COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2517

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

DAVID J. DOWIASCH,

PETITIONER-RESPONDENT,

v.

TRACY DOWIASCH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Tracy Dowiasch appeals from the judgment divorcing her from David Dowiasch. Her sole concern on appeal is the division of marital property. After finding that the marital debts exceeded the value of the assets, the trial court awarded virtually all of the assets, and the liabilities, to

David. Because we conclude that the evidence does not support a finding that the liabilities exceeded the value of the assets, we reverse and remand for reconsideration of that issue.

The parties married in 1991. One year earlier, David and his brother, Arlyn, had signed a ten-year lease on their parents' farm, giving them the use of 400 acres of land, the residence, outbuildings, machinery and livestock. The contract also gave them an option to buy the real estate at the end of the lease term, for its fair-market value. In exchange, David and Arlyn agreed to pay $4,305 per month, an amount equal to their parents' mortgage, insurance and tax obligation on the property. David and Arlyn, in turn, agreed to equally share that payment and all other farm obligations and to share equally in the farm income as well.

David and Arlyn separately agreed to gradually buy all of the machinery and livestock from their parents and to pay $3,195 monthly toward that end, also over a ten-year period.

At the time of the divorce in 1996, David had paid his parents approximately $115,000 under the latter agreement. With those payments and from outside purchases, he had accumulated assets he valued at $61,000, and Tracy valued at $118,000.

David also presented evidence that the brothers had incurred farm-related debts totaling $71,000 and, for the first time at trial, claimed that one-half of his parents' $179,000 mortgage on the leased farm was also a marital debt. Tracy disputed the existence and/or amount of several of the debts included in the $71,000 figure and contended that there was no evidence that any part of the

parents' mortgage was a marital debt. According to her calculations, the marital estate has a positive value of $74,000.

In a succinct decision, the trial court found:

> If you accept Mrs. Dowiasch's testimony, the farm went from basically having nothing in '90 or '91 when they started, when the lease started in '91 when they were married, to having a net value now of 70, $80,000. Pretty short time for this kind of an operation to make that kind of money. It just doesn't make sense.
>
> I am satisfied, that, in fact, there is no net equity here to be divided. If anything, it's a negative, and there simply is nothing to divide ….

Even when viewing David's evidence most favorably to him, the marital estate has a negative net worth only if half the parents' mortgage is included as a marital debt. We therefore assume that the trial court found it to be so, and treat that finding as the dispositive issue.

The division of marital property is discretionary. ***Haugan v. Haugan***, 117 Wis.2d 200, 215, 343 N.W.2d 796, 804 (1984). We affirm a discretionary award if the trial court articulates its reasoning, bases the award on facts of record and the correct legal standards, and the award is neither excessive nor inadequate. ***Id.*** at 215-16, 343 N.W.2d at 804.

There are no facts of record allowing the court to treat the parents' mortgage as a marital debt. There was no contract between David and his parents transferring the obligation, admittedly no liability to the mortgage holder on David's part, no evidence of consideration paid to David to assume liability, no liability reflected in David and Tracy's tax returns, and no reference to this alleged liability anywhere else. Furthermore, the only reference at trial was David's legal

conclusion that he and Tracy owned the liability. He did not attempt to explain how that came to be.

If there is a marital liability on the real estate, it is David's $2,150 monthly obligation on the lease until the year 2000.[1] That liability, in turn, would have to be balanced against the value conveyed by the lease, including a substantial cash flow and an option to buy the real estate when the lease expires.[2] However, neither party attempted to value the lease as either an asset or a liability.

On remand, the trial court shall exclude the mortgage of David's parents from the calculation of the marital estate. That exclusion will, in turn, require the court to make findings on each disputed valuation and remaining liability. We leave it to the court's discretion whether to allow additional evidence on these matters.

By the Court.—Judgment reversed and cause remanded.

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

[1] There was testimony that the lease had been extended beyond its ten-year term, although no documentation to that effect.

[2] The cash flow allows the brothers to pay their parents $7,500 per month, pay other farm expenses and liabilities, and allows each $500 per month for personal expenses.