COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1486

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

IN RE THE MARRIAGE OF:

CINDY BRENENGEN,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

BRIAN D. BRENENGEN,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

HOOVER, J. Brian Brenengen appeals a divorce judgment; Cindy Brenengen cross-appeals. The issues Brian raises are whether the trial court

inappropriately: (1) valued his minority interest in a family partnership; (2) failed to decrease the value of the partnership by the amount of a loan; and (3) failed to consider the tax consequences of its property division. Brian also requests a new trial because of the trial court's predisposition against his evidence. Because the values the trial court found were not clearly erroneous, we affirm its asset valuation. We also affirm the property division as an appropriate exercise of discretion.

Cindy contends that the trial court erred in determining Brian's gross income and by failing to award her maintenance. We again affirm because the trial court's finding regarding Brian's income was not clearly erroneous, and it properly exercised its discretion by declining to award her maintenance.

Brian and Cindy were married for sixteen years and have three minor children. Both are in good health. Cindy had a home cleaning business and worked approximately ten hours a week. Brian had a one-third interest as a partner in a family farm partnership. The parties stipulated to some issues, but contested the partnership interest's value for property division purposes, the amount of Brian's income, and whether Cindy should receive maintenance. The trial court determined the partnership's interest's fair market value as $567,556.65 and Brian's annual income as $85,574. Although the court did not award maintenance to Cindy, it left the issue open for five years.

The marital estate's largest asset was the interest in the family farm partnership. The partnership's assets consisted of cash, corn and bean inventory, personal property, real estate and prepaid expenses. The partnership's personal and real property was appraised at fair market value, and there was no dispute over the value of those assets. The dispute concerned both the valuation method

applied to the minority partnership interest and which partnership liabilities are properly recognized in determining the partnership's value.

I. BRIAN'S APPEAL

Brian contends that the court's valuation of his partnership interest was flawed for two reasons. First, he asserts the court should have discounted the value to reflect his status as a minority interest partner. Regarding this first assertion, he claims the court erred by: (1) finding that he would not sell his minority partnership interest; (2) rejecting his expert's testimony that a minority discount should be applied when valuing his interest; and (3) applying a legally incorrect valuation methodology. We reject these contentions.

Valuation of Brian's partnership interest 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, 918-19 (Ct. App. 1993). The circuit court must value assets at their fair market value. *See* ***id***. at 399, 501 N.W.2d at 920. Fair market value is, however, a definition, not a valuation method. ***Id***. The appropriate valuation methodology is within the trial court's discretion. *See* ***Sharon v. Sharon***, 178 Wis.2d 481, 489, 504 N.W.2d 415, 419 (Ct. App. 1993). In connection with the valuation methodology, we examine the record to determine if the trial court considered the relevant facts, applied a proper standard of law and used a demonstrated rational process to reach a conclusion a reasonable judge could make. ***Id***. at 488, 504 N.W.2d at 418.

A. The Minority Interest Discount

1. Sale of the partnership interest.

Brian asserted that, although he did not want to, he would be forced to sell his partnership interest to make a lump sum payment to equalize the property division. He contended this was the only way he could realize the interest's value because he could not borrow money. His thought was to sell the partnership interest to his brother and become a partnership employee at a salary of approximately $25,000 a year.

Whether Brian would need to sell his partnership interest is a factual determination that will be upheld unless it is clearly erroneous. The trial court is the ultimate arbiter of weight and credibility. *See* § 805.17(2), STATS.; ***In re Estate of Dejmal***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). Its credibility assessments will not be overturned unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

The trial court found that Brian would not have to sell his partnership interest. In making this determination, the court first did not find credible Brian's testimony that he would sell his partnership interest, which was generating annual income in excess of $80,000, to work for the partnership for $25,000 a year. There is no basis in the record to upset this credibility assessment. *See* § 805.17(2), STATS.; ***Chapman***, 69 Wis.2d at 583, 230 N.W.2d at 825. Further, the court inferred from the evidence that Brian could borrow funds

sufficient to make a lump sum equalization payment.[1] There is record evidence supporting this finding, and it is thus not clearly erroneous. Although Brian's banker testified that he would not lend Brian money based on the information Brian had supplied, he withdrew from this position when provided additional information about Brian's financial circumstances[2] and indicated a loan "could be worked."

2. The Expert's Opinion

Brian contends that the court erred by ignoring his valuation expert's testimony. He asserts that because Cindy offered no evidence of the partnership interest's fair market value other than to add asset values and subtract liabilities, the court should have accepted his expert's testimony.[3] Cindy contends that Brian's expert's assumptions, and therefore his opinions, were flawed because he was not aware of and had not considered that under ch. 178, STATS., a minority partner could force liquidation of the partnership under that chapter. Because Walch demonstrated ignorance of information material to determining valuation, Cindy argues, his opinion regarding a minority share discount should be disregarded.

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[1] In fact, the court indicated to Brian it was willing to entertain various proposals as to the amount of the lump sum payment and questioned him as to how much he could borrow. Brian made no proposals, and the trial court ordered a lump sum payment of $75,000, but invited Brian to return with an alternate proposal.

[2] Brian did not provide copies of his tax returns, which reflected an income level of $15,000 to $30,000 higher than what had been represented to the banker. In addition, the banker was not aware that Brian's financial statements showed a net worth of approximately one-half million dollars.

[3] A trial court is not required to accept an expert's uncontradicted testimony. *See* ***Capitol Sand & Gravel Co. v. Waffenschmidt***, 71 Wis.2d 227, 233-34, 237 N.W.2d 745, 749 (1976).

Brian called the only expert witness, Thomas Walch. Walch valued Brian's partnership interest by adding the appraised values, deducting liabilities, and dividing by the number of partners to arrive at Brian's gross interest. He then applied a 25% minority interest discount and a reduction for taxes payable upon liquidation of assets. Walch concluded that "the value of the partnership stems from the underlying assets and not its future earnings potential," but did not consider the partnership's liquidation value because its members had not indicated a willingness to liquidate. He assumed the only way for Brian to obtain any value from his interest would be to sell it because, among other things, he assumed Brian could not force the partnership's dissolution to realize the underlying asset value. On cross-examination, however, when asked if he was aware that under ch. 178, STATS., a minority partner in fact *could* force liquidation, Walch admitted he was not.

The trial court agreed with Cindy and concluded that Walch had shown his underlying assumptions to be inaccurate and that therefore Walch had contributed little to the proceedings. The trial court rejected Walch's analysis, as was its right, and determined the partnership interest's value by using Walch's initial method without applying a discount. Section 805.17(2), STATS.

3. Valuation Methodology

Brian also argues that the trial court applied a legally incorrect methodology to determine the partnership interest's value. He contends that ***Liddle v. Liddle***, 140 Wis.2d 132, 410 N.W.2d 196 (Ct. App. 1987), requires the trial court to value the partnership interest by looking at the price the partnership interest will bring when offered for sale by one not obligated to sell to one not obligated to buy. Thus, he argues, it is subject to a minority interest discount.

We agree that Brian correctly recites the definition of fair market value, but disagree that the court is required to use his valuation method. The valuation method used is within the trial court's discretion. *See* ***Schorer***, 177 Wis.2d at 399, 501 N.W.2d at 920. Although ***Liddle*** recognized that a minority interest discount can be an appropriate factor in valuation, it does not compel use of the discount. ***Liddle*** does not address whether a minority interest discount is appropriate if the minority partner could force the partnership's dissolution. There was also undisputed evidence in ***Liddle*** that the minority partnership interest would be sold. ***Id***. at 140, 410 N.W.2d at 199. In addition, the partnership in ***Liddle*** had tax shelter, income and asset value. ***Id***. Here, Brian's own expert indicated the value of this partnership lies in its assets. They had been appraised at their fair market value. The court indicated that the assets were "hard assets" and easily valued. We cannot conclude that the trial court erred in the methodology it used, adding asset values, subtracting liabilities and dividing by three to value the partnership interest.

B. The Start-Up Loan

Brian contends that, regardless of the valuation method used, the trial court erred by not reducing the partnership's value by the amount of a start-up loan. Both Brian and his mother testified that in 1988, Brian's father, Donald Brenengen, loaned the partnership $129,834 for start-up expenses. The trial court found that the alleged loan was not a legitimate partnership liability, but rather a sham that had been created for the divorce to reduce the partnership's value.

Alternatively, it concluded that the loan was unenforceable because the statute of limitations had run.[4]

The trial court heard evidence that: (1) there is no note or other writing confirming the loan; (2) the partnership never made a payment on the loan; (3) the loan was not shown in the partnership's financial statements; (4) the loan was not disclosed in tax reports; and (5) Brian did not know the precise amount of the loan until after the divorce proceedings began. As indicated earlier, the trial court is the ultimate arbiter of the witnesses' credibility and, based on this record, we cannot say that its finding was clearly erroneous. *See* ***Estate of Dejmal***, 95 Wis.2d at 151-52, 289 N.W.2d at 818.

C. Tax Consequences

The trial court found Brian owed Cindy a $174,764.60 equalization payment, payable $75,000 within sixty days and $1,000 a month thereafter until paid in full.[5] Brian contends that he will have to sell a portion, if not all, of his minority interest to meet the initial payment. Alternatively, he claims the only way he could get this amount from the partnership was for it to make a distribution to him of either cash or grain that he would have to sell. Therefore, he argues that the court erred by failing to consider the tax consequences of the initial payment.

As discussed earlier, the court implicitly found that Brian would not have to sell his partnership interest to pay the lump sum. It concluded that he

[4] The statute of limitations is six years. *See* § 893.43, STATS. Although Brian contends that the loan had been reaffirmed, this was not done in writing and is therefore not enforceable. *See* § 893.45, STATS.

[5] The balance of the payment not paid as a lump sum was to earn simple interest of 6%.

could borrow funds sufficient to pay the lump sum. Although Brian claims he could not get a loan, the record demonstrates that his efforts have been less than motivated. At the post-trial motion hearing, the court indicated that it was willing to consider a lower lump sum payment and wanted Brian to make specific proposals. Rather than accept the court's invitation, Brian asks us to ignore the trial court's findings, supported by the record, and to grant him relief. We decline to do so.

Brian also contends that he should be permitted to pay Cindy the initial payment in grain so as to shift the sales tax consequences to her. It is not clear that this was a concrete proposal. Paying Cindy in grain would constitute a partnership distribution to Brian. Yet, at the post-trial hearing, Brian contended that the partnership had not authorized a distribution to him and that he could not force it to make a distribution. Based on this record, we cannot conclude that Brian has made a proposal that necessitates he incur negative tax consequences. The trial court is not required to consider the tax consequences of hypothetical or theoretical dispositions of property. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 106, 536 N.W.2d 101, 105 (Ct. App. 1995).

D. Trial Court's Predisposition

Finally, Brian argues that we should grant a new trial because the trial court was predisposed not to listen to his evidence regarding the property division. This argument is first presented on appeal, and we thus have no obligation to consider it. *See* ***Anderson v. Nelson***, 38 Wis.2d 509, 514, 157 N.W.2d 655, 658 (1968). We have, however, reviewed the record and fail to see that the trial court was predisposed one way or another, except that it would not tolerate the parties wasting its time by eliciting irrelevant or redundant testimony.

II. CINDY'S CROSS-APPEAL

A. Brian's Income

Cindy contends the court erred because it permitted the partnership's manipulation of expenses to artificially decrease Brian's income after the parties separated. She points to the significant increases in the partnership's prepaid expenses[6] and rent paid to Donald for his equipment and land. The trial court rejected Cindy's argument and based its income determination upon the average of the figures on Brian's 1996 tax return and his 1997 financial statement. A party's income is a factual finding reviewed under a clearly erroneous standard. *See* ***Bentz v. Bentz***, 148 Wis.2d 400, 404, 435 N.W.2d 293, 294 (Ct. App. 1988). Although both prepaid expenses and rental payments did increase substantially after the parties separated, the trial court's income finding was not clearly erroneous.

From 1994 to 1998, the rental payments to Donald Brenengen increased 62%. Although there may have been some manipulation of these amounts, the trial court found that the rent charged was nonetheless consistent with fair market rates, and the record supports that determination. Donald based the equipment charges on John Deere rental figures and Wisconsin Agricultural Statistics Service rates. The land rental was brought in line with what the partnership paid third parties for land. There was no evidence to show that Donald had an obligation to rent to the partnership at less than the going market rates.

[6] For example, in 1997 the partnership purchased seed and fertilizer for the 1998 crop.

The trial court included the prepaid expenses as a partnership asset for property division purposes. Although these amounts increased after the parties separated, there was testimony that by prepaying, the partnership received a purchase discount. Moreover, even if not prepaid, the partnership would incur those expenses the following year. Thus, the trial court could properly include them as part of the partnership's property. Once included within the property division, our supreme court has warned against double-counting. *See* ***Kronforst v. Kronforst***, 21 Wis.2d 54, 63-64, 123 N.W.2d 528, 534 (1963). Cindy's request would lead to this generally disfavored result. Considering the record, we are satisfied that the court's refusal to double count was not clearly erroneous.

B. Maintenance

Cindy contends that the court erred by declining to order a current maintenance award. She argues that the court's decision was flawed because it imputed income to her on assets that do not produce income and because it requires her to invade the property award to support herself while Brian does not have to.

The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court, and we will not disturb its determination unless it erroneously exercised its discretion. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). The dual objectives of maintenance are support and fairness. ***Id***. at 33, 406 N.W.2d at 740.

The trial court reserved ruling on maintenance, holding it open for five years. We agree with her that the trial court's assessment of her income was in some respects flawed. This and Cindy's need notwithstanding, the trial court found that with all of Brian's other current obligations, he did not have the ability

to pay a current maintenance award. The court recognized that may change once there is finality to the initial property equalization payment. We cannot say, given the record, that the court erroneously exercised its discretion. This decision is also ultimately fair to both Cindy and Brian under that prong of ***LaRocque***, because the court left maintenance open, and Brian is not required to pay beyond his ability.

The trial court rationally considered the parties' requests. It applied relevant factors under the law and the record supported its findings. It arrived at decisions that a reasonable court could reach. The law requires no more.

By the Court.—Judgment affirmed.

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