STATE OF MICHIGAN

COURT OF APPEALS

ANNE K. DAVIDSON,

Plaintiff-Appellee,

v

RICHARD D. DAVIDSON,

Defendant-Appellant,

UNPUBLISHED
August 9, 2011

No. 298746
Tuscola Circuit Court
LC No. 08-024763-DO

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce entered following a bench trial. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

The parties were married on December 31, 2005. During the marriage, the parties jointly operated a business franchise, known as Davidson Breeze Freeze (DBF), a frozen beverage company. Defendant purchased the franchise with monies from the account of one of his other businesses, Davidson Cement Grooving, plus a loan from a friend. DBF purchased Breeze Freeze concentrate for sale to its clients from its franchisor, Frozen Beverage Solutions. DBF supplied the concentrate to its clients along with machines that produced frozen fruit drinks from the concentrate.

The value of DBF was a contested issue at trial. Plaintiff produced a certified public accountant, whom the trial court qualified as an expert witness. Employing an income approach to valuation, plaintiff's expert testified that the business was worth $206,502.33 based on income tax returns from its three years of operation. The trial court did not qualify defendant's preferred expert, however.

The trial court determined that the value of DBF was $133,502.33, which the trial court arrived at by using a 3-year capitalization instead of the 5-year rate used by plaintiff's expert, and by subtracting $40,000 owed by the business to defendant's friend. The trial court then determined that plaintiff's claim to the business, "based on sweat equity," was $66,751.17. The trial court found that plaintiff had received payments and benefits worth $31,693.54 from defendant during pendency of the divorce, and that this sum was a claim against her interest in

DBF. The trial court then awarded plaintiff $65,000 "as full and final settlement of her claims against the marital estate."

Defendant first argues that the trial court abused its discretion by refusing to qualify his proffered witness as an expert. "Whether a witness is sufficiently qualified to provide opinion testimony is a decision within the sound discretion of the trial court, and that court's decision will not be disturbed absent an abuse of discretion . . . ." *Dybata v Kistler*, 140 Mich App 65, 68-69; 362 NW2d 891 (1985).

MRE 702 provides in part that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify . . . in the form of an opinion." According to defendant, the trial court ignored facts about his witness's education and experience, including 30 years in the accounting business, completion of college accounting courses, training from his father, and the fact that he held a real estate license. It is true that defendant's expert testified to working as an accountant for over 30 years and that he had been trained by his father, a real estate broker, in real estate appraisal. However, while he self-reported taking college accounting classes and "acing" them, he also testified that he held no college degree and offered no transcripts or curriculum vitae. He also testified that his expertise lay in tax matters rather than business valuation. Defendant's proposed expert additionally testified that he has testified in court only about three or four times, that the testimony concerned tax matters, and that he had never been qualified as an expert in any court. Further, when asked how many times he has valued a business for a client, he responded that "it's probably four to a half dozen every year." He explained that his clients "occasionally . . . want to know, well, what's [their business] worth." Given the vague presentation of the proffered expert's qualifications and methods, the trial court did not abuse its discretion in deciding not to qualify him as an expert witness.

Defendant argues next that the trial court erred by relying on the testimony of plaintiff's expert witness. Defendant contends that the testimony of plaintiff's witness was flawed, in part because her method of business valuation did not take into account the fact that DBF's franchise agreement was set to expire in 2011. Defendant also argues that the court should have taken the testimony of DBF's franchisor, Chester Mazzoni, on the value of the business.

The trial court did not clearly err in utilizing the expert's income approach to business valuation rather than relying upon Mazzoni's testimony regarding the worth of DBF's machines. "The three most common approaches for determining true cash value are the capitalization-of-income approach, the sales-comparison or market approach, and the cost-less-depreciation approach." *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 390; 576 NW2d 667 (1998). "The capitalization of income method is based on the premise that there is a relation between the income a property can earn and the value of that property." *Northwoods Apts v Royal Oak*, 98 Mich App 721, 725; 296 NW2d 639 (1980). "In the case of income producing property, bought and sold largely on the basis of the net income it will produce, the income method is probably the most accurate method of valuation, again absent evidence of comparable sales." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 475 n 9; 302 NW2d 164 (1981) (Levin, J., concurring).

Mazzoni's testimony was limited to the amount that he would pay for DBF's machines if he was purchasing them in a liquidation sale. Defendant did not suggest at trial that he planned

to end his business after the expiration of the franchise, and Mazzoni testified that DBF would be permitted to continue to purchase Breeze Freeze concentrate from his company. Mazzoni's testimony did not take into account the prior income of DBF or its prospective future profits, or indeed any of its liabilities or assets besides the machines. By contrast, plaintiff's expert considered all of DBF's assets purchased during each year of business. We see no error in the trial court's handling of this matter.

Defendant also argues that the trial court erred when it concluded that the sum of $31,693.54 that defendant had paid to plaintiff during the pendency of divorce proceedings was offset by money she would have received as 50 percent owner of DBF. Further, he argues that the court erred when it required him to pay plaintiff interest on the $65,000 award despite finding that defendant had paid plaintiff $31,693 during the divorce proceedings.

Sparks v Sparks, 440 Mich 141, 151-152; 485 NW2d 893 (1992) provides:

> [T]he appellate standard of review of dispositional rulings is not limited to clear error or to abuse of discretion. The appellate court must first review the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. But because we recognize that the dispositional ruling is an exercise of discretion and that appellate courts are often reluctant to reverse such rulings, we hold that the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable.

The trial court found that plaintiff's claim in DBF was $66,751.17, but that this amount was offset by the $31,693.54 in payments and benefits that defendant testified he had paid to plaintiff during divorce proceedings. The trial court stated further that this sum "is partially and or [sic] totally a claim against her interest in the franchise." The trial court then awarded to plaintiff $65,000 "as full and final settlement of her claims against the marital estate." The divorce judgment does not mention the $31,693.54 "offset," but states simply that "Defendant shall pay to Plaintiff, the sum of $65,000.00" and that in exchange, defendant was to receive DBF. The judgment further states that interest shall accrue from the date of the filing of the action, but that no interest will accrue if payment was made in full within 90 days of the judgment.

The trial court's determination of the worth of DBF was not arbitrary. The trial court based its determination on the testimony of plaintiff's expert, substituting formulas that resulted in a more conservative value of DBF, and determined that plaintiff was owed half that amount, or $66,751.17. The trial court offset this amount by the amount defendant had paid to plaintiff in cash and benefits during the divorce proceedings ($31,693.54).

Defendant's argument reflects a misunderstanding of the trial court's award. The trial court did not state that plaintiff's award was a "buyout" for her share of DBF. Although the trial court did not include a break-down of the award in its opinion, the trial court's award represented plaintiff's total share of the marital estate, including her half-interest in DBF, "spousal support and attorney fees claims." The trial court further explained that DBF had taken $146,807 in

business deductions, and that "Plaintiff is entitled to have shared in that benefit and the Court rules that [at] a minimum, her share is $31,693.54—the support provided to her by the Defendant." The trial court then made further reductions to plaintiff's claim against her share of the business.

While defendant is incorrect in his statement that no interest was due because the trial court's award to plaintiff was a disbursement of funds due on her share of DBF, defendant is correct in arguing that plaintiff was not in fact entitled to receive interest on the court's award. This Court has held that the goal of divorce judgments is to equitably distribute property rather than to compensate a party for loss; therefore, an interest award in a divorce action is not intended to compensate for lost use of funds. *Reigle v Reigle*, 189 Mich App 386, 394; 474 NW2d 297 (1991). In its discretion, however, a trial court may award interest on amounts to be paid pursuant to a property division when such amounts are overdue. *Id.* The goal of such awards of interest is to encourage prompt compliance with court orders and avoid a windfall to the delinquent party who derives interest on this money during the period when it is due to be paid but is not. *Id.*; *Ashbrenner v Ashbrenner*, 156 Mich App 373, 377; 401 NW2d 373 (1986).

Here, the trial court did not explain why it was awarding interest in the divorce judgment, and it is not evident from the record that defendant would have otherwise enjoyed a "windfall" from money that was due to plaintiff. Defendant had been making payments toward plaintiff's support during the pendency of the divorce proceedings, and the record does not indicate that additional payments were overdue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto