

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP493

Cir. Ct. No. 2007FA120

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

SOMMER J. DEHART,

PETITIONER-RESPONDENT,

V.

ANDY W. DEHART,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
SANDY A. WILLIAMS, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Andy W. Dehart appeals from an order deciding certain postjudgment matters after his divorce from Sommer J. Dehart. The parties reached an agreement on all issues except those relating to the stock options Andy exercised during the marriage and while the divorce was pending. Andy argues that to the extent the proceeds were used to satisfy the couple's financial obligations, they should not also have been included in the equitable distribution scheme. He also argues that the trial court erred in valuing the stock options when it accepted the exercise price as the value. We agree in both regards. We reverse and remand for further proceedings.

¶2 The parties married in March 2004; they had one child. The divorce action was filed in April 2007. Between 1999 and 2004, Andy's compensation package included stock options. He held 2500 options with an exercise, or "strike," price of \$14.40 and 5500 options with a strike price of \$35.

¶3 Andy testified at the one-day bench trial that his company decided to liquidate its employees' stock options in 2006 when it was being purchased by another entity. Andy estimated at trial that he received about \$72,000 in a single distribution in 2006; a payment of about \$18,000 in September 2007; and, representing the balance of his options, about \$8895 a few weeks later.¹ The distributions did not indicate a dollar figure paid out per option, but he believed it was \$35 or \$36, such that the options with a strike price of \$35 generated little profit. Andy testified that the payouts went toward living expenses, retiring the roughly \$103,000 mortgage on the marital home, and family trips to Hawaii and

¹ The 2007 cash-outs occurred during the pendency of the divorce.

Florida. In addition, \$26,109.72 was used for improvements to a house on Langlade county property his parents had quitclaimed to him.

¶4 In dividing the marital estate, the trial court awarded Andy the marital home, ordered him to pay Sommer half of the \$70,000 appreciation, half of the sum put into the Langlade county house and half of the proceeds of the other stock options liquidated during the marriage. Valuing the stock options proved to be a sticking point, which a subsequent hearing failed to resolve.² When the parties' further attempts at valuation also failed, Sommer sought a contempt order. The family court commissioner determined Andy's obligation for half the stock options to be \$13,054.86—half the amount spent on the Langlade county house.

¶5 Sommer moved for a hearing de novo. *See* WIS. STAT. § 757.69(8) (2009-10).³ Sommer argued that the value of Andy's stock options was \$228,500, a figure reached by multiplying the 2500 options by their strike price of \$14.40 and the 5500 options by their strike price of \$35 and adding those sums. Sommer contended that her portion of the proceeds was \$101,195.14—half of the \$228,500 less the \$13,054.86 he already had paid her.

¶6 Andy's response was two-fold. First, he argued that Sommer's valuation would result in inequitable double-counting. The stock option proceeds used to satisfy the mortgage on the marital home, for example, also were being counted as a divisible asset and, further, Sommer was awarded half of the home's

² Judge Joseph D. McCormack retired shortly after presiding over the bench trial. Judge Sandy A. Williams, elected to fill the vacancy, presided over the posttrial proceedings.

³ The hearing de novo was set to address child support, the other contested issue. All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

increased value. Andy's counsel argued that the amount he already paid in connection with the Langlade county property should satisfy his obligation:

I can't imagine that given these parties spent money as a couple, they took trips on this money, I can't imagine that Judge McCormack truly intended that now my client should reach into his pocket for the money that they've spent together on taking trips and doing all of these things, that he was supposed to reach into his pocket and now pay Ms. Dehart half of that.

¶7 Second, Andy argued that a stock option's strike price is not its value; it is what one *pays* to exercise the option. The trial court agreed with Sommer's valuation of the stock options, however, and that her remaining half of the stock options still owed was \$101,195.14. It gave Andy thirty days to submit an alternate valuation.

¶8 Andy filed a motion for reconsideration of the ordered payment on the cashed-out stock options. He included exhibits indicating that he had received approximately \$69,000 during the marriage from cashing out his stock options. The court concluded that what Andy produced was insufficient to find that the value of the stock options was anything different than earlier determined. It confirmed its finding that Andy owes Sommer \$101,195.14. Andy appeals.

¶9 Property division determinations in divorce proceedings are within the trial court's sound discretion, and we will uphold such determinations unless the court erroneously exercised that discretion. *Steinmann v. Steinmann*, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145. Whether certain property is part of the marital estate subject to division presents a question of law that we decide without deference to the trial court's decision. *Chen v. Chen*, 142 Wis. 2d 7, 12, 416 N.W.2d 661 (Ct. App. 1987).

¶10 We are unable to sustain the trial court’s determination. The marital estate comprises assets owned by the parties at the time of the divorce. *See Maritato v. Maritato*, 2004 WI App 138, ¶29, 275 Wis. 2d 252, 685 N.W.2d 379. It is undisputed that the stock options no longer existed when the parties divorced. All that might have existed was proceeds from them.

¶11 Assets depleted during the pendency of a divorce are not included in the divisible estate. *See Overson v. Overson*, 125 Wis. 2d 13, 21, 370 N.W.2d 796 (Ct. App. 1985). Just as an asset cannot be used both as marital property subject to division and as a factor in a party’s future income for purposes of determining maintenance, *id.* at 20, we conclude that an asset, once depleted—especially for marital expenditures—cannot also be counted as a present, divisible asset.

¶12 We further conclude that the trial court erred in adopting Sommer’s valuation of the stock options. A stock option is the ability to buy stock at a future date at a specific value, usually the value on the date of granting the option. *Maritato*, 275 Wis. 2d 252, ¶22. An option’s value is “the difference between the market value and the exercise value, reduced for taxes and any costs associated with exercising the option.” *Id.*, ¶36 (citation omitted). Valuation is discretionary but discretionary decisions must be supported with facts of record. *Peerenboom v. Peerenboom*, 147 Wis. 2d 547, 553, 433 N.W.2d 282 (Ct. App. 1988). The record does not support a valuation of \$228,500. We reverse the order and remand the case to the trial court to determine the stock option proceeds existing at the time of the divorce.

By the Court.—Order reversed and cause remanded with directions.

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

