

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2001

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.

No. 01-1170-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MICHELLE L. PETERS,

PETITIONER-APPELLANT,

V.

JOSEPH A. PETERS,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County:
PETER NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michelle Peters appeals her divorce judgment. She challenges the property division, arguing that the trial court erroneously valued her former husband, Joseph's, interest in a family corporation at zero, when the undisputed book value was \$279,000. She also argues that regardless of the

valuation of his interest, the trial court erroneously failed to award her one half the stock. Because the record supports the trial court's determination, we affirm the judgment.

¶2 In 2001, the parties were divorced after a three-and-one-half-year marriage. Joseph has been employed by Triple P Corporation since 1983. The corporation is principally owned by Joseph's two brothers; each holds a 40% interest, while Joseph owns the remaining 20%.

¶3 A key issue at trial was the valuation of Joseph's interest in the corporation, described as a construction company. Joseph testified that he has no intention of selling his interest in the corporation under any circumstances. He explained that he liked his job but would not want to continue to work for Triple P unless he owned his stock.

¶4 Michelle presented the testimony of Thomas Zoeller, owner of De Pere Business Center. Zoeller, who had been an Internal Revenue Service agent, has a bachelor's degree in business administration, a master's degree in taxation, and is a certified financial planner. He testified that much of his work involves income and estate tax related issues. He also performs business valuations.

¶5 Zoeller testified that the object of a business valuation is "[g]enerally [to] come up with what would the business transfer [for,] assuming you have a willing seller and a willing buyer." He testified that he used four methods of valuation: the book value method, which he believed reflected the lowest value; straight capitalization, which yielded the highest value; the capitalization of earnings method; and, finally, a years purchase method. Based upon the

application of these methods, Zoeller concluded that Joseph's interest in the company was worth \$279,000.

¶6 Zoeller testified that the only information he used was derived from Schedules A, C, and E of Triple P, Inc.'s, 1996 through 1999 tax returns. He did not request access to the company books. He did not consider the collectability of accounts receivable, did not obtain profit and loss statements, and did not inquire as to the company's growth prospects. He stated that he did not talk to anyone at the company. He did not consider the marketability of the stock in his valuation or consider a discount due to Joseph's minority interest. In determining the average income over 1996 to 1997, Zoeller reduced that income by \$6,500, admitting that this was an "arbitrary, subjective" valuation on his part.

¶7 On cross-examination, Zoeller was asked what a willing buyer would pay for just Joseph's interest. Zoeller answered: "Probably a nominal amount." Counsel inquired, "Nominal meaning what?" to which Zoeller replied: "I don't know. You wouldn't have a willing buyer. ... I wouldn't be interested in it, would you?"

¶8 The following exchange took place:

Q. [Y]ou would advise me to pay a nominal amount for that interest?

A. You either got to buy it at bargain one, or, two, you have to get some type of agreement with the company that if you leave for any conditions or you terminated for services for any conditions, you're going to get your "X" number of dollars back.

Q. And one of your suppositions is I get a bargain. That's a relative term, isn't it?

A. Yes.

Q. What is a bargain in your estimation given your experience for this interest? I'm sitting across from you in your office. I'm saying, "What is a bargain? What should I pay Joe for that?" ... Would you pay a dollar? Would you tell me to pay one dollar for it?

A. I don't know.

Q. Would you tell me to pay \$1,000,000 for it?

A. I don't know.

Zoeller explained that a minority share in a family business is not easy to market.

¶9 The trial court found that Zoeller's opinion was that Joseph's interest had nominal value when considering the accepted definition of fair market value. "[I]mportantly, Mr. Zoeller was unable to give a valuation for the business as of the date of the hearing based on the willing seller/willing buyer definition." The court stated: "The best [Zoeller] could do on redirect was indicate that [Joseph's] interest had a value of \$279,000 to a willing buyer who was guaranteed a return of his investment under any circumstances. However, that hypothetical did not include a seller willing to sell under those circumstances."

¶10 The trial court determined that Zoeller was asked to testify "out of his element" and, "even if one could assume he had the necessary credentials, he was not provided with the necessary tools to provide an opinion which would carry persuasive weight in view of this finder of fact." The trial court determined that the record was insufficient to set any value on Joseph's interest.

¶11 Michelle argues that the trial court erroneously failed to place any value on Joseph's interest in Triple P, Inc. Michelle contends that the court should have placed more weight on Zoeller's opinion as to book value. Because the record supports the trial court's determination, we reject Michelle's argument.

¶12 Fair market value is the proper method of valuing property in a divorce proceeding. *Liddle v. Liddle*, 140 Wis. 2d 132, 138, 410 N.W.2d 196 (Ct. App. 1987). Fair market value is the price that property will bring when offered for sale by one who desires but is not obligated to sell and bought by one who is willing but not obligated to buy. *Id.*

¶13 Generally, the issue of property division is addressed to trial court discretion. However, the valuation of a given asset is a factual determination. *Siker v. Siker*, 225 Wis. 2d 522, 527-28, 593 N.W.2d 830 (Ct. App. 1999). As a result, “appellate review of a trial court's valuation of a closely-held business in a divorce action should proceed on the clearly erroneous standard.” *Id.* at 532. When reviewing issues of fact, appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. *Estate of Dejmajal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).

¶14 The weight and credibility to be given to the opinions of expert witnesses is uniquely within the province of the trial court. *Siker*, 225 Wis. 2d at 528. “[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Id.* (citation omitted).

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.

Id. at 530-31 (citation omitted).

¶15 Here, the only expert testimony was offered by Michelle's expert, Zoeller. He offered a number of methods that he employed in the valuation process. However, he conceded that he could not provide an opinion for anything more than nominal fair market value for Joseph's stock. The trial court believed this testimony and, as a result, the court's finding that the stock had no more than nominal value is not clearly erroneous.

¶16 Michelle argues, nonetheless, that the trial court erroneously placed the burden of proof on her to demonstrate the value of the asset. She argues that it is the trial court's obligation, not hers, to properly value the asset, relying on *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 853, 454 N.W.2d 55 (Ct. App. 1990). Michelle misreads *Sommerfield*. It is the court's obligation to determine fair market value in the context of the evidence at trial, not in the absence of such evidence. Because the evidence at trial indicated a nominal value, the court did not err.

¶17 Next, Michelle argues that the court misinterpreted its authority under WIS. STAT. § 180.1805(3).¹ She contends that a statutory close corporation

¹ WISCONSIN STAT. § 180.1805 (1999-2000) reads:

No interest in shares of a statutory close corporation may be transferred without the written consent of all shareholders holding voting stock, unless the interest is transferred in any of the following circumstances:

- (1) As provided in s. 180.1807.
- (2) To the corporation or to any other holder of the same class or series of shares.

(continued)

may be transferred without the written consent of all shareholders in the event the transfer is to a shareholder's immediate family, which is defined to include the shareholder's spouse. From this proposition, she argues that the court erroneously exercised its discretion when it failed to award her half of Joseph's stock, or 10% of the corporation. We do not resolve Michelle's issue of statutory interpretation because the record reveals a rational factual basis for the court's decision.

¶18 The determination of property division is addressed to trial court discretion. *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). Discretion is the reasoned application of the proper principles of law to the facts that are properly found. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306

(3) To members of the shareholder's immediate family, or to a trust, all of whose beneficiaries are members of the holder's immediate family. In this subsection, "shareholder's immediate family" means the shareholder's spouse, parents, lineal descendants, including any adopted children and stepchildren, and the spouse of any lineal descendants, and brothers and sisters.

(4) To a personal representative on the death of a shareholder or to a trustee or receiver as the result of a bankruptcy, insolvency, dissolution or similar proceeding brought by or against a shareholder.

(5) By merger or share exchange that becomes effective under ss. 180.1101 to 180.1107 or a share exchange of existing shares for other shares of a different class or series in the corporation.

(6) By a pledge as collateral for a loan that does not grant the pledgee any voting rights possessed by the pledgor.

(7) After termination of the corporation's status as a statutory close corporation.

(8) As otherwise provided in the corporation's articles of incorporation or in an agreement among shareholders under s. 180.1823.

N.W.2d 16 (1981). It is well established that a trial court, in the exercise of its discretion, may reasonably reach a conclusion that another court would not. *Liddle*, 140 Wis. 2d at 156. We are to look to the record for reasons to sustain a trial court's discretionary decision. *In re R.P.R.*, 98 Wis. 2d 613, 619, 297 N.W.2d 833 (1980).

¶19 Here, the court found that Zoeller opined that a 20% minority interest in the family business only had nominal fair market value. Because the court could reasonably conclude that the stock was of nominal value, it could rationally conclude that the award of 10% of the stock would confer no actual benefit to Michelle. As a result, its decision to allow Joseph to retain the stock is rationally based and sustained on appeal.

By the Court.—Judgment affirmed.

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

