

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 29, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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**No. 99-2193**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**TIMOTHY P. MCQUISTON,**

**PETITIONER-RESPONDENT-  
CROSS-APPELLANT,**

**v.**

**ROBERTA S. MCQUISTON,**

**DEFENDANT-APPELLANT-  
CROSS-RESPONDENT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER and DAVID RESHESKE, Judges. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Roberta S. McQuiston appeals and Timothy P. McQuiston cross-appeals from their judgment of divorce. Because the parties raise numerous issues, they will be described and addressed as they arise in this opinion. After reviewing the issues and the record, we affirm the judgment in part, reverse in part and remand the matter for further proceedings.

¶2 Roberta and Timothy McQuiston were married in 1974 and had been married for twenty-four years at the time of trial. The parties have two surviving children of the marriage. At the time of trial, Roberta and Timothy were both forty-six years old and their son Tanner, fourteen, was still a minor. For much of the marriage, Timothy was self-employed, devoting his energies to numerous business ventures that he started during the course of the marriage. Currently, Timothy is vice president of research and development and a consultant for one of these enterprises, California Dream, Inc. Timothy started California Dream, a company that designs and installs spoilers and wings on automobiles, in the parties' garage in the early 1990s. He is currently a warrant holder in the company. In addition, Timothy performs consulting work, races cars, buys and sells automobiles, and engages in various other business-related activities under the sole proprietorship T.P.McQ Co., formerly known as MJM Co. Roberta has worked throughout the marriage, assisting Timothy in his various enterprises as well as maintaining full- and part-time factory jobs. She has been employed by her present employer for seven years and currently holds a responsible administrative position earning \$26,630 per year.

¶3 The parties stipulated to joint legal custody of their son, with primary placement with Roberta. Various issues related to maintenance, child support, division of property and contribution toward attorney fees were tried during the lengthy bench trial before the Honorable Richard T. Becker. The trial

court filed written findings of fact and a written decision on January 12, 1999. The findings of fact, conclusions of law and judgment of divorce were entered on June 1, 1999. Roberta filed a motion for reconsideration, but Judge Becker had retired from the bench and his successor, Judge David Resheske, declined to hear the motion. This appeal followed.

¶4 Roberta appeals the trial court's maintenance award, arguing that both the duration and the amount of the maintenance award are inadequate. The court awarded Roberta maintenance for a period of five years in the amount of \$450 per month. We conclude that the trial court's decision regarding maintenance reflects an appropriate exercise of discretion, and we affirm the maintenance award.

¶5 The amount and duration of maintenance to be awarded to a divorcing party is committed to the sound discretion of the trial court. *See Bahr v. Bahr*, 107 Wis. 2d 72, 77, 318 N.W.2d 391 (1982); *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). The factors the court must consider in deciding whether to order maintenance payments are set forth in WIS. STAT. § 767.26 (1997-98).<sup>1</sup> These factors are the touchstone in determining or reviewing

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<sup>1</sup> The factors set forth in WIS. STAT. § 767.26 are as follows: (1) The length of the marriage; (2) the age and physical and emotional health of the parties; (3) the division of property made under WIS. STAT. § 767.255; (4) the educational level of each party at the time of marriage and at the time the action is commenced; (5) the earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment; (6) the feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal; (7) the tax consequences to each party; (8) any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of

(continued)

a maintenance award. *See LaRocque v. LaRocque*, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987). “They reflect and are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective).” *Id.* The trial court must consider the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal if the goal is feasible. *See id.* at 32.

¶6 Roberta argues that the trial court failed to give proper weight to the “fairness objective” because the maintenance award will not enable her to become self-supporting at a standard of living reasonably comparable to that she enjoyed during the marriage. *See id.* She claims that the trial court should have awarded her more than half of the parties’ disposable income, arguing that it is not fair that she must support both herself and her son on the same amount of disposable income as Timothy enjoys. She claims that the court failed to consider all her expenses, such as her need to obtain a vehicle, and that the trial court gave inadequate consideration to the extent to which she contributed to Timothy’s earning capacity.

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reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties; (9) the contribution by one party to the education, training or increased earning power of the other; and (10) such other factors as the court may in each individual case determine to be relevant. All references to the Wisconsin Statutes are to the 1997-98 version.

¶7 We reject Roberta’s attempt to equate this case with *LaRocque*. Unlike Mrs. LaRocque, who was a full-time homemaker, Roberta is employed, able to support herself, and has worked her way up to a very responsible position over the past seven years with her present employer. The trial court determined that indefinite maintenance was not warranted on the facts of this case, and the record supports this conclusion.

¶8 Contrary to Roberta’s claim, the record reveals that the court was mindful of the fairness objective in making its determination.<sup>2</sup> The court addressed each of the statutory factors set forth in WIS. STAT. § 767.26 and evaluated the feasibility of Roberta achieving a standard of living reasonably comparable to that she enjoyed during the marriage.<sup>3</sup> While it is true that Timothy was finally achieving success with California Dream after many failed financial ventures, the financial obligations incurred in those previous ventures remain largely unsatisfied. The parties had more than \$500,000 of indebtedness at the time of trial and were making payments on only a fraction of the debt.

¶9 Quite simply, the trial court found that the parties had lived well beyond their income during the marriage, characterizing the marriage as “free spending” and noting the parties’ substantial debt obligations. The court also properly considered Timothy’s child support obligation of \$1,235 per month in determining how much maintenance Timothy could afford to pay. *See Besaw v.*

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<sup>2</sup> The trial court explicitly stated that it had in mind the *LaRocque* decision, in which the Wisconsin Supreme Court articulated the “fairness objective.” *See LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987).

<sup>3</sup> Roberta claims that the trial court failed to consider her contribution to Timothy’s earning potential. The record reveals that the trial court deemed this factor “not relevant.” We cannot say that this finding renders the maintenance award improper. The trial court was also within its discretion in declining to award Roberta a percentage of Timothy’s future bonuses.

*Besaw*, 89 Wis. 2d 509, 515, 279 N.W.2d 192 (1979). The court thus concluded that “there is no way the amount of child support and maintenance that [Roberta] requests can be granted on the state of this record.” The trial court then fashioned a maintenance award that sought to divide Timothy’s disposable income between the parties for a period of five years, noting that the maintenance award extended longer than the child support award.

¶10 Roberta’s request for a larger maintenance award is based in part on her conviction that Timothy has considerably more income than he admits. Throughout this case, Roberta attempted to show that Timothy was concealing assets. The trial court addressed Roberta’s claims that Timothy had not been forthright about his true income. The court agreed that Timothy was “devious and manipulative when it comes to financial affairs,” noting that it did “not believe the figures that have been presented on [Timothy’s] behalf as to income and expenses and who is paying them.” However, the court ultimately concluded, “[T]here simply has been no proof of income over and above what I have determined in the findings.” In making its award, the trial court stated that it had considered each of the factors set forth in WIS. STAT. § 767.26 in reaching its conclusion. The record supports the trial court’s conclusion and we see no misuse of discretion in the court’s award of maintenance.

¶11 Roberta next contends that the trial court erred in its calculation of Timothy’s gross income for purposes of calculating both maintenance and child support. It is clear from the record that determining the amount of Timothy’s gross income was no easy task. The record reflects extensive testimony and numerous motions to compel filed by Roberta in her effort to ascertain the sources and amounts of Timothy’s income. The trial court also commented on Timothy’s contrived financial dealings, concluding that the only “hard figure” available to the

court was the income reported on Timothy's 1997 income tax return. Thus, the court awarded child support based on a percentage of Timothy's salary and bonuses paid by California Dream, plus a fixed figure to include other sources of income.

¶12 The record reflects the court's careful efforts to ascertain Timothy's income. In determining Timothy's gross income, the court considered his salary of \$53,000 paid by California Dream, and his additional net profit of \$34,192 as reported on Schedule C of his 1997 tax return.<sup>4</sup> The court noted that the net profit reported on Schedule C reflects a deduction for interest payments in the amount of approximately \$1,160 per month and concluded, based on Timothy's testimony, that this figure represents interest payments on some of Timothy's various business-related loans.

¶13 Roberta contests this interest deduction, asserting that the loans on which Timothy pays interest are not related to production of his business income such that the interest was not properly deducted from the gross receipts reported on Schedule C. Our review of the record does not indicate that the trial court misused its discretion in finding that these loans were related to the process of starting California Dream.<sup>5</sup> For example, Roberta challenges the applicability of the Sepstead note because it was used to cover "bounced checks." However,

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<sup>4</sup> The court noted that Timothy's 1997 W-2 form reported wages paid in the amount of \$51,632 but that his check stub established that he received \$53,000 in wages. The income reported on Schedule C includes a \$1,500 "consulting fee" that Timothy receives from California Dream each month.

<sup>5</sup> The loans in question include: the 1995 Stumpf note of \$10,000, the two Hill notes totaling \$31,756, the Koshakow/Carender note of \$5,000 and the Shipley note of \$55,000. Timothy testified that he pays \$1,160 in interest each month on the Stumpf note, the Hill notes, the Shipley note and the Sepstead note of \$11,000, which was incurred in 1983.

Timothy did testify that those bank overdrafts were linked to his repurchase of McQ's Auto Products, a predecessor venture to California Dream. Similarly, Roberta challenges the applicability of the Shipley loan, but the record indicates that the loan was used for the purchase of the race car Timothy uses to promote California Dream. We conclude that the trial court did not misuse its discretion in concluding that these loans were incurred in connection with California Dream, such that the interest deduction was reasonable for purposes of calculating Timothy's income for purposes of child support and maintenance.

¶14 Roberta raised several issues in a motion for reconsideration filed after entry of judgment. However, the trial court judge retired, and his successor declined to rule on the motion for reconsideration, finding that "if the court heard this motion to reconsider it would be, in essence, inappropriately acting as a reviewing court of Judge Becker's decision." Thus, the court reasoned that "consideration of this motion would not serve judicial economy." We disagree.

¶15 It is the function of the trial court to consider motions for reconsideration. They frequently serve an important purpose by clarifying the prior ruling and providing an opportunity for the trial court to correct manifest error.<sup>6</sup> Such motions are not rendered improper simply because the original trial judge is no longer available. Indeed, common sense and practical economic considerations of time, effort and money dictate that such "mechanical" adjustments to the findings and judgment should first be allowed to occur at the

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<sup>6</sup> "[M]anifest error' contemplates that self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation. It is the type of error which tends to immediately reveal itself as such to reasonable legal minds. It does not, and should not, embrace those kinds of alleged errors which lend themselves to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy." *Schinner v. Schinner*, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988).

trial court level. In many cases, reconsideration may eliminate the expense and delay of an appeal as to such issues. It will also eliminate trial court proceedings after remand to correct rudimentary error, which the trial court should have earlier addressed. *See Schinner v. Schinner*, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988). We now turn to the issues Roberta raised in her motion for reconsideration.

¶16 Roberta argues that the trial court failed to include the value of a Miata automobile in the marital estate. We agree, noting that this appears to be a ministerial error on the part of the trial court. The trial court found that the Miata was worth \$22,500. The vehicle was titled in the name of California Dream and was fully encumbered by a lien held by Randolph Shipley, but Timothy testified that he considered the vehicle his own. The trial court included the Shipley loan in the amount of \$55,000 in the marital estate as one of Timothy's business debts, but neglected to offset this debt by including the value of the Miata in the marital estate as well. Accordingly, we reverse and remand to the trial court to include the value of the Miata in the marital estate and to divide the value between the parties consistent with the trial court's intent to effect an equitable division of the marital property.

¶17 Roberta also claims that the trial court erred by failing to rule on the appropriate treatment of two bonuses Timothy received during the pendency of the divorce proceeding, totaling \$53,000. Again, we agree. Timothy received these bonuses in July 1996. He did not disclose the bonuses to Roberta, despite a court order requiring him to do so. Accordingly, in September 1997, the family court commissioner ordered Timothy to provide an accounting of the bonus money within two weeks. Timothy did so, but submitted a substantially revised accounting at trial. He testified that the monies were used for a variety of things,

including auto parts, legal expenses, payments to the Internal Revenue Service, loan repayments and other business-related expenses.

¶18 The trial court did not make findings on the \$53,000 of bonus money, stating: “I am unaware if the accounting was ever provided but I assume it was and has been taken into account by the parties.” Contrary to Timothy’s claim, this statement is not indicative of a reasoned exercise of the trial court’s discretion. Rather, the record reveals that the trial court, inundated with reams of contested financial information, simply overlooked the fact that the \$53,000 in bonus money remained in dispute. A failure to exercise discretion constitutes a misuse of discretion. *See Wisconsin Pub. Serv. Corp. v. Krist*, 104 Wis. 2d 381, 395, 311 N.W.2d 624 (1981). It is also unclear from the record why the court did not order Timothy to pay child support from these bonuses. Therefore, we reverse on this issue and remand this cause to the trial court for further consideration and for the exercise of discretion guided by law.

¶19 Roberta also appeals the trial court’s decision regarding contribution for her attorney’s fees, alleging that Timothy engaged in overtrial. The trial court found that Roberta had not argued overtrial per se, but awarded her \$12,000 in attorney’s fees. Roberta asserts that although she did not specifically argue overtrial, the record supports a finding on that issue and there is no bar that prevents the trial court from awarding attorney fees notwithstanding a party’s failure to explicitly raise the issue.

¶20 When presented with a request for a contribution to attorney fees, the trial court must make findings of fact as to the reasonableness of the total fees, the need of one spouse for contribution, and the ability of the other spouse to pay. *See Corliss v. Corliss*, 107 Wis. 2d 338, 350-51, 320 N.W.2d 219 (Ct. App. 1982).

The trial court made these findings and commented on the delays caused by Timothy. We see no basis to disturb the trial court's exercise of discretion on this issue.

¶21 Roberta also asserts that the trial court failed to allocate all of the parties' many debts, and that she is prejudiced by the court's failure to establish an adequate payment plan with respect to certain debts assigned to Timothy that have been reduced to judgment liens against her residence. We agree.

¶22 Timothy's financial statement itemized a total of \$462,609.71 in debts that the trial court categorized and allocated between the parties. The court found that Timothy incurred certain debts after the divorce action commenced and assigned those debts to Timothy.<sup>7</sup> The court recognized that tax liabilities are marital debts, but assigned responsibility for payment of the tax liabilities to Timothy because they were generated in connection with his various business enterprises.<sup>8</sup> Because Roberta was awarded the residence, the trial court concluded that she would be responsible for the mortgage debt<sup>9</sup> as well as "debts related to the house."

¶23 In assigning Roberta "debts related to the house," it appears that the trial court intended to assign Roberta two debts in addition to the mortgage,

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<sup>7</sup> These debts include a promissory note to California Dream in the amount of \$11,000 that Timothy testified he used for legal expenses, a second Stumpf note in the amount of \$3,500, a note to Joanne Jahn in the amount of \$6,300 that Timothy testified he used to pay for the business valuation, and a promissory note to Steve Kerns in the amount of \$2,000.

<sup>8</sup> These liabilities include an IRS assessment in the amount of \$150,108.15 and a Wisconsin Department of Revenue assessment in the amount of \$25,324.13. The court noted that Timothy was likely to successfully contest an additional IRS assessment in the amount of \$46,128.12, but indicated that it would be Timothy's responsibility if he were required to pay it.

<sup>9</sup> The mortgage on the residence was \$68,834.50 at the time of trial.

namely, the Haas Construction and Aqua Well debts in the amounts of \$5,615.15 and \$812.60, respectively.<sup>10</sup> The court then concluded that all the “other debts” identified on Timothy’s financial statement were incurred by Timothy for business purposes or while the divorce was pending, and the court assigned these remaining debts to Timothy. The “other debts” total approximately \$201,821.56.<sup>11</sup>

¶24 However, the trial court failed to allocate several of the parties’ debts, presumably because they were not listed on Timothy’s financial statement.<sup>12</sup> These additional debts include judgments owed to Boehlke Bottled Gas Corp. in the amount of \$353.97, Wisconsin Gas Co. in the amount of \$1,286.53, and two separate judgments owed to Wilde Dodge in the amounts of \$1,026.47 and \$1,168.25, respectively. There are also two DILHR tax liens which derive from Timothy’s failure to pay obligations of \$683.73 and \$1,848.58 to DILHR.

¶25 Roberta is clearly prejudiced by the trial court’s omission because these debts have been reduced to judgment liens against the residence, which was

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<sup>10</sup> The court stated: “Since the debts related to the house, that is, Haas and Aqua Well, have been reduced to judgments they are liens against the house. These debts will also be assigned to [Roberta].” The record supports this classification. Timothy testified that the Haas and the Aqua Well judgments were related to the residence.

<sup>11</sup> The remaining debts that the trial court identified as marital debt and assigned to Timothy include: the Jurg/Bieri note in the amount of \$44,349, the Sepstead note in the amount of \$11,000, the Lura McQuiston judgment in the amount of \$10,356, the PoP Automotive judgment in the amount of \$14,070, the Auto-Plas America Corp. judgment in the amount of \$16,485.68, the Delco Financial judgment in the amount of \$1,377.73, and the Milwaukee Telephone judgment in the amount of \$2,426.80. Timothy’s testimony supports the trial court’s finding that these debts were incurred in connection with Timothy’s business activities.

<sup>12</sup> The unassigned debts appear on an exhibit accompanying the residential property appraisal, identifying liens against the residence.

awarded to her.<sup>13</sup> She will shoulder the full burden of these debts if she sells the house or if creditors attempt to take action against the property. It is also problematic that several of the debts the trial court expressly assigned to Timothy have also been reduced to liens against the homestead.<sup>14</sup> It is not clear that the trial court considered that these were liens against the residence when it assigned these debts to Timothy.

¶26 Accordingly, we reverse and remand to the trial court for allocation of the unassigned debts totaling \$6,367.53. With respect to debts assigned to Timothy that have been reduced to liens against Roberta's residence, we direct the trial court to establish a reasonable time by which Timothy shall retire these debts or cause them to be removed as liens against Roberta's residence.

¶27 Finally, Roberta argues that the trial court failed to order the parties to exchange income tax returns in the coming years and failed to rule on the issue of the division of costs for their son's extracurricular activities. Our review of the record confirms that these issues were not addressed by the court in its findings. Accordingly, we direct the trial court to address these issues on remand.<sup>15</sup>

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<sup>13</sup> We reject Timothy's claim that Roberta waived this argument by failing to bring it to the trial court's attention. Had Timothy's financial statement been accurate, it is unlikely the trial court would have failed to allocate these debts.

<sup>14</sup> These include the judgments in favor of Lura McQuiston (\$10,356), PoP Automotive (\$14,070), Auto-Plas America Corp. (\$16,485.68), Delco Financial (\$1,377.73), and Milwaukee Telephone (\$2,426.80). Timothy testified that these judgments were related to business enterprises that preceded California Dream.

<sup>15</sup> If we have not addressed with specificity some particular aspect of the appellant's plethora of issues, we deem it as lacking sufficient merit or importance to warrant individual attention. See *Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

¶28 We now turn to Timothy's cross-appeal. Timothy challenges the trial court's decision regarding the valuation of his 3,900 warrants in California Dream.<sup>16</sup> Timothy argues that the trial court's valuation is clearly erroneous because it employed an incorrect figure for normalized capital expenditures in calculating the value of his warrants.<sup>17</sup>

¶29 At trial, each party presented a valuation expert and the court heard extensive testimony regarding the valuation of Timothy's warrants. The testimony extended over several days and included numerous opportunities for counsel and the court to question each expert, and for each expert to justify his own conclusions and to critique the methods and conclusions of the other. Timothy's expert, Scott Wildman, utilized a capitalized cash flow method to determine that the warrants were worth \$293,173. Roberta's expert, Wayne Huberty, averaged the results obtained from three methods, including the capitalized cash flow method, and opined that the warrants were worth \$1,206,257. The trial court ultimately concluded that Timothy's warrants were worth \$583,050. In making this finding, the court adopted the methodology and assumptions employed by Timothy's expert with two exceptions, only one of which is relevant for purposes

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<sup>16</sup> Pursuant to the terms of a Shareholders/Warrant Holders Agreement, Timothy may convert these warrants to 3,900 shares of stock at a price of \$1 per share. When the shares are redeemed, Timothy will own 78% of California Dream, with 3,900 of the 5,014 shares outstanding.

<sup>17</sup> Normalized capital expenditures are cash expenditures for the acquisition of machinery and equipment and incurred obligations such as lease obligations for the leasing of machinery and equipment. Arguably, this discrepancy constitutes a "manifest error" which requires a motion in the trial court before it can be raised on appeal. See *Schinner*, 143 Wis. 2d at 92-94. While it is preferable to bring any error to the trial court's attention before appeal, we decline to hold Timothy to any waiver of the issue given that the trial court declined to hear the motion for reconsideration.

of this appeal.<sup>18</sup> Timothy's expert valued the company using \$260,000 as the amount of the company's normalized capital expenditures. The trial court rejected that figure and used \$187,701, the value employed by Huberty, Roberta's expert. Timothy argues that Huberty's figure for normalized capital expenditures was based on flawed calculations such that the court's decision to use that figure in valuing the company amounted to clear error.

¶30 Determining the value of assets subject to division is a finding of fact that we will not disturb unless it is clearly erroneous. *See Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993). We are guided by the rule that in "divorce actions, trial courts are not required to accept any one method of valuation over another." *Id.* at 399. Indeed, a trial court is free to make its own assessment of competing expert opinions and "determine the fair market value of a business asset based upon the nature of the business." *Sharon v. Sharon*, 178 Wis. 2d 481, 492, 504 N.W.2d 415 (Ct. App. 1987). Thus, we will not disturb a trial court's decision on the valuation of a closed corporation unless it is contrary to the great weight and clear preponderance of the evidence. *See Dean v. Dean*, 87 Wis. 2d 854, 876, 275 N.W.2d 902 (1979); *Jost v. Jost*, 89 Wis. 2d 533, 542, 279 N.W.2d 202 (1979) (applying clearly erroneous standard to conclude that "[t]he finding of the trial court as to value of the stock was not against the great weight and clear preponderance of the evidence and we must affirm it.").

¶31 The trial court explained its rationale for adopting Huberty's value for capital expenditures over that of Wildman:

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<sup>18</sup> The trial court declined to include a guaranteed lease obligation for Dashboards Plus, LLC in its calculation of the value of the warrants. Wildman included this obligation in his valuation calculation, but Huberty did not. Timothy does not appeal the trial court's decision to exclude the guaranteed lease obligation from its calculation.

I adjusted the normalized capital expenditures to \$187,701, the figure used by Huberty. This provides a normalized cash flow of \$259,299. The reason for this is that Wildman used figures supplied by [California Dream] which have no historical basis. Huberty's figures are based on historical figures and are more appropriate. I note that I asked Wildman about this and he considered his figure to be proper; however, in many other cases he used actual figures where he could find them. Considering the control that [Timothy] has over this corporation, I will not accept an inflated estimate of what might be done on capital expenditures this year or in the future.

¶32 On appeal, Timothy argues that Huberty's figure is simply wrong, and that the trial court's reasoning is further flawed because Wildman did in fact consider historical figures in determining a value for capital expenditures. We conclude that the record supports the trial court's decision to adopt Huberty's figure for normalized capital expenditures, and thus we affirm the trial court's findings with respect to the value of Timothy's warrants.

¶33 Both experts testified that they used financial statements prepared by California Dream's accountants, Deloitte and Touche, for the years 1994 through 1997 as the basis for their respective valuations. Huberty testified that he derived his figure for capital expenditures using the line item for "property and equipment expenditures." The four-year average of these figures was \$187,701. On cross-examination, Huberty conceded that he did not include the figures for capital lease obligations incurred by the company in calculating capital expenditures. However, he also testified that he believed his figure reflected a fair assessment of the capital expenditures California Dream would require to maintain its existing production capacity.

¶34 Timothy criticizes at great length the accuracy of the methodology and the assumptions used by Huberty. He argues that the trial court misused its discretion in applying Huberty's figure for capital expenditures. Wildman

testified emphatically that Huberty erred by failing to include capital lease obligations as part of his figure for capital expenditures, and Wildman presented the court with a detailed mathematical proof in support of his position.

¶35 Timothy also challenges the trial court's finding that Wildman did not use historical figures in determining an appropriate figure for capital expenditures. The record shows that Wildman did consider California Dream's actual capital expenditures for the period of 1994 through 1997 as set forth in trial exhibit 24, which showed that the four-year average—inclusive of capital lease obligations—was \$264,000. However, it is clear that in selecting a figure for capital expenditures, Wildman placed great weight on information he obtained during interviews with California Dream's executives, who claimed that a large value for capital expenditures was necessary because the company intended to “ramp up growth” in the coming year. The trial court questioned Wildman thoroughly on this point, asking why he did not use the 1997 figure for capital expenditures, \$123,816, inclusive of capital lease obligations. Wildman responded that he selected a number consistent with the company's stated intent to increase production. On redirect examination following Wildman's testimony on the need to include capital lease obligations as part of capital expenditures, Huberty stood by his figure for capital expenditures, maintaining that his figure was appropriate if the company intended to maintain production capacity.

¶36 Timothy has failed to persuade us that the trial court's acceptance of Huberty's basic testimony rendered the valuation clearly erroneous. As we have noted, “determining the fair market value of a closely-held corporation turns on the credibility of the expert as well as the methods and analyses employed by the witness to arrive at his or her conclusion.” *Schorer*, 177 Wis. 2d at 399. This is not a case where the trial court simply overlooked expert testimony on the

appropriate method of calculating capital expenditures. The trial court questioned Wildman thoroughly on this issue. The trial court's findings explicitly note that Huberty "unfortunately, had misinformation and had to adjust his calculations at the time of trial." The trial court also recognized that Huberty's efforts to value the company were impeded because "[Timothy] used his California Dream connection to try to stop [Roberta] from getting information necessary to evaluate that ownership." The trial court found that Wildman was biased in favor of Timothy and clearly stated that it would "not accept an inflated estimate of what might be done on capital expenditures this year or in the future." As we stated in *Schorer*:

'[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.' Therefore, if a finder of fact accepts the testimony of one expert over that of another expert, who testified differently, and the first expert's testimony is sufficient to support the fact finder's conclusion, it must be sustained.

*Id.* at 397 (citations omitted).

¶37 The court weighed the expert testimony, considered all of the relevant evidence and engaged in a rational decision-making process in determining the value of the company. On this record, we cannot say that the trial court erroneously exercised its discretion or otherwise erred in adopting, in part, Huberty's valuation methodology. A trial court is free to assess expert opinion and determine that the fair market value of warrants in a closed corporation lies somewhere between the extremes testified to by two experts. *See, e.g., Arneson v. Arneson*, 120 Wis. 2d 236, 248-49, 355 N.W.2d 16 (Ct. App. 1984). We conclude

that the trial court's findings regarding the valuation of California Dream were not clearly erroneous and we affirm on this issue.

¶38 No costs to either party.

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

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

