

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 2004

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. 03-2115
STATE OF WISCONSIN**

Cir. Ct. No. 01FA000296

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

KEITH P. HERLITZKE,

PETITIONER-RESPONDENT,

v.

JOLENE M. HERLITZKE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Jolene Herlitzke appeals a judgment divorcing her from Keith Herlitzke after more than twenty years of marriage. Jolene challenges

the property division, her maintenance award and the circuit court's decision denying her motion for attorney fees. We reverse.

¶2 Jolene first challenges the circuit court's ruling that the value of the appreciation of several family businesses is Keith's separate property. The general rule is that when the appreciation of separate property is passive—due solely to general economic conditions like inflation or normal appreciation of an asset—the property retains its separate character. *Schorer v. Schorer*, 177 Wis. 2d 387, 407, 501 N.W.2d 916 (Ct. App. 1993). Where, however, “the appreciation of separate property is due to the efforts and abilities *of the marital partnership*, that appreciation becomes part of the marital estate” subject to division at divorce. *Id.* (emphasis added).

¶3 The key issue here, then, is whether the appreciation in the businesses was “due to the efforts and abilities of the marital partnership.” The circuit court found, as a matter of fact, that the appreciation was due (1) to Keith's parents' efforts; (2) to Scott's, Keith's brother's, efforts; and (3) to general economic conditions. It therefore excluded the appreciation from the marital estate.

¶4 We will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2001-02).¹ Despite this deferential standard of review, we conclude after an extensive review of the record that the circuit court's factual findings regarding the appreciation of the businesses are clearly erroneous.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶5 We begin with some background facts that are not in dispute. Keith worked with his two brothers, Scott and Rodney, at Potato King, a business started by their parents in 1958. The brothers gradually took over running the business and by 1984, the parents had a very limited role in the business. At the time the children began running the business, it had 1 to 3 million dollars per year in earnings with about twelve employees. The parents gifted the business to the children, beginning in 1989 and ending in 1992. By 2001, Potato King had been divided into three separate businesses with combined revenue of 18 to 20 million dollars, employing approximately fifty people. The profits of the businesses went up 100% between 1999 and 2002.

¶6 The circuit court found that the appreciation was due to the efforts of Keith's parents. It is true that the parents started the business and that the current existence of the companies is therefore attributable to them to some degree. Nevertheless, the children have been running the company (now, companies) for the last 20 years and have seen growth in revenue from 1 to 3 million dollars to 18 to 20 million dollars per year. There was no testimony that the parents were seriously involved in running the business after 1984. In addition, the children were solely responsible for the diversification of the business into three separate companies, which led to the rapid growth. Therefore, the circuit court's finding that the appreciation during the marriage was due to the efforts of the parents is clearly erroneous.

¶7 The circuit court also concluded that the appreciated value of the businesses was not due to the efforts of Keith, but rather due to the efforts of Scott. However, Scott, Keith and Jolene all testified to the contrary. Scott testified that he is president of the companies and makes major decisions, but that both his brothers have important roles in the businesses. He testified that his brother

Rodney is in charge of payroll, accounts payable and sales and that Keith is in charge of the transportation aspect of the business. Scott testified that he and his brothers make business decisions together, usually by consensus. Scott also testified that the brothers are paid roughly equally.

¶8 Keith testified that he manages the day-to-day running of RSK Transportation—the business with the most rapid recent growth—except for financial issues, which Scott manages. He testified that he usually works from 6:30 a.m. until 4 p.m., every weekday, every third Saturday, and is on call 24 hours a day, 7 days a week. Keith testified that he receives no emergency calls on some nights, but as many as five or more calls on other nights. He testified that the drivers were instructed to call him first in an emergency, and that he would provide support and decide how to proceed. Keith testified he manages 28 to 30 drivers and is responsible for personnel matters such as hiring and firing. Finally, Jolene testified that Keith was an equal partner with his brothers in the businesses and that Keith was never treated as an underling.

¶9 While it is true that Scott is the president of the corporation and is the only one of the brothers to hold a college degree, Keith worked long hours, was constantly on call and had major areas of responsibility. Keith was also involved in the major business decisions. Therefore, the circuit court's factual finding that the business appreciated largely due to the efforts of Scott, not Keith, is clearly erroneous.

¶10 Finally, the circuit court attributed the appreciation to general economic conditions. We find no facts in the record about industry conditions to substantiate this finding and, once again, Scott's testimony contradicts it. Scott testified that the appreciation was active—that is, due to the efforts of the brothers.

Scott testified that the appreciation was due to the brothers' hard work and the fact that they had done a good job of contacting clients and providing good service.

¶11 In sum, the circuit court's findings of fact regarding the appreciation of the companies were clearly erroneous. Since Keith's efforts helped lead to the appreciation, the appreciation is attributable to the marital partnership because Keith and Jolene mutually agreed that she would care for the children and be a homemaker while he worked outside the home. Therefore, we reverse the circuit court's conclusion that the appreciated value of the companies is Keith's separate property. The appreciation is marital property subject to division at divorce.

¶12 Jolene next argues that the circuit court erred in setting maintenance. The circuit court awarded Jolene limited term maintenance of \$3500 per month for a period of three years, \$2500 per month for another three years, and \$1500 per month for six years.

¶13 There are two primary objectives of a maintenance award: "to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective)." *LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987). To achieve these objectives, the circuit court should consider a number of factors, such as the length of the marriage, the age of the parties, the parties' health, the property division and the earning capacity of the party seeking maintenance. *See* WIS. STAT. § 767.26. A maintenance award is committed to the circuit court's discretion. *LaRocque*, 139 Wis. 2d at 27.

¶14 The circuit court erroneously exercised its discretion in setting maintenance because it did not base its decision on Keith's actual income of

\$348,000 per year and did not explain how the support and fairness objectives of maintenance were met by its decision. Before it set the award, the court pointed out that Keith would only have about \$60,000 per year in income if it were not for his employment in the family business. There is no legal basis for basing maintenance on Keith's hypothetical income should he leave the family business, rather than on his actual income. The circuit court also failed to adequately explain how the support and fairness objectives of maintenance were met by its award, especially because the award, during the three years of the highest payments, is about 10% of Keith's income of \$348,000, and from there is reduced to even a smaller fraction of his income. Therefore, we conclude that the circuit court misused its discretion and we remand for a new maintenance determination.

¶15 Jolene next argues that the circuit court erred in making her responsible for her own attorney fees, which are approximately \$100,000. The circuit court may order one party to contribute to the other's attorney fees under WIS. STAT. § 767.262. The circuit court should consider the reasonableness of the fees, the need of the party requesting the fees, and the ability of the other spouse to pay. *Holbrook v. Holbrook*, 103 Wis. 2d 327, 343, 309 N.W.2d 343 (Ct. App. 1981). A decision to award attorney fees is committed to the circuit court's discretion. See *Markham v. Markham*, 65 Wis. 2d 735, 756, 223 N.W.2d 616 (1974).

¶16 We conclude that the circuit court misused its discretion in denying Jolene's motion for attorney fees. When the circuit court denied the motion for contribution, it had just awarded Keith over one million dollars in separate and marital property, while Jolene was awarded approximately \$350,000, much of which was unavailable to her to pay for her attorney fees because it was equity in the family home. The circuit court's decision to deny any contribution by Keith

whatsoever was unreasonable because it would have imposed an extreme hardship on Jolene and would have forced her to spend a substantial portion of the money available to her on her attorney fees. Because both the property and maintenance decisions have been set aside, however, we cannot now evaluate the reasonableness of a request for attorney fees because that question is intertwined with the property and maintenance questions. Therefore, the circuit court should consider Jolene's motion for attorney fees anew after it has decided the property and maintenance issues on remand.

By the Court.—Judgment reversed and cause remanded with directions.

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

