COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0179

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

IN RE THE MARRIAGE OF:

DAVID J. DOWIASCH,

PETITIONER-RESPONDENT,

V.

TRACY L. DOWIASCH,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

DYKMAN, P.J. In this divorce action, Tracy L. Dowiasch appeals from an order awarding her a $4,354.25 payment from her husband, David J. Dowiasch, as her share of the marital estate. Tracy raises a number of issues. She

first argues that the trial court erred by valuing the marital estate on the date on which the family farm was appraised rather than on the date of divorce. She also asserts that the trial court should have counted the accounts receivable for David's milk sales as a marital asset rather than as anticipated income. She argues that the court miscalculated the number of cattle included in the marital estate. She contends that the value of improvements to the farm and the value of some barn equipment installed on the farm should have been included as well. She argues that the court incorrectly excluded one chopper box, and should have included an additional chopper box and the value of some cooperative stock in the estate. She also asserts that the trial court failed to divide the marital property equally, as required by statute. We disagree, and affirm those portions of the trial court's decision.

In addition, Tracy argues that debts in the amount of $33,000 and $25,000 should not have been included in the marital estate because they were obligations of David's parents. We agree. We also agree that the trial court erred by including a debt for spring planting supplies and debts for land rents in the marital estate. Accordingly, we reverse and remand with instructions to exclude those debts from the marital estate. Finally, Tracy asserts that the trial court erred by failing to address the issue of attorney fees. We conclude that Tracy abandoned her claim for attorney fees through her first appeal. However, we agree that the trial court must address this issue for all proceedings after her first appeal. Therefore, we reverse and remand with instructions that the trial court make the appropriate findings as to attorney fees after Tracy's first appeal.

I. Background

Tracy and David Dowiasch married in 1991. One year earlier, David and his brother, Arlan, had entered into an agreement with their parents to lease the family farm. Under the agreement, David and Arlan pay $4,305 per month to rent the farm real estate, machinery, and cattle from their parents. They pay the rent directly to Farm Credit Services to repay their parents' mortgage on the farm. At the time of the divorce trial, the mortgage debt stood at $179,000. In addition, by a separate agreement, the brothers pay $3,195 per month directly to their parents as payments for the feed, machinery, and part of the cattle on the farm.

The lease term was originally for ten years, terminating on January 31, 2000, at which point the brothers had the option to purchase the farm. However, the lease term was extended when the parents took out additional loans on behalf of the brothers. In 1993, the parents borrowed $33,000 so that David and Arlan could pay for some operating costs, for tractor tires, and for a barn roof. In 1994, the parents borrowed an additional $25,000 to pay the brothers' feed bill. Though David and Arlan had been making the monthly payments to Farm Credit Services and had paid off some of their parents' debt, the new loans brought the indebtedness back to approximately the level at which it stood when the lease was signed. Since the lease is tied to paying off the mortgage, its term was informally extended.

At the close of the divorce trial, the trial court concluded that the marital estate had a negative net worth, leaving nothing to be divided between the parties. Tracy appealed. In that appeal, although the trial court did not expressly state it, we assumed that it included the parents' mortgage as a liability of the

marital estate, because that was the only way the estate would have a negative net worth. We concluded that the parents' mortgage should not have been treated as a marital debt since David was not liable for it. We reversed and remanded with directions to exclude the parents' mortgage and reevaluate the marital estate based on further findings as to the value of the various assets and liabilities.

On remand, the trial court valued Tracy and David's assets and liabilities as of November 28, 1995, the date on which the farm was appraised. Although this valuation date was five months before the date of divorce, the court concluded that, since the value of the individual assets and liabilities fluctuated over time, valuing everything on one date would provide the most accurate picture. The court explained that the appraisal would provide the best valuation date because:

> number one, it's the most complete list of all of the assets of the parties; number two, it was compiled by somebody who is at least a little more impartial than the parties themselves; and, number three, it's probably a little more accurate because of that impartiality and because of the fact that [the appraiser] does it for a living.

The trial court used the appraisal as a bottom line in determining the net assets of the farm and made deductions from the appraised value of the farm based on evidence presented at trial. It deducted $445 from the total value for household items that had already been divided. It deducted $7,500 for a Miller Pro 1500 chopper box, concluding that the Dowiasch parents had paid for it, and that there was a question as to who owned it. Next, the court subtracted $1000 for some Deletron pulsation units, and $1,500 for a Pipeline milking system, reasoning that they were a part of the real estate. Finally, the court deducted $83,530 for cattle that belonged to the parents.

In addition, the court declined to include several items that were not part of the appraisal, but that Tracy included in an exhibit. Specifically, the court determined that an account receivable for milk sales should not be part of the marital estate. The court explained that it did not want to double count the "milk checks" since it concluded that they were income.[1] The court also stated that it would not include several improvements David and Arlan made to the farm. The court explained that the new well, barn roof, and stanchions that the brothers installed were part of the farm. Since they did not own the farm, and would not have an option to buy the farm until an undetermined future date, the improvements would not be considered part of David or Arlan's assets.

The court then calculated the parties' liabilities, beginning with the total farm debt David listed in his financial disclosure statement. From that figure, the court excluded the $179,000 mortgage as we directed. Next, the court removed a $4,444 debt for the same Miller Pro chopper box that it had excluded from the farm assets. The court explained that the parents had actually paid for this chopper box. In order to balance the assets and liabilities, since it excluded the chopper box from David and Arlan's assets, it had to exclude the corresponding debt from the liabilities. After making a correction for a misprint, the trial court added the $33,000 and $25,000 that the parents borrowed in 1993 and 1994 to the total farm liabilities.

Concluding that the parties had total assets of $142,642 and liabilities of $125,225, the court found their net worth to be $17,417. Since David

[1] Although the court did not state its reasoning explicitly, by using the term "double count" we presume the court meant that it did not want to include the milk receivables as both an asset and as part of the anticipated income used to calculate child support. Tracy and David stipulated that David would pay $200 per month in child support.

and Arlan farmed as a partnership, the court divided that figure in half, finding that the marital estate was worth $8,708.50. Tracy's share was $4,354.25 and the court ordered David to pay her that amount. Tracy appeals.

II. Discussion

A. Standard of Review

The division of property in a divorce, including the valuation of the marital estate, is within the trial court's discretion. *See* ***Forester v. Forester***, 174 Wis.2d 78, 91, 496 N.W.2d 771, 777 (Ct. App. 1993). We will not interfere with the trial court's division of property unless there has been an erroneous exercise of discretion. *See* ***Gardner v. Gardner***, 190 Wis.2d 216, 236, 527 N.W.2d 701, 707 (Ct. App. 1994). We will sustain the trial court's decision if the court "examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Sharon v. Sharon***, 178 Wis.2d 481, 488, 504 N.W.2d 415, 418 (Ct. App. 1993).

B. Valuation Date

Usually, a marital estate is valued on the date of divorce. *See* ***Sommerfield v. Sommerfield***, 154 Wis.2d 840, 851, 454 N.W.2d 55, 60 (Ct. App. 1990). However, "when conditions over which a party has little or no control arise, such special circumstances can warrant deviation from the rule." ***Id.*** Tracy argues that the trial court erred by valuing the marital property on the date the farm was appraised rather than on the date of divorce. She asserts that the appraiser updated his appraisal at trial and that there was no reason to deviate from the general rule. We disagree.

The trial court properly exercised its discretion in concluding that special circumstances required using the appraisal date to value the marital estate. The trial court was faced with a number of farm assets with fluctuating values–a condition over which neither party had control. As the court explained, some of these fluctuations were interrelated. As the value of one asset went up, the value of another asset went down. Unless a specific date was selected on which to evaluate all the assets, it would be difficult to accurately value the estate as a whole. At trial, the appraiser testified generally as to how he would update his appraisals. However, the November 28, 1995, appraisal remained the only specific list of farm assets presented to the court. The court stated that one of its reasons for using the appraisal as the valuation date was that it was "the most complete list of all of the assets of the parties." Special circumstances existed which permitted the trial court to use November 28, 1995 as the valuation date.

C. Inclusion of the $33,000 and $25,000 Debts

Tracy argues that the trial court erred by including the $33,000 and $25,000 debts in the marital estate. She asserts that while the Dowiasch parents may have borrowed the money so that David and Arlan could pay some farm expenses, the debts remained in the parents' name. Tracy argues that these two new debts are part of the same $179,000 mortgage liability that we previously ruled should not be part of the marital estate.

We conclude that, by including the $33,000 and $25,000 liabilities in the marital estate, the trial court erroneously exercised its discretion. In the first appeal, we concluded that the $179,000 mortgage should not be part of the marital estate since it was the parents' obligation, not David's. The same reasoning

applies here. The $33,000 and $25,000 debts are obligations of the Dowiasch parents, not of David and his brother.

David argues that since the parents borrowed the money on his and his brother's behalf, the debts were appropriately included in the marital estate. However, David presents no authority supporting the proposition that a debt incurred by a third party on behalf of a party to a divorce should be included in the marital estate, and we know of none. We will not consider arguments that are not supported by reference to legal authority. *See* ***Phillips v. Wisconsin Personnel Comm'n***, 167 Wis.2d 205, 228, 482 N.W.2d 121, 130 (Ct. App. 1992). Accordingly, we reverse and remand with instructions to exclude the $33,000 and $25,000 debts from the calculation of the marital estate.

D. Account Receivable for Milk Sales

Tracy argues that the trial court should have included in the marital estate an account receivable for milk David and Arlan sold in April 1996. Accounts receivable are usually assets subject to property division. *See* ***Hubert v. Hubert***, 159 Wis.2d 803, 812, 465 N.W.2d 252, 255 (Ct. App. 1990). The trial court has discretion to exclude accounts receivable from the marital estate if the evidence indicates a link "between the receivables and salary and that dividing the receivables would adversely affect the ability to pay support or maintain professional and personal obligations." ***Sharon***, 178 Wis.2d at 495, 504 N.W.2d at 421. Generally, it is error to double count an account receivable as both an asset and as anticipated income. *See* ***Peerenboom v. Peerenboom***, 147 Wis.2d 547, 553, 433 N.W.2d 282, 285 (Ct. App. 1988). However, the rule against double counting is not absolute, but rather a warning to avoid unfairness by considering the effect of the property division on the need for maintenance and the availability

of income for child support. *See* ***Cook v. Cook***, 208 Wis.2d 166, 180, 560 N.W.2d 246, 252 (1997); ***Seidlitz v. Seidlitz***, 217 Wis.2d 82, 90, 578 N.W.2d 638, 641 (Ct. App. 1998).

The trial court's decision to exclude the milk checks from the marital estate so they would not be double counted was reasonable. David testified that the milk checks go into one account from which the brothers pay all the farm expenses, and each takes out $500 per month in income. From that $500, David presumably would pay $200 per month in child support. To divide the April 1996 milk checks as part of the marital estate would be unfair. It would hamper David's ability to pay his share of the farm expenses and meet his child support obligations.

E. Cattle Herd

Tracy contends that the trial court miscalculated the number of cattle that belonged to David and Arlan. In evaluating a marital estate, a court's determination of an asset's value is a finding of fact. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 107, 536 N.W.2d 101, 105 (Ct. App. 1995). We will not set aside such a finding unless it is clearly erroneous. *See* § 805.17(2), STATS.; ***Preuss***, 195 Wis.2d at 107, 536 N.W.2d at 105.

We conclude that the trial court's valuation of the cattle herd was not clearly erroneous. The court valued David and Arlan's cattle by relying on the appraisal, which valued all of the cattle on the farm, including those owned by David's parents. The court then deducted $83,530 for cattle owned by the parents. The appraisal valued all of the cattle at $96,830. By deducting $83,530 from the total value of $96,830, the court valued the cattle owned by David and Arlan at $13,300. This comports with other evidence presented at trial. David testified

that, at the time of the appraisal, he and his brother owned nineteen of the cows. The appraisal valued the cows on the farm at $700 each. Using that value, nineteen cows are worth $13,300—the same value used by the trial court.

F. Farm Improvements and Barn Equipment

Tracy asserts that the trial court erred by not including in the marital estate the value of a well, barn roof, and stanchions that David and Arlan installed on the farm. She also argues that the court should not have excluded the Deletron pulsation units and the milking system.

We conclude that the trial court appropriately exercised its discretion by excluding the farm improvements, the pulsation unit and the milking system from the marital estate. The trial court determined that these assets were part of the real estate, and thus not owned by David, a tenant on the farm. David has an option to purchase the farm, but, considering that the lease term has been informally extended, it is unclear whether or how soon he will be able to exercise that option. Were David to leave now, the well, barn roof, stanchions, pulsation units and milking system would remain a part of the farm. Property not owned by David, like debt he does not owe, is not part of the marital estate.

G. Chopper Boxes and Cooperative Stock

1. Miller Pro Chopper Box

Tracy contends that the trial court erred by deducting a Miller Pro 1500 chopper box from the marital assets. She argues that David admitted at trial that he and Arlan owned this chopper box. But, neither David nor Tracy produced any definitive evidence as to who owned the Miller Pro chopper box. David testified that he and his brother financed two $7,500 chopper boxes through Miller

Pro. They paid for one in 1994. They were unable to make their payment for the second one, so their parents made a $4,455 payment for it. The trial court could reasonably conclude that the second chopper box belonged to the parents. The trial court also excluded the debt for the second chopper box from the marital estate. We conclude that the trial court did not erroneously exercise its discretion by excluding both the second chopper box and its debt from the marital estate.

2. Gehl Chopper Box and Cooperative Stock

Tracy also suggests that two assets not addressed by the trial court should have been included in the marital estate. First, she asserts that David and Arlan owned a Gehl chopper box worth $3,500 that Arlan traded in for a new chopper box. She does not dispute that the value of the new chopper box was not included, but asserts that the value of the Gehl chopper box should have been part of the estate. In addition, she argues that the trial court erred by not including $5,231 of cooperative stock owned by David and Arlan in the estate.

Absent a specific finding by the trial court, we will affirm a trial court's ruling if it reached a result the evidence would sustain had a specific finding supporting that result been made. *See* ***Marine Bank Appleton v. Hietpas, Inc.***, 149 Wis.2d 587, 592-93, 439 N.W.2d 604, 606 (Ct. App. 1989). In such a case, the fact that credible evidence might support more than one reasonable inference is no reason not to affirm. *See* ***Village of Big Bend v. Anderson***, 103 Wis.2d 403, 410, 308 N.W.2d 887, 891 (Ct. App. 1981).

Although the court did not make a specific finding, we uphold the trial court's exclusion of the Gehl chopper box because the evidence supports a finding that David did not own that chopper box on the valuation date. The evidence presented at trial could support conflicting inferences as to whether

David owned the Gehl chopper box on the valuation date. David testified that he and his brother owned the Gehl chopper box at one point. Arlan then traded it in for a new chopper box of which Arlan was the sole owner. David listed the Gehl chopper box on a depreciation statement from 1994, but it was not listed on the appraisal. This evidence could support the inference that David did not actually own the Gehl chopper box on the date of the appraisal. The trial court did not erroneously exercise its discretion by not including it as part of the marital estate.

We also conclude that the exclusion of the cooperative stock was an appropriate use of the trial court's discretion. In valuing a marital estate, the trial court must ensure that a fair market value is placed on the marital assets. *See* ***Schorer v. Schorer***, 177 Wis.2d 387, 399, 501 N.W.2d 916, 920 (Ct. App. 1993). Although the trial court made no finding, the evidence supports a finding that that the stock had no fair market value on the valuation date. Neither party presented evidence that the cooperative stock had an actual fair market value. Adding the listed values of the various cooperative stocks from David's financial disclosure statement to the retained earnings David lists for the AMPI account for his farm produces the $5,231 figure Tracy asserts should have been included in the farm's assets.[2] However, no evidence was produced demonstrating that this cooperative stock could actually have been sold for that amount on the valuation date. Accordingly, we affirm.

[2] David listed "Westby Farmers Union Co-op (Stock)" with an August 1, 1995 value of $610, "Chaseburg Farmers Union (Stock)" with a May 1, 1996 value of $710 and "Vernon Electric Cooperative (Capital Credits)" with a July 28, 1995 value of $1,490 on his financial disclosure statement. He also provided a separate attachment titled "AMPI Account" that, for his farm, lists retained earnings of $449.40, $521.56, $493.96, $481.31 and $475.61 for 1991 through 1995.

H. Debts for Planting Supplies And Land Rents

David's list of farm debts in his financial disclosure statement included $19,318 for spring planting supplies and $7,400 for land rents. Tracy argues that the trial court erred by including these debts in the marital estate. She argues that the spring planting supplies were purchased after the valuation date, but that the court included the debt without including the value of the supplies. Similarly, she asserts that although the land rents were not yet due on the valuation date, the court included them without including the value of the land being rented. David argues that the trial court was correct in including the spring planting debt, but not the value of the supplies purchased with that debt, because those supplies were "operating capital." He also argues that the land rents were an ongoing farm expense and appropriately deducted from the value of the farm.

We conclude that including these debts in the marital estate was an erroneous exercise of discretion. As of the valuation date, David had not yet incurred the spring planting debt nor the debts from the rented land. It would make sense to include a liability not yet incurred on the valuation date if the value of the asset acquired with that liability was also included. That was not the case here. No value for the planting supplies and no value for the rented land were included in the appraisal or in the court's evaluation of the estate.[3] We therefore reverse and remand with instructions to exclude the $19,318 liability for the spring planting supplies and the $7,400 liability for the land rents from the calculation of the marital estate.

[3] We have found no authority supporting the trial court and David's reasoning that "operating capital" is appropriately excluded from a marital estate.

I. Equal Property Division

Tracy also argues that the trial court failed to equally divide the property under § 767.255(3), STATS. The trial court is not required to divide the marital estate equally. Section 762.255(3). But it did so. The court valued the marital estate at $8,708.50 and then divided that amount equally between Tracy and David. Tracy's dispute is with the value of what was divided, not whether it was divided equally.

J. Attorney Fees

Finally, Tracy asserts that the trial court erred by failing to address the issue of costs and attorney fees at trial and on remand. At trial, Tracy presented fee statements from her two attorneys, but did not make a motion for attorney fees. The court did not address the issue other than in its judgment of divorce, where it concluded that David and Tracy were responsible for their own attorney fees. In her first appeal, Tracy did not raise the issue of attorney fees. On remand, Tracy filed a motion for costs and attorney fees, accompanied by another fee statement from her lawyer, but did not make any arguments in support of the motion. In its decision and order on remand, the trial court did not directly address the issue of attorney fees, but ordered that any term or provision of the original judgment of divorce remained in effect unless specifically amended by the decision on remand.

The decision whether to award attorney fees is within the discretion of the trial court. *See* ***Laribee v. Laribee***, 138 Wis.2d 46, 56, 405 N.W.2d 679, 683 (Ct. App. 1987). In making that decision, the court must "determine the need of the spouse seeking contribution, the ability of the other spouse to pay and the reasonableness of the total fees." ***Id.***

In this case, the trial court did not make the required findings at trial or on remand. However, in her first appeal, Tracy did not raise the issue of attorney fees. An issue not raised on appeal is deemed abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis.2d 475, 491, 588 N.W.2d 285, 292 (Ct. App. 1998), *review denied*, 224 Wis.2d 263, 590 N.W.2d 489 (1999). Any claim she had for attorney fees up through the first appeal has been abandoned. Therefore, we reverse and remand with instructions that the trial court make appropriate findings as to attorney fees for all proceedings after the first appeal.

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

Not recommended for publication in the official reports.