COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 4, 1997

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1126-FT

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

IN RE THE MARRIAGE OF:

VICKY L. STELLFLUE,

Petitioner-Respondent,

v.

LLOYD C. STELLFLUE,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Trempealeau County: DANE F. MOREY, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. Lloyd Stellflue appeals the property division of the divorce judgment concerning his former wife, Vicky Stellflue.[1] After fourteen years of marriage and on the basis of hardship, the trial court included in the marital estate some farm real estate given Lloyd and his brother, Donald, shortly before the divorce by their parents and uncle. During the marriage and before the gifts, Lloyd operated these farms through a partnership with his brother, in addition to other farms they had purchased. After the gifts, Lloyd and Donald owned these in a form of co-ownership, as joint tenants and tenants in common. The partnership did not own the gifted farms at any time. The trial court judge who conducted the trial left the bench without issuing a decision. A second judge decided all issues, including any factual issues, after reviewing the trial transcripts and trial exhibits, without taking any additional testimony.

On appeal, Lloyd makes two basic arguments: (1) the trial court wrongly included the gifted real estate in the marital estate; and (2) the trial court wrongly adjusted Lloyd's personal and partnership debts downward and his personal and partnership assets upward, contrary to the evidence at trial. On the second issue, Lloyd makes several assertions. He claims that the brothers' transactions with the partnership had the effect of reducing his net worth. He claims that Donald and his parents, not the partnership, owned various pieces of farm equipment improperly included in the marital estate. He claims that the trial court improperly ignored liabilities owing to his parents. He also claims that the trial court miscounted assets and liabilities. Because the trial court reasonably exercised its discretion to include the gifted property but appears to have double-counted some assets, we affirm the judgment in part, reverse it in part, and remand the matter to the trial court for further proceedings.

Although most divorces do not warrant the division of gifted property, trial courts may include such property if a hardship exists. ***Popp v. Popp***, 146 Wis.2d 778, 791, 432 N.W.2d 600, 604 (Ct. App. 1988). Hardship is a discretionary finding, ***Asbeck v. Asbeck***, 116 Wis.2d 289, 295, 342 N.W.2d 750,

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

753 (Ct. App. 1983), and we will affirm such a finding if there is a reasonable basis for it. ***Id***. A hardship determination must be made in light of the facts and history of the case and relative financial circumstances of the parties before and after the divorce. ***Popp,*** 146 Wis.2d at 792, 432 N.W.2d at 605. The hardship exception means privation, not a hardship claimant's mere desire to continue an existing lifestyle, ***Doerr v. Doerr,*** 189 Wis.2d 112, 124, 525 N.W.2d 745, 750 (Ct. App. 1994), or the absence of other dividable marital assets. ***Popp***, 146 Wis.2d at 792, 432 N.W.2d at 605. It rests not on fairness or equitable principles, but on privation principles. *See* ***id.*** at 792, 432 N.W.2d at 604-05. It is a somewhat indefinite concept that includes consideration of many factors beyond the financial needs of hardship claimants. *See* ***Asbeck***, 116 Wis.2d at 295, 342 N.W.2d at 753. It is a case-by-case inquiry, ***id.*** at 296, 342 N.W.2d at 754, and the law presumes no hardship. *See* ***Hughes v. Hughes***, 148 Wis.2d 167, 173, 434 N.W.2d 813, 815 (Ct. App. 1988). We recognize the no-hardship presumption takes on special importance concerning gifted family business property. Courts have exhibited caution before using the hardship exception to invade gifted family business property. *See, e.g.*, ***Popp***, 146 Wis.2d at 790-93, 432 N.W.2d at 603-05. The legislature has made hardship invasion the exception, not the rule. *See* ***Asbeck,*** 116 Wis.2d at 291, 342 N.W.2d at 752.

Division of gifted, nonmarital property is not a one-sided inquiry into the economic needs of the hardship claimant. *See* ***Asbeck***, 116 Wis.2d at 295, 342 N.W.2d at 753. Such economic needs function as a threshold factor that, once reached, permit courts to consider other factors. For example, courts in nearby jurisdictions have considered the factors relevant to division of marital property, such as the length of the marriage, ***Roel v. Roel***, 406 N.W.2d 619, 622 (Minn. App. 1987), and the length of time the property was in marriage. *See* 3 RUTKIN, FAMILY LAW & PRACTICE § 37.06, at 37-110 (1995). Other relevant factors are each spouse's other property, ***id***., and the intent of the donor, ***Vanderpol v. Vanderpol***, 529 N.W.2d 603, 605 (Iowa App. 1994), especially if a close relationship existed between the donor and donee. ***Liebich v. Liebich***, 547 N.W.2d 844, 850 (Iowa App. 1996). Each spouse's contribution toward the gifted property is another factor. ***Martens v. Martens***, 406 N.W.2d 819, 822 (Iowa App. 1987). The availability of maintenance is relevant. *See* ***Girard v. Girard***, 521 S.W.2d 714, 718-19 (Tex. Civ. App. 1975); ***Burt v. Burt***, 799 P.2d 1166, 1169 (Utah App. 1990). Some courts have concluded that a severe

disparity between the spouses' economic conditions must exist to apportion gifted property. ***Reynolds v. Reynolds***, 498 N.W.2d 266, 271 (Minn. App. 1993).

After reviewing the record, we uphold the hardship determination. The trial court made a discretionary decision, ***Asbeck***, 116 Wis.2d at 295, 342 N.W.2d at 753, and reasonably exercised its discretion. Vicky had few assets and virtually no earning power. At the same time, she had nominal income and increased living expenses. On the other hand, Lloyd displayed no ability or inclination to pay Vicky maintenance. He claimed that the farm partnership did not provide him sufficient financial resources to pay Vicky maintenance. He claimed a negative net worth from his nongifted assets. Faced with this state of affairs, the trial court had nothing but Lloyd's interest in the gifted farm property to apply toward Vicky's financial needs. Under these circumstances, where the trial court needed to make a financial allowance for Vicky other than maintenance, the trial court could rationally include the gifted farm property in the marital estate on the basis of hardship.

Also, we conclude that the trial court had sufficient grounds to reject Lloyd and Donald's claims concerning Lloyd's net worth. It is for the trial court as the fact finder, not the appellate court, to weigh the evidence and credibility of the witnesses. *See* § 805.17(2), STATS. The brothers made various allegations on how their personal dealings with the partnership entity reduced Lloyd's net worth, either by increasing Lloyd's personal liabilities to Donald and the partnership, by increasing the partnership's debt to Donald, by reducing Lloyd's equity interest in the partnership, or by increasing Donald's equity interest. The brothers were not specific on many aspects of these transactions. Rather, they claimed in a general way that Lloyd owed either Donald or the partnership for Lloyd's borrowings from the partnership and for Lloyd's disproportionate partnership distributions. They also claimed that Lloyd owed either Donald or the partnership for Donald's loans to the partnership or Donald's disproportionate equity contributions to the partnership. The brothers further claimed that Donald individually owned several pieces of farm equipment used in the farm operations, with neither Lloyd nor the partnership having any ownership interest. Last, Lloyd claimed that his parents, not

himself, Donald, or the partnership, owned some of the equipment used in the farm operations.

Although these net worth claims involved substantial sums, Lloyd produced little or no documentation to support them. He relied on his and Donald's testimony. For example, Lloyd and Donald testified that Lloyd took more funds out of the partnership than Donald, either in the form of loans or distributions, and then spent these funds to support Vicky and their child. The brothers also testified that Donald, who is single, invested his smaller partnership distributions in the farm equipment Lloyd sought to exclude from the marital estate. In essence, Donald testified that he used partnership funds, in a broader sense, to buy the equipment. He stated he took the distributions from a checking account owned jointly by Lloyd, Donald, their mother, and the partnership. Under the Uniform Partnership Act, however, a presumption arose that this equipment was partnership property, from the fact that Donald used partnership funds to buy the equipment and then used the equipment in the partnership operations. *See* ***Estate of Schaefer***, 72 Wis.2d 600, 605, 611, 241 N.W.2d 607, 609-10, 612 (1976); § 178.05(2), STATS. The trial court could reasonably conclude that the brothers' evidence failed to rebut this presumption. They had no business records to verify the equipment's ownership. They offered only their own testimony, which the trial court had the right to reject.

In addition, partnerships must keep books and records sufficient to render partners complete and accurate accounts; those with inadequate records face adverse presumptions and have doubts resolved against them. *See* ***Wilson v. Moline***, 47 N.W.2d 865, 867 (Minn. 1951); ***Guntle v. Barnett***, 871 P.2d 627, 633 (Wash. App. 1994); 2 BROMBERG & RIBSTEIN, PARTNERSHIP § 6.05, at 6:53-54 (1994); § 178.16, STATS. This rule applies to Vicky's imputed marital partnership interest. Here, the brothers' poor record-keeping resolved doubts against their claims on equipment ownership, partnership advances, partnership distributions, partnership equity contributions, and partnership liabilities. Further, the brothers asked acceptance of large scale claims without documentation. This stood in stark contrast to the extensive documentation they supplied for each small scale $50 disbursement the partnership made to

Vicky. If litigants produce no evidence where litigants normally would, the trial court may infer that the true facts are the exact opposite of those asserted. *See* ***Booth v. Frankenstein***, 209 Wis. 362, 370, 245 N.W. 191, 193-94 (1932). In sum, the trial court, as the fact finder, could reject all Lloyd's net worth claims, including the claim of equipment ownership by the parents.

The trial court also had a sufficient basis to disregard the promissory note Lloyd and Donald had issued to their father in March 1978. First, despite the note's written terms, the evidence permitted the inference that the parents would never demand payment. In practice, neither the payors nor the payees seem to have carried the notes on their books at their face value. For example, Lloyd, Donald, and their parents had all failed to disclose the note on various occasions on their respective financial statements. They had sought loans and other financial assistance without disclosing the note either as an asset on the parents' financial application or as a liability on the brothers'. This divergence between the terms of the note and its practical treatment by the parties permitted the trial court to discount the note from its face value to its probable fair market value, *see* ***Schorer v. Schorer***, 177 Wis.2d 387, 399, 501 N.W.2d 916, 920 (Ct. App. 1993), and to set its fair market value at zero, with a corresponding zero liability for Lloyd, Donald, and the marital estate. *See also* ***Wright v. Wright***, 469 A.2d 803, 809-10 (Del. Fam. Ct. 1983).

Second, the trial court had no obligation to treat the parents' probable forgiveness of this note to constitute gifted property, exempt from the property division. The promissory note financed the farm operations, and Lloyd's partnership interest in these operations was part of the marital estate. This use of the note merged and commingled the liability created by the note with the marital estate and rendered any forgiveness of such debt a marital forgiveness, in which Vicky had a marital interest. However, the trial court erroneously disregarded the second $20,000 promissory note that the brothers had issued to their mother in August 1992. The evidence showed that the brothers issued the note to their mother as evidence of indebtedness for money their mother loaned them to purchase some farm land. Their mother obtained the money by cashing in her certificate of deposit at the local bank. The trial court included the land purchased with the money in the marital estate.

Inasmuch as the farm property purchased with the money was part of the marital estate, the liability associated with the purchase was also part of the marital estate. The trial court had no basis to include the farm land in the marital estate but exclude the debt incurred to purchase the farm land.

Last, Lloyd argues that the trial court ignored various debts, including consumer debts, which Lloyd's reply brief sets at about $3,400 (consumer debt $1,743, Visa $1,306.55 and hospital bill $359). Lloyd also claims that the trial court overvalued the marital estate by about $10,900. Lloyd states that 1.78 acres of the nongifted Erickson farm, valued at $1,700, actually belongs to his brother, not him. Lloyd also claims that the trial court double-counted a trailer home valued at $9,200 after already valuing it as part of the Erickson farm appraisal. The record is unclear as to why the trial court ignored these debts or why it included the 1.78 acres and again the trailer home. It appears that the trial court double-counted the trailer and improperly included his brother's 1.78 acre parcel. *See* ***Peerenboom v. Peerenboom***, 147 Wis.2d 547, 552, 433 N.W.2d 282, 284 (Ct. App. 1988). Here, however, the overvaluation appears to have been only fifty percent, by virtue of the fact that the trial court assigned only one-half the property's overcounted value to Lloyd as a one-half co-owner of the real estate. The net overvaluation approximated $5,500. Because we cannot tell from the record whether the $3,400 of debts should be disregarded or why the court included the trailer home and the 1.78 acre parcel, the trial court on remand should revisit these issues.

We therefore affirm the trial court's award based on hardship, but reverse and remand the property division for reexamination consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part; and cause remanded for proceedings consistent with this opinion. No costs to either party.

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