then the 'income approach' for valuing land with its incumbent use of the capitalization method is proper where such is the best method for ascertaining the fair market value. Jones, 173 Ind. App. at 254, 363 N.E.2d at 1025. Such is the case here.

Judith submitted a report prepared by an accountant, who also testified at the hearing, detailing his "income approach" valuation of the oil and gas lease. The accountant averaged the result reached using two methods of estimating the net present value, the direct capitalization method, and the net present value method. The accountant based his projected income figures on past payments received by Judith from the oil and gas lease. In response, Richard presented the testimony of an appraiser, who testified at length about the difficulties in determining the effect of an oil and gas lease on the overall value of a property but, in the end, gave no actual appraisal amount for the 110-acre farm.

The burden of producing evidence as to the value of the marital property falls appropriately on the parties. In re Marriage of Church, 424 N.E.2d 1078, 1082 (Ind. Ct. App. 1981). "[A]ny party who fails to introduce evidence as to the specific value of the marital property … is estopped from appealing the distribution on the ground of trial court abuse of discretion based on that absence of evidence." Id. at 1081. Judith presented the trial court with evidence based on a valid method of determining the added value of the oil and gas lease to the 110-acre property. Although he attacked the reliability of Judith's method, Richard did not provide any alternative valuation from which the trial court could make its decision. Therefore, the evidence supports the trial court's valuation of the oil and gas lease.

Richard also argues that the trial court incorrectly doubled the value of the oil and gas lease supplied by Judith's expert witness. The accountant's report clearly indicates that he based his figures on the past income received by Judith from the oil and gas lease. The trial court's prior dissolution decree ordered Judith to receive one-half of the income from the oil and gas lease; therefore, the estimated value determined by the accountant represents only one-half of the total value of the oil and gas lease. As a result, the trial court did not abuse its discretion in accepting the value supplied by Judith's expert witness.

III. Farming Expenses

Next, Richard argues that the trial court abused its discretion when it deducted depreciation and interest expenses from the overall 2003 farming expenses. Richard provides no citations to authority to support his argument; nor, for that matter, did Judith provide any citation to authority in her response. Indiana Appellate Rule 46(A)(8)(a) requires each issue raised by a party to be supported by cogent reasoning and citations to authority. Generally, a party waives any issue it fails to support with adequate citation to authority. Hartley v. Hartley, 862 N.E.2d 274, 284 (Ind. Ct. App. 2007). However, our own research has not uncovered any authority directly addressing this issue. Therefore, we proceed to discuss the merits of Richard's argument.

"Depreciation is the annual deduction that allows you to recover the cost … of your business or investment property over a certain number of years." Department of the Treasury, Internal Revenue Service, Instructions for Form 4562: Depreciation and Amortization, at 2 (2008). In the context of the calculation of child support, the Child

Support Guidelines state:

> Weekly Gross Income from self-employment, operation of a business, rent, and royalties is defined as gross receipts minus ordinary and necessary expenses. In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income. These expenditures may include a reasonable yearly deduction for necessary capital expenditures. Weekly gross income from self-employment may differ from a determination of business income for tax purposes.

Ind. Child Support Guideline 3(A)(2). Further, "[w]hile income tax returns may be helpful in arriving at weekly gross income for a self-employed person, the deductions allowed by the Guidelines may differ significantly from those allowed for tax purposes." Child Supp.G. 3(A), comment 2(a). Depreciation, investment tax credits, and certain other business expenditures allowed by the IRS are excluded from ordinary and necessary expenses. Bass v. Bass, 779 N.E.2d 582, 593-94 (Ind. Ct. App. 2002). Although not controlling, we find the treatment of this issue in the Child Support Guidelines particularly helpful to our analysis of the trial court's determination of the 2003 farming expenses.

The trial court accepted Richard's 2003, 1040-Schedule F tax form, Profit and Loss from Farming, as evidence of his 2003 farming expenses. The depreciation expense, which spreads the cost of an initial purchase of equipment or property over a period of years, does not represent an actual outlay of money in 2003. As such, it did not impact the income that Richard and Judith actually received from their 2003 farming activities. In addition, the trial court had already given Richard credit for loan payments, which presumably included both principal and interest expenses, made on the mortgage on the 110-acre farm, the lawnmower, and the combine. Therefore, the trial court reasonably deducted the interest expenses from

the total 2003 farming expenses.

Given the trial court's discretion to determine the division of property and the treatment of such expenses in the context of child support determinations outlined above, we are not left with the firm conviction that a mistake has been made. As a result, we hold the trial court did not abuse its discretion when it calculated the 2003 farming expenses.

Conclusion

The trial court did not abuse its discretion when it calculated the added value of the oil and gas lease to the 110-acre farm or when it calculated the 2003 farming expenses.

Affirmed.

CRONE, J., concurs.

BROWN, J., concurs in part and dissents in part.

IN THE
COURT OF APPEALS OF INDIANA

RICHARD M. DAVIS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 31A01-0802-CV-80
	)	
JUDITH K. DAVIS, now known as JUDITH K. GUNTHER,	)	
	)	
Appellee-Petitioner.	)	

BROWN, Judge concurring in part and dissenting in part

I concur with the majority as to the calculation of the 2003 farming expenses but respectfully dissent as to the valuation of the farmland.

This court's directive to the trial court following the earlier appeal relative to this issue was to "(6) clarify whether the valuation of the 110-Acre Farm included the value of the oil and gas lease, and if the lease was not taken into consideration, hold a hearing regarding the value of the lease and amend the valuation of the 110-Acre Farm if necessary."

Further, this Court's prior order was to "(5) amend the dissolution decree by removing the award to Judith of one-half of the future royalty payments under the oil and gas lease on the 110-Acre Farm, order Judith to reimburse Richard for any royalty payments he has made to her that accrued following the final date of separation, and require [Judith] to relinquish her interest in that lease."

Clearly, this Court's order was that Judith was to receive no future royalty payments,

and that the value of the farm was to be amended if necessary following a hearing as to the value of the lease. I conclude that the trial court abused its discretion in determining that the value of the farm should be increased by $60,400.00 based on an accountant's testimony as to the present value of future cash flows of royalties. The accountant testified as to two methods for estimating the value of future royalties: the direct capitalization method and the net present value method. These two separate means of estimating future income produced similar results: $31,709.15 and $28,675.09 respectively. The accountant averaged these figures to arrive at a value of $30,172.12. The trial court determined these figures to be based on Judith's receipt of royalties over a 37 month period. The court then multiplied the figure by two to account for Richard's receipt of a like amount of royalties, rounded up to $60,400.00, and then added $60,400.00 to the appraised value of the farm.

However, the accountant did not take into account any terms of the lease; in fact he never read the lease and instead made assumptions not supported by any evidence including that an income stream would remain constant and that using a 30-year term was appropriate when it was not a 30-year lease. There was no evidence introduced as to oil reserves in the land or the viability or intentions of the extractor. Fluctuation in oil prices which impact profitability of continuing to drill was not considered. The accountant did not consider the lease's actual terms including that the extractor may stop production at any time, and that the extractor may pool the farm with other properties and divide royalties equally. While his testimony was the only testimony as to valuation of the lease, it really was an estimate of the present day value of future income. The longer the term, the more speculative profitability

becomes. There simply is no basis in the record for using a 30-year term.

The State Highway Comm'n v. Jones case cited by the majority approved the income approach for valuing land when income is produced from the sale of minerals and when such is the best method for determining fair market value of the land. However, in the present case, the accountant valued a stream of income separate from the value of land which the trial court simply added to the land's appraised value. In fact, the State Highway Comm'n case pointed out that "The capitalization of income was not used to project future profits and to compensate the lessor and lessee for those lost profits, but rather it was used to calculate the fair market value of the land at the time of the taking." 173 Ind. App. 243, 254, 363 N.E.2d 1018, 1025 (1977). Further, the court cited Gradison v. State, 260 Ind. 688, 300 N.E.2d 67 (1973), which held that "The value of minerals may not be determined separately from the land, but in all cases must be considered as a part of the land and valued together with the land as a unit." Id. at 1023. Further:

> In valuing property for condemnation purposes the general rule is that the courts should not look to business profits as an indicator of the value of the land for the reason that the success of a business depends so much upon the skill of the operator and the efficiency of the operation. An estimation of future profits is usually considered to be too speculative; a consideration of actual past profits is not usually considered to be an accurate indicator of profits in future years, because so many variables exist in regard to the successful processing and marketing of the product.

Id. at 1023-1024.

Clearly, the lease produced income. But this Court's directive was that Judith was not to receive future royalty payments. By adding the stream of income to the value of the farm land and requiring that Richard pay half of this sum to Judith, the trial court did not follow

this Court's order.

The issue before the court was the fair market value of the land, and whether the previous valuation should be amended. Richard relied essentially on the appraisal he had submitted in the earlier hearing, which had noted the existence of the lease. He also presented testimony that the existence of an oil and gas lease has potential negative effects on fair market value as well as the positive potential of producing income. (6-01-07 Tr., p. 50-51) While we do not reweigh evidence, there was no evidence that the income stream the land had produced would continue or was even likely to continue, much less for 30 years. I believe it was an abuse of discretion for the trial court to add $60,400.00 to the value of this land and would reverse the Court's order that Richard pay Judith $30,200. The parties have had their day(s) in court. Evidence was not presented sufficient to prove that the previous valuation of the farm land should be amended, and no further hearing is necessary.

For these reasons I respectfully concur in part and dissent in part.