

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-0873

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

CHARLOTTE A. BAUSANO,

PETITIONER-RESPONDENT,

v.

JAMES J. BAUSANO,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. James J. Bausano appeals from the judgment divorcing him from Charlotte A. Bausano. He challenges the maintenance award, the valuation of his business, and the disposition of inherited property and

property acquired before the marriage. We reject his challenges to the divorce judgment and affirm.

¶2 The Bausanos were married for twenty-nine years. James is the president and majority shareholder of a closely held copy machine refurbishing, sale and service business. Charlotte worked for the copier business and also had other jobs. The parties had one minor child at the time the judgment of divorce was entered.¹

¶3 James claims that the circuit court misused its discretion in awarding maintenance because it did not adequately consider the relevant statutory factors. In awarding maintenance, the court considered the length of the marriage, the parties' ability to work, the parties' education and professional training, and that the copier business benefited from Charlotte's assistance. The court noted that while the parties had discussed early retirement, the business's diminished profitability and the marriage's demise made this plan unrealistic. The court also noted the property division as it bore on maintenance and maintenance as it bore on the property division. The court was aware that James had been the primary caretaker for the minor child since the parties' separation.

¶4 In addition to working for the copier business, Charlotte also worked as a certified nursing assistant, housekeeper and telemarketer. The court found that Charlotte's earnings as a nursing assistant were the best she could hope to achieve and it was unlikely that her earning level would significantly improve in

¹ The parties' other child reached the age of majority during the pendency of the divorce.

the future.² The court could not determine the time at which Charlotte's earnings would afford her a standard of living reasonably comparable to that enjoyed during the marriage. The court found a need for indefinite maintenance in light of Charlotte's inability to support herself at the marital standard of living, the benefits of her service to the copier business, the length of the marriage and the tax consequences to each party.

¶5 The court began its maintenance calculation with the proposition that the parties' income should be divided equally. The court found that the parties' monthly combined income was \$5206 based on James's actual income and Charlotte's earning capacity. Because James would have primary placement of the minor child, the court reduced Charlotte's monthly maintenance by a child support obligation of \$442,³ and awarded Charlotte \$678 per month in maintenance. The court deferred the date James had to make the property division equalization payment until the minor child completes high school.⁴

¶6 In addressing maintenance, a court is to be guided by the relevant WIS. STAT. § 767.26 (1999-2000)⁵ factors, *Trattles v. Trattles*, 126 Wis. 2d 219, 228, 376 N.W.2d 379 (Ct. App. 1985), and the support and fairness objectives set forth in

² At the time of the divorce, Charlotte was earning \$6.25 per hour working seventeen to twenty-three hours per week as a telemarketer. She had previously worked as a nursing assistant at \$8.50 per hour. The court set her earning capacity at \$8.50 per hour or \$1473 per month based on her earnings as a nursing assistant. Charlotte does not challenge this finding.

³ James complains that the child support award does not take into account that he has primary placement of the child. The court employed the child support percentage standards, and James did not move the court to deviate from those standards. Therefore, we do not consider this argument which is raised for the first time on appeal. *Meas v. Young*, 138 Wis. 2d 89, 94 n.3, 405 N.W.2d 697 (Ct. App. 1987).

⁴ James was required to pay interest on the equalization payment.

⁵ All statutory references are to the 1999-2000 version unless otherwise noted.

LaRocque v. LaRocque, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987). We will uphold the circuit court's determination of the amount and duration of maintenance unless the court misused its discretion in setting the award. *Bisone v. Bisone*, 165 Wis. 2d 114, 118, 477 N.W.2d 59 (Ct. App. 1991).

¶7 James argues that the circuit court made only a passing reference to the maintenance factors but did not provide any reasoning for its decision on maintenance. We disagree. The court recognized the relevant factors, and the weight to be given to the various factors was within the court's discretion. *Meyer v. Meyer*, 2000 WI 132, ¶49, 239 Wis. 2d 731, 620 N.W.2d 382 (Prosser, J., concurring) ("Sound discretion in maintenance determinations must reflect consideration of the factors set out in WIS. STAT. § 767.26, but the factors in the statute do not appear to be weighted, implying that the weighting will be done by the circuit court."). We reject James's suggestion that the circuit court did not perform a substantive analysis of the relevant maintenance factors. Rather, the court considered the relevant statutory factors, the facts of the parties' marriage, and the support and fairness objectives of maintenance. The maintenance award is not the product of a mechanistic approach.

¶8 James complains that the circuit court did not explain how its analysis of the statutory maintenance factors yielded the maintenance award. James does not cite any authority for the proposition that a circuit court must attribute a monetary value to each of the factors it considers when awarding maintenance.

¶9 James complains that the court began with an equal division of the parties' income. However, this is a sanctioned starting point for maintenance in

the context of a long-term marriage. *Bahr v. Bahr*, 107 Wis. 2d 72, 84-85, 318 N.W.2d 391 (1982).

¶10 James challenges the award of indefinite maintenance. He argues that the parties had intended to semi-retire upon the minor child's graduation from high school. However, as the circuit court found, the circumstances have changed dramatically since the parties made their semi-retirement plans. That plan cannot be accommodated in the divorce setting.

¶11 James also argues that limited term maintenance would encourage Charlotte to become self-supporting. This argument ignores that the circuit court attributed income to Charlotte at her highest earning capacity, even though her current income was less than her earning capacity. The court also found that it was unlikely that Charlotte's earning capacity would improve for the duration of her income-producing years. Indefinite maintenance was a proper exercise of the court's discretion under the facts of the case.

¶12 James argues that the court should have deducted the costs of caring for the minor child before determining maintenance. Those expenses should have been reflected in James's budget and argued to the circuit court. Moreover, Charlotte must pay child support to James in the form of an offset against her maintenance payment from him. James has not established a basis for reversing the maintenance award.

¶13 James contends that the circuit court did not consider that the family residence needs repair and that the appraiser's valuation did not consider the expense of maintaining the residence. This argument is inadequately developed, does not cite sufficient facts from the record and will not be considered by this

court. *Vesely v. Sec. First Nat'l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).

¶14 James next argues that the maintenance award is excessive and unfair. James must pay \$678 per month in maintenance, \$343 per month as interest on the property division equalization payment, support the minor child who resides primarily with him, and bear responsibility for substantial debt, insurance and health care expenses, and possible corporate tax liability. He contends that these payments leave him with insufficient income to meet his budget and other obligations. As will be discussed below, the court's allocation of financial responsibility is supported by the record in this case.

¶15 James argues that Charlotte should have been assigned some of the corporate debt and tax liability because she was the corporate vice president and secretary.⁶ James overstates Charlotte's involvement in the corporation. Charlotte provided clerical and customer support services to the copier business; James, the president and majority shareholder, was responsible for the day-to-day and financial operations. The corporation failed to file tax returns for twelve years. James also controlled the family finances; the Bausanos did not file personal income tax returns for twelve years.⁷ Charlotte assumed that all tax returns had been filed. The court found that James had the ability to see to it that corporate tax returns were filed and by choosing not to, wasted assets of the corporation, itself a marital asset. Under these circumstances, the court held the corporation, which

⁶ We do not address the suggestion that corporate debt may become a corporate officer's personal liability.

⁷ While the divorce was pending, the Bausanos brought their personal income tax returns current and expected federal and state income tax refunds.

James controls, responsible for taxes and penalties relating to the corporation's tax situation, and absolved Charlotte of any liability. We see no error.

¶16 James argues that the circuit court erroneously valued the copier business. Each party employed an appraiser to value the company's stock. James, through his appraiser, claimed that liquidation was the best measure of value because the business had been operating at a loss in recent years. James also contended that the business depends on his skill and would be worthless without him. The court found that a co-worker had recently obtained a minority stake in the business in the expectation that he would operate the business when James retires, and that there was no indication that James intended to liquidate the business. The court also found that once the divorce was completed, James intended to focus his efforts on the business and he expected the business to improve. The court found that the business had good prospects.

¶17 The court found that Charlotte's appraiser's replacement value was more credible than James's liquidation value. Charlotte's appraiser valued the business as an ongoing concern. The court found that the two appraisers agreed on the same values for the corporation's assets but discounted those values differently.⁸ The court deemed not credible James's contention that the copy machine inventory had lost 80% of its value in two years. The court reduced the inventory's value by 25% rather than the steeper discount associated with the liquidation value. The court valued the business at \$75,165.

⁸ For example, the appraisers differed on the value of software used by the business. Charlotte's appraiser valued it at \$2950, a depreciated amount kept on the corporation's books, and a loan fee of \$425. James's appraiser assigned no value to the software because it was obsolete and never worked well in the first place and the loan fees would have no value to the corporation upon liquidation. The court valued the software at \$1000.

¶18 James contends that the circuit court erred in selecting a valuation method. The appropriate valuation methodology is committed to the circuit court's discretion. *Sharon v. Sharon*, 178 Wis. 2d 481, 489, 504 N.W.2d 415 (Ct. App. 1993). Valuation of a close corporation is also discretionary and will not be disturbed on appeal unless it is contrary to the great weight and clear preponderance of the evidence. *Popp v. Popp*, 146 Wis. 2d 778, 797, 432 N.W.2d 600 (Ct. App. 1988).

A trial court is free to assess expert opinion and determine fair market value in light of testimony regarding the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net worth, the marketability of the shares, past earnings or losses and future earning potential.

Arneson v. Arneson, 120 Wis. 2d 236, 248-49, 355 N.W.2d 16 (Ct. App. 1984). The court's discretionary valuation of the copier business is supported by the record.

¶19 James argues that in valuing the business, the court neglected to consider the corporation's tax liability. However, James did not move the court to reconsider its valuation on this basis. Therefore, this claim is waived on appeal. *Schinner v. Schinner*, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988). Furthermore, the court stated its reasons for refusing to let James's failure to file corporate tax returns reduce the value of the company for purposes of division at divorce.

¶20 James complains that the court arbitrarily valued the inventory. We disagree. The court stated its reasons for valuing the inventory in light of the appraisers' opinions. The weight and credibility of the valuation evidence was for the circuit court to decide, not for this court to decide *de novo* on appeal. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988).

¶21 Finally, James complains that certain inherited property and property he acquired before the marriage should have been excluded from the marital estate. In particular, James refers to \$15,000 he inherited from his mother in 1996 and property he owned before the marriage (an automobile, a life insurance policy and savings bonds).

¶22 James lent the inherited \$15,000 to the copier business in 1996. The corporation repaid these funds in 1998 during the pendency of the divorce proceeding. James then used the funds to pay his son's college expenses.⁹ Although the inherited funds were used for a laudable purpose, college expenses for an adult child are not marital purpose debt. *Weiss v. Weiss*, 122 Wis. 2d 688, 699-700, 365 N.W.2d 608 (Ct. App. 1985). James's choice to use the inherited funds to pay college tuition did not mandate exclusion of the expended funds from the property division.

¶23 We turn to the property James brought to the marriage: an automobile, a life insurance policy and savings bonds. Under WIS. STAT. § 767.255, absent an agreement to the contrary, property owned prior to the marriage becomes marital property. *Lang v. Lang*, 161 Wis. 2d 210, 229, 467 N.W.2d 772 (1991). Here, James and Charlotte did not have an agreement relating to the treatment of this property. Therefore, the property was subject to division at divorce.

¶24 James complains that he must pay interest on the equalization payment to Charlotte. James retained the bulk of the marital property, including

⁹ Charlotte's respondent's brief states that James also used part of the inherited funds to make maintenance payments. James does not elaborate on this statement in his reply brief. Therefore, we do not address it further.

the marital home. He declined to sell property, such as a boat and other water craft, to raise funds or eliminate debt on these items. We do not see a misuse of discretion in requiring James to pay interest on the equalization payment.

¶25 We choose not to address James's argument, raised for the first time in his reply brief, that the court erred in not requiring Charlotte to fully reimburse the corporation for her use of a corporate vehicle during the pendency of the divorce. James explains that he did not raise this issue in his appellant's brief because the appellate record on this question was incomplete at the time he filed his appellant's brief. While that may be so, this is not cause for considering an issue raised for the first time in a reply brief. *Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).¹⁰

By the Court.—Judgment affirmed.

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

¹⁰ Had James desired to raise this issue in his appellant's brief, he should have moved this court to supplement the record on appeal with the necessary material and then filed his appellant's brief based on a complete record.

