

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2467

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DEBRA SUE FARBER,

PETITIONER-APPELLANT,

v.

DANIEL PAUL FARBER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sauk County:
VIRGINIA A. WOLFE, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Debra Farber appeals a judgment of divorce from Daniel Farber. She claims the trial court erred by ordering the parties to sell a funeral chapel and apply the proceeds to a mortgage assigned to Daniel, rather

than valuing and allocating the funeral chapel based on the appraisal of the property's value which Debra had submitted. For the reasons discussed below, we conclude the trial court acted within its discretion and affirm.

BACKGROUND

¶2 The parties were married in 1984 and divorced in 1998. During the marriage, Daniel attended mortuary school and the parties went into the funeral home business. The business prospered, and they acquired several funeral home properties. The only property whose division is disputed on this appeal is the Cazenovia Funeral Chapel.

¶3 The parties acquired the Cazenovia Funeral Chapel in 1986. The funeral chapel was also used as security on a business loan for the Farber Funeral Home in Reedsburg. At the time of the divorce, the Reedsburg Bank mortgage on the Cazenovia and Farber Funeral Homes was \$130,091. The parties disputed the value of the Cazenovia Funeral Chapel, but stipulated that the Farber Funeral Home was worth \$275,220. The trial court awarded Daniel the Farber Funeral Home and assigned him the Reedsburg Bank mortgage. It ordered that the Cazenovia Funeral Chapel be sold, and the proceeds applied to the Reedsburg Bank mortgage.

¶4 The trial court also ordered Daniel to make an equalization payment to Debra based on the value of the marital estate excluding the value of the Cazenovia Funeral Chapel. On reconsideration, the trial court clarified that Daniel's equalization payment to Debra was to be increased after the sale of the funeral chapel to include 50% of the funeral chapel's net sale proceeds to account for the fact that application of the proceeds to the Reedsburg Bank note benefited Daniel in the property division.

STANDARD OF REVIEW

¶5 The valuation and division of the marital estate lie within the sound discretion of the circuit court. *See Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). Therefore, we will affirm any property division which represents a rational application of the correct legal standards to the facts of record. *See id.* We will independently determine, however, whether the proper legal standards were applied. *See Hartung v. Hartung*, 102 Wis. 2d 58, 66-67, 306 N.W.2d 16 (1981).

ANALYSIS

Authority to order funeral chapel sold

¶6 Under WIS. STAT. § 767.255(1) (1997-98),¹ the trial court “shall divide the property of the parties and divest and transfer the title of any such property accordingly.” This provision does not mandate the liquidation of marital assets. *See Arneson v. Arneson*, 120 Wis. 2d 236, 246-47, 355 N.W.2d 16 (Ct. App. 1984). However, we are satisfied that the language of the statute allows the trial court to order the sale of real or personal property as necessary to effectuate an equitable division of the property. Indeed, we view this as a relatively common and appropriate practice in situations where the parties cannot agree upon the disposition of a particular asset, or its value, or where the property division would be grossly unequal if the largest asset in the estate were awarded to one party. We conclude that the trial court had the authority to order the parties to sell the funeral chapel.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶7 Debra contends that, even if the trial court had the authority to order the funeral chapel sold, it erroneously exercised its discretion by failing to set the terms of the sale. In particular, she questions how the parties are to agree on a selling price when they could not agree on the property's value. We note, however, that a low valuation would have been in Daniel's interest if he were awarded the funeral chapel and required to compensate Debra for half its value in his equalization payment. The court's order largely removes this incentive, however. Even though he must still compensate Debra for her 50% interest in the property, it is now to Daniel's advantage to receive the highest possible sale price, in order to reduce his outstanding debt to the Reedsburg Bank as much as possible. Because the trial court's order tends to place the parties' interests in alignment, we do not think it was irrational for the trial court to reason that the parties could cooperate in effectuating the sale at market value. Also, as the trial court noted in its reconsideration order, further remedies would be available from the trial court if one of the parties refused to cooperate, in violation of the order.

Failure to assign present value to property

¶8 As a general rule, marital assets are to be valued as they exist on the date of the divorce. See *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Special circumstances may warrant deviation from this rule, however. See *id.* One such exception applies to assets which are difficult or impossible to value with any degree of accuracy as of the divorce date because they depend in part on future events. See *Bloomer v. Bloomer*, 84 Wis. 2d 124, 129-34, 267 N.W.2d 235 (1978) (pension fund); *Weiss v. Weiss*, 122 Wis. 2d 688, 697, 365 N.W.2d 608 (Ct. App. 1985) (installment payments for a partnership stock buy-out based on future contingency fees). The trial court may

divide those types of assets on a percentage basis without assigning a present value. See *Bloomer*, 84 Wis. 2d at 136; *Weiss*, 122 Wis. 2d at 697.

¶9 Debra points out that, unlike the assets at issue in *Bloomer* and *Weiss*, the funeral home's worth was ascertainable without reference to future events. She argues that the trial court therefore had an absolute duty to make a factual finding as to its present market value. We disagree.

¶10 Daniel listed the funeral chapel as worth \$25,000 on his financial disclosure statement, and testified that he believed the property to be worth between \$30,000 and \$40,000. The 1997 real estate tax assessment of the funeral chapel was \$77,300. Debra's expert opined that the funeral chapel was worth \$90,500. The trial court noted that Daniel's opinions as to the funeral chapel's value were unsupported by any other evidence, and found the expert's opinion problematic in several regards. Given the wide disparity in the assessments of the funeral home's value offered by the parties, the trial court was justified in concluding that it would be very difficult to determine the asset's actual value based on the evidence presented.

¶11 The two cases on which Debra relies to support her contention that the trial court was obligated to assign the funeral chapel a present value both deal with the use of expert testimony to determine the fair market value of property to be included in the marital estate. See *Schorer v. Schorer*, 177 Wis. 2d 387, 399, 501 N.W.2d 916 (Ct. App. 1993); *Dean v. Dean*, 87 Wis. 2d 854, 871, 275 N.W.2d 902 (1979). Neither case involves a court-ordered sale of property. As we have explained above, it is not necessary for the court to make any determination of the value of an asset which is to be divided on an equal-percentage basis.

¶12 Debra appears to be under the assumption that Daniel has been awarded 100% of the funeral chapel's value, as a windfall above and beyond the otherwise equal division of the parties' remaining assets and liabilities. While we agree that is how the original judgment of divorce reads, that result was modified by the trial court's order on reconsideration. As modified, the judgment now requires Daniel to increase his equalization payment by one-half of the funeral chapel's net sale proceeds. The trial court has therefore satisfied its obligation to see that all of the parties' property is divided according to its fair market value. *See Schorer*, 177 Wis. 2d at 399. We see no erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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

