COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0199

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

IN RE THE MARRIAGE OF:
GARY R. ISHERWOOD,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

M. PATRICIA ISHERWOOD,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Patricia Isherwood appeals the maintenance and property division components of her divorce judgment from Gary Isherwood.

Patricia maintains the circuit court erred when it failed to include the value of accounts receivable and certain appraised property of Gary's family farm within the marital estate and awarded Gary 75% of the marital property. She also claims that the circuit court erred when it considered the income which she would receive from her portion of the property settlement as part of its maintenance analysis. On cross-appeal, Gary contends that the circuit court erred by including any part of the Isherwood Company in the marital estate. We conclude that Gary's interest in the partnership was properly included in the marital estate, and the court's maintenance award was an appropriate exercise of its discretion. However, we also conclude that the circuit court erroneously exercised its discretion when it excluded certain assets from the marital estate and imposed a 75/25 division of the marital property. Accordingly, we affirm in part; reverse in part and remand for reconsideration of the valuation of the receivables/crops, Grandpa's 160 and for reconsideration of the property division. Additionally, if the court chooses, the maintenance award may also be reconsidered in light of the standards referred to herein.

BACKGROUND

Gary and Patricia Isherwood were divorced on December 11, 1996, after a twenty-year marriage during which three children were born. The primary placement of the couple's two minor daughters was awarded to Gary and is not at issue on this appeal.

When the couple married in 1976, Gary was practicing law in Superior, Wisconsin and Patricia, who had a high school education, was working as a bank teller. In 1982, Gary and Patricia moved to Plover, Wisconsin so that

Gary could participate in a family potato farm operation called Isherwood and Sons, which was then being run by Gary's brothers, Robert and Donald.

Gary's status on the farm was not formalized in writing. Robert testified that the brothers did not "give" Gary any sort of interest in the farm when he moved to Plover; rather, Gary was expected to work for his share.[1] Although the brothers did not discuss wages or salaries, initially Gary was allowed to draw $400 a month, which gradually increased to $1,500 a month, from the farm's accounts. Gary also understood that he would become a partner "some day."

In addition to the monthly draws, the farm account paid for house, vehicle and health insurance premiums, gas and oil bills, income and property taxes, medical and educational expenses, and cars for all the brothers. The remainder of the profits stayed in the account and were reinvested in the farm operation. Despite the lack of a partnership agreement, each of the brother's income tax returns treated the farm as a partnership. The Isherwoods' tax preparer determined the percentage of profit to assign to each brother each year. Gary received 20% in 1982, 15% in 1983, 25% in 1984, 15% in 1985, 20% in 1986, 30% in 1987 and 33-1/3% from 1988 until 1995.

Both Gary and Patricia worked on the farm. Patricia drove a forklift, fabricated boxes, worked in the warehouse, unloaded potatoes from trucks to the grading line, stacked cartons, answered the phone and did payroll for years. She never received any salary, apart from Gary's monthly draw. Patricia also worked at a small retail store in town part-time, and used her income to buy clothing and furnishings for the home.

[1] This statement was also supported by the fact that no gift tax returns were ever filed.

On April 29, 1996, in a separate partition action, the circuit court divided the assets of the Isherwood farm into three equal portions, pursuant to a Settlement Agreement. Gary and Donald then combined their portions into a partnership called the Isherwood Company (the Company). For purposes of the divorce action, the circuit court valued Gary's interest in the Company at $1,029,859.90, not including sizable accounts receivable and stored crops owned by the Company. In addition, the parties agreed to accept the appraisal figures of Joe Bunczak for the purpose of valuing all real estate. Bunczak appraised one parcel of land owned by the Company, and known as "Grandpa's 160," at $268,000; however, Gary valued his portion at $67,000, rather than $134,000, on his financial exhibits at trial. The court incorporated Gary's figure in its judgment. When it made its property division, the court awarded Patricia only $300,000 of the value of the Company.

The circuit court also ordered Gary to pay Patricia maintenance in the amount of $500 per month for a limited period of seven years, based on its findings that Gary earned $59,000 a year from the farm and Patricia would be earning $8,400 a year running her own antique shop, plus $15,000 in interest on her property division, and that Patricia was not ordered to pay any child support. Patricia has appealed the valuation of the marital estate, the property division and the maintenance award. Gary cross-appealed the circuit court's conclusion that the Company was marital property.

DISCUSSION

Standard of Review.

Maintenance and the valuation and division of the marital estate are both within the sound discretion of the circuit court. ***Sellers v. Sellers***, 201 Wis.2d

578, 585, 549 N.W.2d 481, 484 (Ct. App. 1996); ***Long v. Long***, 196 Wis.2d 691, 695, 539 N.W.2d 462, 464 (Ct. App. 1995). Therefore, we will affirm maintenance and property division awards when they represent a rational decision based on the application of the correct legal standards to the facts of record. ***Id***. However, in considering whether the proper legal standard was applied, no deference is due, because this court's function is to correct legal errors. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Marital Estate.

Marital assets are usually valued as they exist at the date of the divorce. ***Sommerfield v. Sommerfield***, 154 Wis.2d 840, 851, 454 N.W.2d 55, 60 (Ct. App. 1990). Marital assets (collectively, the marital estate) include all of the property of either party which has been acquired before or during the marriage, unless specifically exempted by statute. Section 767.255(2)(a), STATS., provides:

> Except as provided in par. (b),[2] any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:
>
> 1. As a gift from a person other than the other party.
>
> 2. By reason of the death of another ....
>
> 3. With funds acquired in a manner provided in subd. 1. or 2.

The burden of showing that property should be excluded from the marital estate is on the party asserting the exclusion. ***Brandt v. Brandt***, 145 Wis.2d 394, 408, 427 N.W.2d 126, 131 (Ct. App. 1988).

[2] Paragraph (b) allows the court to also subject gifted or inherited property to division if the refusal to include the property in the division would create a hardship on the other party.

1. The Company.

Because the Company represents the largest asset, we begin our review of this case with Gary's cross-appeal. Gary contends that the proper valuation of the Company is irrelevant, because the farm should not have been included in the marital estate in the first place. As it is clear that Gary did not inherit any part of the farm "by reason of death," his claim for exclusion rests on his being able to prove that his partnership interest was a gift. Section 767.255(2)(a)2., STATS. In addition to demonstrating the gifted status of the property, Gary must prove that the character and identity of such property has been preserved.[3] ***Brandt,*** 145 Wis.2d at 408-09, 427 N.W.2d at 131.

Gary has failed to meet his burden. As the circuit court aptly observed, the mental process involved in Gary's return to the farm with his family was not that Gary was getting a gift, but that he would acquire some sort of partnership interest "by working, by being part of the family potato farming operation." The circuit court's finding that, had Gary returned to Superior after the first year, he would not have taken any ownership interest with him, is not clearly erroneous. Therefore, we agree that Gary acquired his interest in the farm over a period of years through his own labor, and the labor of Patricia. When "during the marriage, both spouses contribute to the acquisition of property through their abilities and efforts, that property is part of the marital estate." ***Haldemann v. Haldemann***, 145 Wis.2d 296, 302, 426 N.W.2d 107, 109 (Ct. App.

[3] Conversely, "[w]hether the identity or character of property has been maintained is irrelevant when we have determined as an initial matter that the property at issue has not been gifted or inherited." ***Preuss v. Preuss***, 195 Wis.2d 95, 103, 536 N.W.2d 101, 104 (Ct. App. 1995).

1988). Consequently, Gary's partnership interest in the Company was properly included in the property division.

2. Accounts Receivable/Crops.

Patricia contends the circuit court erred in omitting $200,000 in accounts receivable from the value of the Company. Accounts receivable are ordinarily to be considered as assets subject to property division. ***Hubert v. Hubert***, 159 Wis.2d 803, 812, 465 N.W.2d 252, 255 (Ct. App. 1990). In certain circumstances (for example, to maintain cash flow necessary to continue a business), accounts receivable may instead be considered as anticipated income for the purpose of fixing maintenance and/or child support obligations. ***Id***. (citing ***Johnson v. Johnson***, 78 Wis.2d 137, 143, 254 N.W.2d 198, 201 (1977)). The circuit court may determine which analysis is most appropriate under the facts of the case at bar, so long as the receivables are not double counted. ***Id***.

Whether the assets which Patricia asserts were erroneously omitted from the value of the Company were all accounts receivable in the truest sense is questionable. For example, Gary testified that there were 150 acres of corn still in the fields on October 31st, the last date on which testimony was taken, and that there were 4,000 one-hundred pound bags of potatoes in storage, as well as an unspecified amount of corn and beans which were also in storage. These crops, although assets of the Company, had not yet been turned into accounts receivable.

Gary also testified that 11,000 bags of potatoes had been sold, but he did not expect the money[4] for them until January or February, and that he

[4] The potatoes had been sold for $3.50 per bag, creating a $38,500 receivable for that one item.

"guessed" that the total accounts receivable due to the Company were a "couple hundred thousand." The testimony was not clear in regard to whether Gary was including the value of the corn in the field in the "couple hundred thousand" figure or whether that figure represented crops that already had been sold to Del Monte and other customers on the date of the hearing.

We conclude there are two problems with the circuit court's treatment of these assets. First, it did not place any value on them at all, yet these appear to be very sizable assets. Second, it did not divide Gary's share of them as marital property. In so doing, it failed to include these assets of the Company in *either* the property division *or* in the maintenance award. This was an error of law. Absent the circuit court's calculating the accounts receivable and crops as income in the maintenance analysis, they should have been characterized in their normal manner—as property subject to division. ***Ondrasek v. Ondrasek***, 126 Wis.2d 469, 479, 377 N.W.2d 190, 194 (Ct. App. 1985). Indeed, twice during the circuit court's bench decision, it referred to the "receivables" as assets of the Company, suggesting that their absence from the final judgment may have been no more than an oversight. In any event, since Gary held a 50% interest in the Company, the marital estate was undervalued by one-half of the value of these assets of the Company.[5]

Because the circuit court had an unclear record on which to properly value these assets, we remand this issue for a determination of the value of the receivables/crops, whether in the form of accounts receivable, payments received subsequent to October 31, or some other form of compensation received or due for

[5] The record does reflect that the circuit court did not account for the receivables/crops as income to Gary when it made the maintenance award.

them. In this regard, the circuit court may wish to take testimony to further its understanding of the proper value to place on these assets, prior to coming to its final valuation of the Company and prior to dividing Gary's interest in the Company as part of the marital estate.

3. Grandpa's 160.

Patricia contends that the circuit court undervalued the parcel of real estate known as Grandpa's 160. At trial, the appraisal of $268,000 for this parcel was undisputed. However, Gary requested the circuit court to value his interest at $67,000 and the whole parcel at $134,000, based on an alleged ownership interest of his mother, which ownership interest he valued at $134,000. In support of the alleged ownership interest and of the reduction in value of this parcel, Gary testified:

> Because Isherwood & Company is joint tenants with our mother, and the reason that our mother's name was put on it is as a part of this partition,[6] there were 200 acres in Robert's name, in Linda's name as joint tenants with each other, as tenants in common with my mother. My mother was, was—owned a half interest in it. In signing off her interests on [the property Robert received], we felt that she had to get something. I mean, otherwise—she was getting nothing, and that did not seem fair, and so what we did is we gave her—we thought it would be reasonable for her to get a half interest in Grandpa's 160 ….

The partition action Gary referenced was settled on April 29, 1996, according to Exhibit 15. However, Exhibit 15 makes no mention of any agreement or legal obligation of any type to make Gary's mother a one-half owner of Grandpa's 160.

[6] Prior to the divorce proceedings, Robert Isherwood's interest in the farm operation was legally partitioned from that of Gary and Donald Isherwood. The transcript of the resolution of that action was entered into the record at the divorce trial as Exhibit 15.

Additionally, the record contains no deed to show that she had an interest in the property.

When faced with a challenge to the valuation of the marital estate, we will affirm the valuation, unless it is clearly erroneous. ***Laribee v. Laribee***, 138 Wis.2d 46, 52, 405 N.W.2d 679, 682 (Ct. App. 1987). Additionally, because Gary is asserting that his mother owned half of the parcel, the burden of proving that ownership interest rested with him. ***Brandt***, 145 Wis.2d at 408, 427 N.W.2d at 131.

Within one year of filing a petition for divorce and during the course of a divorce action, a party is not free to transfer interests in marital property to third parties and thereby diminish the value of the marital estate, in the absence of a valid debt to the third party. *See* ***Zabel v. Zabel***, 210 Wis.2d 337, 565 N.W.2d 240 (Ct. App. 1997); § 767.275, STATS.

The circuit court did not make findings sufficient to support the existence of a legal obligation to Gary's mother which would support an ownership interest that would not contravene § 767.275, STATS., or case law, in regard to transfers to third parties. It also did not make findings to support the value of such an interest if one were to lawfully exist. In its calculation of the value of the Company as a whole, it did not reference testimony; rather, it only generally referred to Gary's "exhibits." Those exhibits included the reduced value of Grandpa's 160.[7] However, the testimony in the record is insufficient to sustain

[7] The court accepted the value of the Company found on Exhibit 18 ($1,029,859.90). Exhibit 18 incorporated the real estate and Kemper fund combined value of $367,188 found in Exhibit 17. And, Exhibit 17 values Gary's share of Grandpa's 160 at $67,000 in the $367,188 figure.

Gary's burden to prove that one-half of Grandpa's 160 should have been excluded from the marital estate. Therefore, given the court's reference to Gary's "exhibits," we are uncertain whether the court simply overlooked the reduction in value that is set forth in Exhibit 17 because the court was focusing on Exhibit 18 which summarizes the value of the Company but also incorporates the reduced value from Exhibit 17, or whether it did not realize that Gary had to establish the existence of a legal obligation to pay his mother $134,000, before any reduction could be permitted. Therefore, we remand this issue to the circuit court as well, to determine whether Gary's mother had a legal interest in Grandpa's 160, and if she did, whether it was based on a legal obligation to pay her $134,000.

Property Division.

The court shall presume that all marital property is to be divided equally between the parties, but it may alter the distribution somewhat in consideration of certain statutory factors. Section 767.225(3), STATS. In this case, the circuit court apparently relied on two factors to support its deviation from the 50/50 presumption: (1) that the farm was a family operation in which Gary's familial relationship allowed him the opportunity to gain an interest which an unrelated third party would not have had, and (2) that the farm was an ongoing business which the brothers had no intent to sell.

We agree that it was appropriate for the circuit court to consider the second factor. Section 767.255(3)(j), STATS. However, consideration of the first factor, which the court labeled "somewhat of a gift component," undermines the court's earlier determination that Gary's interest was acquired by working. *See* ***Long v. Long***, 196 Wis.2d at 696, 539 N.W.2d at 464 ("While we recognize that the trial court was attempting to effect an equitable division of property, it could

not do so by classifying as property something that was not."). And, even if Gary was afforded an opportunity to participate in the running of Isherwood and Sons based on his status as a family member, the same can be said of Patricia, who was never directly paid for her years of work on the farm. Family farm or no, the fact remains that Gary would not own any part of the potato business had he not returned, and together with Patricia, worked on the farm during their marriage. Moreover, the circuit court's reasoning that it would be more equitable for Gary to keep his farm rather than sell does not explain why some sort of extended equalization payments would not have been an appropriate mechanism to permit Gary to keep the farm, while still paying Patricia a larger share of the value of Gary's interest in the Company.

Given the valuation concerns for the receivables/crops and for Grandpa's 160 described above and the 75/25 property division in this long-term marriage, we conclude it is necessary to remand to the circuit court for a reconsideration of the property division in light of this opinion and in light of ***Bahr v. Bahr***, 107 Wis.2d 72, 318 N.W.2d 391 (1982).

Maintenance.

Although maintenance is conceptually distinct from property division, the two often must be considered together in order to achieve a fair and equitable result. ***Bahr***, 107 Wis.2d at 79-80, 318 N.W.2d at 395-96. Our analysis of a maintenance award begins with a comparison of the statutory factors found in § 767.26, STATS. They are designed to accomplish two related objectives: the support objective and the fairness objective. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 32, 406 N.W.2d 736, 740 (1987).

When making its maintenance award, the circuit court considered the past and present life style of the parties, their current incomes, their health, their needs, the income tax consequences, the property they would be awarded, as well as Gary's obligations attenuate to physical placement and support of the two minor children and Patricia's lack of those obligations. We conclude that all were proper factors for the court's consideration. However, in light of our property division decision, the circuit court may wish to reconsider the maintenance award on remand. We presume that the circuit court is aware that the starting point for a maintenance evaluation following a long-term marriage is to award the dependent spouse half of the total combined earnings of both parties. ***Bahr***, 107 Wis.2d at 85, 318 N.W.2d at 398. In this regard, we agree with the circuit court's consideration of the income to be generated by Patricia's portion of the property settlement, because Gary's income will also be generated in part from his property division.

CONCLUSION

We remand to allow the court to reconsider its property valuation, division and maintenance awards in light of this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.