COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-1722

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

IN RE THE MARRIAGE OF:

JACQUELYN R. BROTHERTON,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

PAUL E. BROTHERTON,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: CLAIR VOSS, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. This is an appeal and cross-appeal from the property division and maintenance determinations embodied in a judgment of divorce. We agree with Paul E. Brotherton's argument that the trial court erred in valuing the parties' auditing service and reverse the judgment in part and remand on that issue. On remand the trial court shall reconsider property division and maintenance. We reject Jacquelyn R. Brotherton's claim that the trial court had authority to award her a portion of Paul's social security "account" because it was enhanced by the reporting of her earnings. We affirm the judgment in all other respects thereby rejecting the additional claims of the parties.

Paul and Jacquelyn had been married for nearly thirty-four years when this divorce action was commenced in January 1995. Prior to 1993, both Paul and Jacquelyn worked as accounts payable auditors. They were affiliated with Howard Schultz & Associates (HSA), a firm which provides accounts payable invoice auditing services to grocery stores. Paul officially retired on December 31, 1992. Jacquelyn continued to work until April 1995.

Based on the report prepared by an expert retained by Jacquelyn, the trial court valued the auditing business at $85,000 and awarded it to Paul. Paul contends that the auditing business has no value because he has no clients, no contract with HSA, and no employees. The valuation of a particular marital asset is a finding of fact which we will not upset unless clearly erroneous. *See* ***Liddle v. Liddle***, 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987); *see also* § 805.17(2), STATS.

Jacquelyn's valuation expert authored two reports, each of which valued the auditing service as of December 31, 1994. The trial in this matter started on October 13, 1995 and was not concluded until September 10, 1996.

Wisconsin law requires that assets be valued as of the date of divorce, although special circumstances may warrant deviation from this rule. *See* ***Schinner v. Schinner***, 143 Wis.2d 81, 98, 420 N.W.2d 381, 388 (Ct. App. 1988). The trial court did not express any special circumstances which would justify accepting the expert's valuation that was nearly two years old at the conclusion of the trial.

The fact that the expert's reports did not assign a current value of the auditing service is significant in this case. By a letter of August 8, 1995, HSA terminated Paul's agreement and affiliation with it. Jacquelyn's expert acknowledged that the principal asset of the auditing service was the affiliation with HSA. He acknowledged that if there was no contractual relationship with HSA that could be sold to a third party, the auditing service had no fair market value. The contractual relationship was terminated. Any valuation based on the assumption that the contractual relationship existed is clearly erroneous. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 107, 536 N.W.2d 101, 106 (Ct. App. 1995) (valuation of livestock which did not take into account the cattle that were no longer part of the herd was clearly erroneous).

The trial court erred in relying on the reports of Jacquelyn's expert. We reverse the valuation of the auditing service and remand that issue for determination. We remind the trial court that in valuing a business it must factor in the liabilities, whether actual or contingent.[1] *See* ***Peerenboom v. Peerenboom,***

[1] Because we reverse and remand with respect to the valuation of the auditing service, we do not separately address Paul's claim that the trial court failed to account for contingent liabilities as a result of past auditing work.

147 Wis.2d 547, 553, 433 N.W.2d 282, 285 (Ct. App. 1988); ***Lewis v. Lewis***, 113 Wis.2d 172, 179-80, 336 N.W.2d 171, 175 (Ct. App. 1983).

As part of the property division, Jacquelyn sought to be compensated for Paul's reporting of her wages as his own for the purpose of paying into the social security system. Because Paul reported Jacquelyn's earnings as his own, Jacquelyn had no social security "account" of her own. When the parties start to draw social security, Paul will receive approximately $400 more per month than Jacquelyn. Jacquelyn presented expert testimony that the present value difference between the parties' social security "accounts" was $49,000. She argues that the trial court proceeded on an erroneous view of the law in determining that it did not have jurisdiction to consider Paul's artificially inflated social security "account."

We conclude that the trial court correctly determined that its ability to reimburse Jacquelyn for her earnings which were credited to Paul's social security "account" was constrained by the nondivisibility provisions of the federal social security law. *See* ***Mack v. Mack***, 108 Wis.2d 604, 611, 323 N.W.2d 153, 156 (Ct. App. 1982). Paul has no vested interest in his social security account, and federal law prohibits any division based on anticipated payment of a benefit. *See* ***Hisquierdo v. Hisquierdo,*** 439 U.S. 572, 581-82 (1979). We reject Jacquelyn's contention that ***Hisquierdo*** permits an inquiry into fraud or breach of trust concepts in order to reach the inflated value of Paul's account. Social security benefits may only be reached for a need-based claim, such as spousal support, and not one based on property rights. *See* ***id.*** at 587.

We turn to Jacquelyn's claim that the trial court erroneously exercised its discretion in denying her limited term maintenance when she was

subject to a two-year noncompete clause in the employment contract she signed with Paul. Maintenance and property division are interdependent and cannot be made in a vacuum. *See* ***Weiss v. Weiss***, 122 Wis.2d 688, 697-98, 365 N.W.2d 608, 613 (Ct. App. 1985). A substantial error in the property division necessitates reconsideration of the maintenance award. *See* ***Bahr v. Bahr***, 107 Wis.2d 72, 80, 318 N.W.2d 391, 396 (1982). Therefore, the maintenance award is also remanded to determine the possible maintenance for either party as the result of changes made in the property division.[2] This will give the trial court an opportunity to re-examine the effect the noncompete clause has had on Jacquelyn's ability to support herself.

Jacquelyn's remaining claim is that the trial court should have made Paul pay the attorney's fees she incurred between the initial trial date on October 13, 1995 and the adjourned trial date on September 10, 1996. She contends that the trial was adjourned because of Paul's failure to have certain property appraised as ordered by the court.

This aspect of Jacquelyn's argument on appeal is poorly developed. To the extent that she seeks attorney's fees as a sanction for Paul's failure to timely have the property appraised, the trial court's order that Paul pay "any expense" Jacquelyn incurred on October 13, 1995, did not encompass an award of attorney's fees. The trial court merely directed that Paul pay Jacquelyn's expert witness fee for that day of trial which was not completed.

[2] We therefore need not address Paul's contention that the trial court erroneously exercised its discretion in not holding open maintenance payable to him.

It is within the discretion of the trial court to award a contribution to attorney's fees. *See* ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 499, 496 N.W.2d 660, 666 (Ct. App. 1992). Attorney's fees are to be awarded upon a showing of need, ability to pay and the reasonableness of the fees. *See* ***id.*** The trial court correctly exercised its discretion in denying Jacquelyn a contribution to her attorney's fees when there was no evidence of her need for the contribution.

Paul challenges the $4172.66 credit Jacquelyn received in the property division to offset a bonus paid to a former subcontractor of the auditing service. The subcontractor worked for Paul from 1989 until 1993. The bonus, in the amount of $8345.37, was paid sometime after the initial October 13, 1995 trial date. Jacquelyn argued that the bonus was not a legitimate business expense.

Section 767.275, STATS., provides that any marital asset with a fair market value of $500 or more that is "transferred for inadequate consideration, wasted, given away or otherwise unaccounted for" within one year of the commencement of the divorce proceeding is rebuttably presumed to be part of the marital estate and must be considered in the property division under § 767.255, STATS. Thus, 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, 347 n.3, 565 N.W.2d 240, 242 (Ct. App. 1997). A rebuttable presumption is imposed and the burden of proof is shifted to the spouse attempting to exclude the asset as marital property. *See* ***id***.

The former subcontractor testified that he believed he was entitled to a bonus and that he did not ask for the bonus earlier in the event that there were

offsets to be made for errors in the audits he performed. Paul testified that with respect to work assignments and pay, the subcontractor was promised to be treated exactly as Paul's son, who was also an audit service subcontractor. Paul's son received a five percent bonus on a regular basis. The written "working agreement" between Paul and the subcontractor did not provide an entitlement to a bonus. The trial court, as the arbiter of credibility, was entitled to reject the testimony that the bonus was promised but just never paid. The trial court's determination that the money paid out as a bonus was marital property is not clearly erroneous. We affirm the credit to Jacquelyn.

Paul's final concerns involve alleged mathematical errors in computing the credit Jacquelyn received for household expenses and the amounts of personal property each party received. Failure to bring a motion before the trial court to correct such manifest error constitutes a waiver of the right to have such an issue considered on appeal. *See* ***Schinner***, 143 Wis.2d at 93, 420 N.W.2d at 386. We do not address these claims.

No costs to either party on appeal.

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

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