

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 26, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 2004AP1471**

**Cir. Ct. No. 2003FA169**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**GRAHAM L. SMITH,**

**PETITIONER-RESPONDENT,**

**V.**

**PAMELA MAE SMITH,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Rock County:  
RICHARD T. WERNER, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Pamela Smith appeals from the property division and maintenance provisions of the judgment divorcing her from Graham Smith. We affirm for the reasons discussed below.

### **BACKGROUND**

¶2 Pam and Graham were married for twenty-two years and had two adult children. By the time of the divorce, Graham was sixty-four years old and had retired on disability. He had monthly income of \$2746 from his retirement account and \$1191 from social security. Pam was fifty-four years old and in good health. During the marriage, both Pam and Graham had worked out of the home for a company called Shaklee. Essentially, they recruited people to sell Shaklee products and then earned bonus money from Shaklee based on a percentage of the sales made by the people they had sponsored. In their peak years, the Smiths were making over \$20,000 per year from Shaklee.

¶3 About three years prior to the divorce, Pam had stopped working actively at the Shaklee business to take up painting, and the couple's Shaklee income had dropped substantially. Although Pam had sold only one of her paintings for \$300 to a friend and had given many of the rest away to family members, the trial court valued the remaining forty-three paintings it awarded to Pam at \$200 each, assigning \$8600 to her portion of the property division.

¶4 The trial court accepted Graham's valuation of the Shaklee business at \$32,960, and awarded the inventory and all but one of the Smiths' clients to Pam. The court stipulated, however, that Graham could keep the position of "uplink sponsor" within the Shaklee organization, meaning that Graham could continue to receive bonus money from the sales generated by Pam and her clients, so long as he also generated a certain amount of business of his own.

Notwithstanding Graham's anticipated continued participation in the Shaklee business, the court assigned the entire value of the business to Pam's portion of the property division.

¶5 The trial court found that Pam could increase her income from Shaklee to \$1000 per month and could earn approximately an additional \$1376 by working forty hours a week at \$8 an hour at a regular job. It also noted that she could perhaps sell some paintings. Taking into account taxes, the trial court determined that \$300 per month in maintenance would be sufficient to allow Pam to meet her estimated monthly budget of \$2100 until she was able to become self-supporting, which it felt she could do within three years.

## DISCUSSION

¶6 The award of maintenance and division of the marital estate are discretionary determinations which we will uphold so long as the trial court reasonably applied the applicable law to the facts of record. *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996).

¶7 Pam first argues that the trial court erroneously exercised its discretion by failing "to fully divest Graham's interest in the Shaklee business awarded to Pam," as she contends was required by the property division statute, WIS. STAT. § 767.255 (2003-04).<sup>1</sup> Subsection (1) of that statute states the trial court "shall divide the property of the parties and divest and transfer the title of any such property accordingly." The key word in this context is "accordingly."

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

The Smiths' participation in the Shaklee organization was not a real property interest with a recorded title. Therefore, the trial court was not required to "divest and transfer the title" of the business. Nor did the statute prohibit the trial court from awarding a partial interest in the business to each of the parties, which appears to be the practical effect of its decision to allow Graham to retain an "uplink sponsor" position in the Shaklee organization and to keep one of the parties' clients. Furthermore, because the value the trial court assigned to the business was based upon the existing clients the trial court assigned to Pam, we are satisfied that the trial court could properly assign the entire value of the business to Pam in the property division.

¶8 With regard to maintenance, Pam claims the trial court erroneously based the award on her earning capacity rather than her actual earnings. She acknowledges that a trial court may permissibly impute income to a party when determining a support obligation "if it finds a spouse's job choice voluntary and unreasonable," but disputes that standard has been met here. *Sellers*, 201 Wis. 2d at 587. More specifically, Pam contends there is no record that she voluntarily reduced her income because, aside from the Shaklee business, she had worked outside the home for only three months during the entire marriage. In addition, she asserts, it was unreasonable to require her to go out and get a job while also redeveloping the Shaklee business. The fact that Pam had chosen not to work outside the home during the marriage did not make her decision any less voluntary, however. Pam was not disabled and had not been laid off or unsuccessful at attempts to find work. Even if Pam's decision to work limited hours at the Shaklee business during the marriage was reasonable, the trial court could properly deem it unreasonable for Pam to continue working limited hours following the divorce when she would have her own household and was in good

health. Further, taking into account testimony that the Shaklee business could be maintained with about ten hours of work each week, we do not consider it unreasonable for the trial court to have calculated an earning capacity for Pam based on a full time job at \$8 an hour.

¶9 Assuming it was proper to base the maintenance award on her earning capacity, Pam still maintains that the trial court erroneously exercised its discretion by also imputing \$1,000 per month in income to her from the Shaklee business, while not imputing any income to Graham from the Shaklee business. It does appear that, as an uplink sponsor for Pam, Graham would earn a certain amount of money from all of the business that Pam or her clients generated, in addition to any new business that he himself generated. However, there was no direct testimony as to how much Graham was likely to earn if the bulk of the Shaklee clients and business were awarded to Pam.<sup>2</sup> In contrast, Pam testified that she believed she could net \$1,000 per month from Shaklee. Given the more speculative nature of the testimony about Graham's potential Shaklee income, the trial court did not erroneously exercise its discretion in imputing income from Shaklee to Pam, but not to Graham.

¶10 Pam also challenges the trial court's conclusion that she could become self-supporting within three years, given her age and her extended absence from the job market. As we view it, however, the court's decision to award maintenance for three years is an acknowledgement of her absence from the job market. The trial court's determination that Pam could eventually earn enough to

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<sup>2</sup> Graham did testify that he believed the Shaklee business could generate about \$1500 per month within about six months, but it appears that amount would include business from the couple's current clients, who were awarded to Pam.

meet her budget was based on facts in the record, such as her college degree, success with the Shaklee business, and relatively good health. We therefore see no misuse of discretion in the time limit the trial court set. If Pam is unable to find full time employment with reasonable effort or to achieve the level of income anticipated by the trial court, she can move for modification of the maintenance award, prior to its expiration.

¶11 Finally, Pam complains the trial court suggested she could earn money from selling her paintings, when it had awarded her the paintings as part of the property settlement. She points out that the practice of requiring one spouse to liquidate his or her portion of the property settlement to provide a stream of income was disfavored in *LaRocque v. LaRocque*, 139 Wis. 2d 23, 34, 406 N.W.2d 736 (1987). We are not persuaded that Pam has fairly characterized the trial court's decision. Pam testified she intended to continue to paint, whether or not she was ever able to sell any paintings. Thus, any future income from painting would not have to come from the paintings she had already done, but could be generated from future painting. Furthermore, Pam testified she would support herself, in part, through the sale of her art. In any event, since the trial court did not impute any actual amount of income to Pam's painting, we see no harm in its comments that Pam might be able to sell some paintings.

*By the Court.*—Judgment affirmed.

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

