

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 12, 1995

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.

NOTICE

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No. 95-1855-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

FRANCIS E. YOHNK,

Petitioner-Respondent,

v.

KLARA YOHNK,

Respondent-Appellant.

APPEAL from an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed in part and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. This matter arises out of post divorce proceedings. Klara Yohnk appeals an order determining that her interest in her former husband's business, Amstar Properties partnership, is \$7,163.18.¹ She argues that the trial court erred because it failed to consider the partnership's income and failed to award her one-half of his accrued wages. Because the trial court properly valued her interest, we affirm that portion of the order. Because

¹ This is an expedited appeal under RULE 809.17, STATS.

the trial court made no findings with respect to accrued wages, we remand to the trial court for findings.

The parties were divorced April 22, 1992. Klara's husband, Francis, owned a one-half interest in a business partnership known as Amstar. Amstar was a real estate development business that owned condominiums, apartments and a motel. The divorce judgment provided that Francis may liquidate his interest in the partnership and pay Klara

50% of the net amount of [Francis'] interest in the Amstar Partnership after payments of the debts and obligations associated with said partnership If the Amstar Partnership is liquidated, [Klara] shall have to agree to the valuation of the debts and assets. ... Said equal division with [Klara] shall include payment to her of one-half of any proceeds received for accrued wages owing to [Francis] by the Amstar Partnership.

When Amstar was dissolved in March 1994, Francis' accountant prepared an asset and liability statement. According to the statement, based upon values agreed upon by the partners, Francis received total assets of \$653,367.67 and assumed debts in the sum of \$639,041.30. His net equity, represented by the difference between the assets and debts, equaled \$14,326.37. Klara does not challenge these values.

Francis' accountant testified that no draws were taken from the partnership over the years in question. He testified that when the five properties were sold in 1993, the tax returns reflect a taxable gain, calculated by a sales price, less the purchase price, plus the depreciation. Because the business had declared depreciation for tax purposes as an expense against income, depreciation of \$66,302 was added back in for tax purposes when the properties were sold. He testified that this accounting procedure did not affect the actual sales price, nor affect the amount received by the partnership for each sale. The 1993 return also reflects a \$14,000 payment to Francis that Amstar had owed him at the time of the divorce.

Klara had moved for discovery of all the details of the dissolution, an accounting of all income and a determination of their one-half interest in Amstar. After the hearing, Klara's attorney stated: "I don't think my client is entitled to Mr. Yohnk's half that he got at the time of dissolution, but I think she's entitled to half of the income during the applicable period of time that the partnership ran before it dissolved." The trial court disagreed, finding that her interest was represented by the sum Francis received upon dissolution: "They used real property values, not a depreciation cost basis, for computations which tells me that the depreciation, while it has some value for tax purposes and value for accounting purposes, it didn't have any actual value to the liquidation of the partnership."

The court found that Francis' actual net value of his interest upon liquidation was \$14,326.37, and that Klara's interest was one-half this amount.

Klara argues that the trial court erred by not considering partnership income during the years after the divorce and before the dissolution. We disagree. First, the judgment of divorce does not provide that Klara is entitled to a portion of partnership income. It states that she is entitled to one-half of Francis' interest upon dissolution. Second, the accountant's testimony that no partnership income was distributed is undisputed.

The record reflects that the trial court correctly valued her interest. Generally, the valuation of an asset is a finding of fact. *Sharon v. Sharon*, 178 Wis.2d 481, 488, 504 N.W.2d 415, 418 (Ct. App. 1993). We do not overturn a trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. Klara contends that tax returns showed that Amstar had income of \$66,302 and that her interest entitles her to a portion of that income. The record fails to support her argument. The accountant, the CPA who prepared the tax returns, testified that the income reported on the partnership return reflected \$66,302 in depreciation added back into the calculation of taxable gain resulting from the sale of partnership properties. The accountant testified that the taxable income did not have any reflection on the sale price received by the partnership. Klara fails to show that the taxable partnership income was available for distribution.

Klara does not dispute that the partnership assets were set at fair market value at the time of dissolution. Klara fails to demonstrate that the

assets' fair market values do not reflect partnership income over the years in question. The record supports the trial court's determination. *Cf. Sharon*, 178 Wis.2d at 489, 504 N.W.2d at 418-19 (partnership interest properly valued according to sums received by withdrawing partner).

Klara also argues that the trial court erred by not awarding her one-half of the accrued wages that Amstar paid Francis, in the sum of \$14,000 owing to him at the time of the divorce. Francis responds that Klara failed to request this sum in her motion or at the hearing.

The divorce judgment states that Klara is to receive "one-half of any proceeds received for accrued wages owing to [Francis] by the Amstar partnership." Testimony was received that Francis was paid \$14,000. There was also proof that due to certain losses, Francis' net taxable income from the partnership was \$4,341.

Although the judgment provided for payment to Klara of proceeds Francis received for accrued wages, Klara did not specifically ask the trial court to address this issue. Her motion merely referred to the interest in the partnership, not Francis' accrued wages. Nonetheless, because the divorce judgment specifically addressed accrued wages, and because the issue was not fully tried, we conclude that the interests of justice require the matter to be remanded to the trial court. *See* § 752.35, STATS. On remand, the trial court shall determine the amount of "any proceeds received for accrued wages" owing to Francis by Amstar at the time of the divorce, but paid thereafter, and award Klara her portion under the judgment. *Cf. State v. Williams*, 104 Wis.2d 15, 22, 310 N.W.2d 601, 605 (1981) (the appellate court may remand for findings and conclusions).

By the Court. – Order affirmed in part and cause remanded with directions. Costs are awarded to petitioner-respondent.

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