

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 6, 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. 03-2550
STATE OF WISCONSIN**

Cir. Ct. No. 01FA000104

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

JEANNE G. FRAWLEY,

PETITIONER-APPELLANT,

V.

EDWARD L. FRAWLEY,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County:
LISA K. STARK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Jeanne Frawley appeals a judgment divorcing her from Edward Frawley after eighteen years of marriage. The issues are: (1) whether the circuit court misused its discretion in valuing the family business;

and (2) whether the circuit court misused its discretion in setting maintenance for Jeanne. We affirm the business valuation, but reverse the maintenance award.

¶2 Jeanne challenges the business valuation on two grounds. First, she argues that the circuit court did not use the legal definition of fair market value. Jeanne contends that the circuit court’s valuation “is not based on what the property is worth to a hypothetical, third party in an arms-length transaction, but what this property is worth to Ed and Jeanne given the fact that the business will also be the source of maintenance and child support.” She points to the following comments by the circuit court:

I know that Mrs. Frawley believed that Mr. Janke’s projections were too low and the business will continue to grow and have an increased income post-divorce, but as long as Mr. Fawley owns it, to some extent, Mrs. Frawley shares in that in the sense of maintenance and child support through the creation of income.

I have to value it, however, as a fixed date, and I’m considering the fact that maintenance and child support are paid by this business and we’re valuing it using the income, and it’s for that reason I also felt [Jeanne’s expert’s] figure was too high because, in a sense, we are double-dipping if we use the aggressive figures of ... [Jeanne’s expert]....

¶3 We agree with Jeanne that the circuit court should not have considered the fact that Jeanne would benefit from the business income through maintenance when placing a market value on the business. Reading the court’s comments in context, however, we conclude that the circuit court’s valuation was not clearly erroneous. *See Siker v. Siker*, 225 Wis. 2d 522, 532, 593 N.W.2d 830 (Ct. App. 1999) (we will uphold the circuit court’s factual finding regarding the fair market value of an closely-held business in a divorce action unless the finding is clearly erroneous). When the circuit court made the comments to which Jeanne points, it had already made its decision on valuation and given a rational reason

for that valuation. The circuit court valued the business at \$462,700, which was between the valuation of Edward's expert, Kevin Janke, who thought the business was worth \$310,000, and Jeanne's expert, Jerry Bremer, who thought the business was worth \$562,000. The court explained that Bremer's valuation was too aggressive and Janke's valuation was too conservative. The court took Bremer's valuation and, rather than discounting it by 15% to account for the fact that the business would not be as valuable without Edward running it, the court applied a 30% discount because the court did not believe the business would bring in anywhere near the same amount of money if sold to a third party. Characterizing the business as "one-of-a-kind," the court explained that the business is "not a readily saleable or marketable business in the normal sense as it's primarily the product of Mr. Frawley." After providing this considered explanation, the court then added the extraneous comments that Jeanne challenges. We see no indication, however, that the court actually lowered its valuation based on the benefits that would continue to accrue to Jeanne or based on the fact that a lower valuation would help Edward with the property settlement equalizing payment. The circuit court's valuation was not clearly erroneous.

¶4 Jeanne's second challenge to the business valuation focuses on puppy breeding and sales. Jeanne contends the valuation was too low because it gave equal weight to the last five years of puppy sales, even though puppy sales in the last two years had been unusually low due to unusual problems with sterile dogs. We acknowledge that there is evidence suggesting that future puppy sales will be higher than the average sales in the last five years but, ultimately, this was a credibility determination about the degree to which Edward was going to actively pursue the dog breeding portion of his business in the future. In light of the extreme deference we accord the circuit court's credibility determinations, *see*

Bank of Sun Prairie v. Opstein, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979), Edward’s testimony that he did not intend to breed as many dogs in the future is sufficient to support the valuation. The circuit court’s valuation was not clearly erroneous.

¶5 Jeanne next argues that the circuit court erred in setting maintenance. 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” and “to ensure a fair and equitable financial arrangement between the parties.” *King v. King*, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999). With these goals in mind, the circuit court must apply the factors listed in WIS. STAT. § 767.26 (2003-04),¹ to the facts of the case to determine whether maintenance is appropriate. *Id.* A maintenance award is committed to the circuit court’s discretion. *Id.* at 247.

¶6 The circuit court set maintenance for three different time periods. Jeanne challenges the maintenance awarded during all three periods. We find troubling the maintenance set for the period that begins July 1, 2004, continuing indefinitely from that date. The court assumed that Jeanne would earn approximately \$30,000 per year in salary, so it awarded her \$500 a month in maintenance, for a total gross annual income of \$36,000 a year. During the same period, Edward will have \$91,200 in annual salary and rent. Subtracting the maintenance award, he will have \$85,200 in gross income after paying

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

maintenance, as opposed to Jeanne's \$36,000, a disparity that will be even greater after tax impacts are considered.²

¶7 This award does not maintain the marital standard of living for Jeanne. The circuit court did not adequately explain why such a large difference in income between Jeanne and Edward is appropriate. If the circuit court's goal was to equalize income, the court failed to achieve that goal with this award.³ If the circuit court began with the presumption of an equal division of income, but decided to deviate from a 50\50 division of the income stream, it did not adequately explain why it did so. If the circuit court did not begin with a presumption that the income stream should be equally shared, the circuit court did not explain how it reached its decision. Therefore, we will remand to the circuit court to reconsider the maintenance issue, and direct the court to explain its reasoning more thoroughly. On remand, we do not necessarily direct the circuit

² Edward argues that we must subtract his mortgage payment and other housing costs from his total income to reach his true gross income for the period after July 1, 2004. Although that adjustment had some validity during the period he was paying the real estate costs in lieu of child support and maintenance while Jeanne lived on the property, the same cannot be said once she vacates the property. Jeanne, of course, will then bear housing costs of her own, and we see no basis for Edward to deduct his housing costs from his gross income for maintenance analysis purposes. It may well be that some part of these costs are attributable to the portions of the premises utilized in Edward's business, and thus arguably reduce the amount of rental income he derives from the tenant business, but the record does not indicate what portion of the expenses might be properly so attributed.

We conclude that the parties' housing costs for the period after July 1, 2004, should not be subtracted from either parties' income to calculate their gross income for the purposes of beginning the maintenance analysis. Instead, the housing costs are properly treated as an *expense* that each party incurs, and thus they are relevant in determining maintenance only insofar as these costs impact Jeanne's support needs and Edward's ability to pay maintenance.

³ The circuit court suggests twice in its oral decision that its award will be close to an equalization of the parties' income. These comments tend to support Jeanne's argument that the circuit court intended to equalize the parties' income, but miscalculated in making its award.

court to either increase or decrease maintenance, but simply to fashion an award that is thoroughly explained.⁴

¶8 Jeanne also argues on appeal that the trial court erred by not taking into consideration for maintenance purposes additional income from the business that she asserts is available to Edward “over and above what is paid to him as salary.” She claims that it is undisputed that, during the marriage, the parties used non-salary distributions from the corporation to pay personal expenses and maintain their standard of living. Jeanne asserts that this non-salary income will continue to be available to Edward post-divorce and cannot be ignored when determining Edward’s ability to pay maintenance. She also claims it was improper for the trial court to disregard this income source on the grounds that Edward will need it to fund the property division equalization payment. On remand, the court should address whether it finds that this additional source of income is indeed available to Edward, and if so, how it impacts his ability to pay maintenance to Jeanne.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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

⁴ As for the time periods that have already elapsed, we will affirm the circuit court’s award because, although not adequately explained, those periods of time were relatively brief, the award was intertwined with child support calculations, and the circuit court provided for more equal sharing of the parties’ income during that period.

