COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2180

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE MARRIAGE OF:

JUDITH L. POSNER,

Petitioner-Appellant-Cross Respondent,

v.

JEFFRY A. POSNER,

Respondent-Respondent-Cross Appellant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: JOHN G. BARTHOLOMEW, Reserve Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Judith A. Posner, an art dealer, appeals from an amended judgment of divorce which terminated her thirty-year marriage to

Jeffry A. Posner, a real estate dealer and investor.[1] Ms. Posner contests certain property valuations and a maintenance provision, which the trial court held open. Mr. Posner cross-appeals from a $20,000 award to Ms. Posner for attorney fees. We affirm the property valuations, but remand the maintenance issue for further proceedings and remand the attorney fee issue for further fact finding.

In 1984, the parties purchased a six-floor warehouse in Milwaukee's Third Ward for $250,000. They named it the Atelier Building. In 1985, they rehabbed it into a condominium at a cost of $900,000. The first two floors housed Ms. Posner's burgeoning art business; the basement contained parking facilities; the parties sold the third, fourth and fifth floors for $140,000 each. They remodelled the sixth floor, containing 7,000 square feet, into a residence at an approximate cost of $375,000.

Ms. Posner asserts that the trial court's $440,000 valuation for the sixth floor condominium unit (Unit Six),[2] where the parties resided for several years, is incorrect because Ms. Posner's expert pretrial valuation of $519,000, acceded to by Mr. Posner,[3] was binding upon the court. Ms. Posner urges that because the parties did not contest the issue, there was nothing for the court to decide. She concludes that the court erroneously exercised its discretion in upsetting the $519,000 stipulated valuation.

A trial court's valuation of an asset in a divorce action is a finding of fact and, as such, will not be overturned on appeal unless clearly erroneous. ***Liddle v. Liddle,*** 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987);

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[1] The original judgment was entered April 4, 1994. The amended judgment was entered July 9. Appended to and incorporated with the amended judgment is the trial court's thirty-nine page opinion which includes findings of fact.

[2] The trial court found a net value of $203,900 after deducting an outstanding mortgage and accrued taxes of $236,100. To this it applied a ten percent "marketability discount" to reach a net for estate division of $183,510. Neither party objected to this discount in their appellate briefs.

[3] The record is unclear whether Mr. Posner stipulated to the $519,000 amount, or whether he stipulated that the appraisal could be admitted into evidence without the need of the appraiser's testimony.

§ 805.17(2), STATS. We look to the record to determine whether credible evidence supports the trial court's findings of fact. Further, our standard of review for determining the fairness of a property division is whether the trial court erroneously exercised its discretion. ***Schumacher v. Schumacher,*** 131 Wis.2d 332, 337, 388 N.W.2d 912, 914 (1986).

Mr. Posner's evidence placed the value of Unit Six at $420,000 to $430,000. An owner of property is competent to give an opinion of the value of his or her real estate. ***Genge v. City of Baraboo,*** 72 Wis.2d 531, 536, 241 N.W.2d 183, 185 (1976). Mr. Posner had been a real estate dealer since 1960, and was an officer in various real estate organizations. Mr. Posner's valuation was supported by an appraisal and by his own knowledge of the area, including properties he owned in the Third Ward—the location of the Atelier Building. We conclude that the trial court's valuation, which is within the range between Mr. Posner's valuation and that of Ms. Posner's expert, is supported by credible evidence.[4] We reject Ms. Posner's contention that the court is bound by the parties' pre-divorce stipulation. Section 767.10, STATS., provides that the parties may stipulate for property division "subject to the approval of the court." Valuation of assets is a *sine qua non* to a division. The trial court was not bound by the parties' stipulated valuation of Unit Six. *See* ***Norman v. Norman,*** 117 Wis.2d 80, 81-81, 342 N.W.2d 780, 781 (Ct. App. 1983) (parties' stipulation in a divorce action is no more than a suggestion to the court what the judgment, if granted, should include).

Ms. Posner next contests the trial court's valuation of Judith L. Posner & Associates, Inc., the art gallery she ran. The gallery, which in its halcyon years sold fine art, published posters and marketed art to corporations, suffered economic decline commencing in 1991. The trial court received into evidence an analysis by Larry J. Soukup, Mr. Posner's certified public accountant, dated August 30, 1993, which concluded that the book value or cost of the gallery was $304,289.22, and that Ms. Posner's fifty-one percent interest was $155,187.50. Soukup's valuation was at cost, not market, value. Ms. Posner's accountant, Paul Matson, testified that, in his opinion, as of November 19, 1992, Ms. Posner's interest in the gallery had a market value of $110,000. The

[4] Ms. Posner does not seek modification of the equalized property division. The trial court's $440,000 valuation is subject to the ten percent marketability discount, reducing it to $396,000.

trial court found a value of $130,000 for Ms. Posner's fifty-one percent interest in the gallery.

Again, we must sustain this finding of fact if it is supported by credible evidence—that is, if it is not clearly erroneous. ***Liddle,*** 140 Wis.2d at 136, 410 N.W.2d at 198. The trial court's valuation is within the range of the experts' valuations. Ms. Posner testified that the evening before trial she reviewed the inventory and found that a listed item, valued at cost $49,000, had been sold. Giving her testimony credit, the trial court ostensibly deducted fifty-one percent of that item from Soukup's valuation of inventory, about $25,000, and rounded off her net interest to $130,000 ($155,000 - $25,000 = $130,000).[5] We conclude that the evidence supports the trial court's valuation of Ms. Posner's interest in the gallery.

Ms. Posner next argues that the trial court erred in failing to set maintenance and by holding the matter open. We must remand on this issue for further hearings on whether Ms. Posner is entitled to limited maintenance.

Section 767.26, STATS., authorizes an award of maintenance for either party in a divorce action and sets forth factors which the court should consider in granting and setting it. To determine whether maintenance should be allowed—and, if so, how much—is left to the discretion of the trial court. ***Hefty v. Hefty,*** 172 Wis.2d 124, 133, 493 N.W.2d 33, 36 (1992). One goal of maintenance is to secure for the parties, as far as feasible, a lifestyle comparable to pre-divorce level. ***LaRocque v. LaRocque,*** 139 Wis.2d 23, 35, 406 N.W.2d 736, 741 (1987).

Ms. Posner argues that the trial court erroneously exercised its discretion by failing to set maintenance, although it held the issue open. She notes the disparateness of the income between her and Mr. Posner. The trial court found, without gainsay, that Ms. Posner's gross income was $2,795 per month, and that Mr. Posner's was $7,980. The parties enjoyed an affluent lifestyle prior to 1991, and Ms. Posner argues that Mr. Posner has continued to

[5] Soukup's valuation of inventory did not include art work acquired by trade or barter, nor did it include several thousand posters.

enjoy the same since. She contends that this matter should be remanded and that the trial court should set, at least, limited term maintenance. Mr. Posner argues that Ms. Posner had demonstrated an ability to earn from $75,000 to $90,000 annually. He argues that Ms. Posner jettisoned a thriving art business of over thirty years duration, which rivaled any in New York or Chicago and which grossed millions of dollars in a customized gallery, to later take a relatively humble position in Los Angeles. His brief, however, does not forthrightly raise an issue of shirking.

In its comprehensive memorandum decision, the trial court made findings on maintenance. The court found that Mr. Posner continues to live in the accommodations of Unit Six, while Ms. Posner abides in markedly less spacious quarters. The trial court found that both parties are capable of providing themselves with a reasonable standard of living, and rejected the financial statements filed by the parties as accurate portrayals of their lifestyles. The court found that Ms. Posner still operates her company in Los Angeles, is working, and has maintained her professional contacts.

The court did not consider an award for limited maintenance to Ms. Posner and made no findings relating to this subject in its memorandum decision. We are satisfied from the record that the art market slumped in the early 1990s, and that Ms. Posner may be entitled to a limited award. Accordingly, we remand for a hearing on the subject of limited maintenance which may tide Ms. Posner over until she establishes herself in her new situation and secures a standard of living that more closely approximates that of her marriage. Upon remand, the court shall determine whether such maintenance is proper and, if so, fix an appropriate amount.

Finally, in his cross-appeal, Mr. Posner argues that the trial court erroneously exercised its discretion in awarding $20,000 in attorney fees to Ms. Posner. He challenges the trial court's factual findings on this issue and suggests that this court determine the issue. In her reply brief, Ms. Posner concedes the insufficiency of the findings, but suggests that this court review the record to determine whether the facts support the award made by the trial court. ***Mohr v. Harris,*** 118 Wis.2d 407, 411, 348 N.W.2d 599, 601 (Ct. App. 1984).

Whether to allow fees and, if so, the amount to be charged, is left to the discretion of the trial court. ***Selchert v. Selchert,*** 90 Wis.2d 1, 15, 280 N.W.2d 293, 300 (Ct. App. 1979). Section 767.262, STATS. In ***Holbrook v. Holbrook,*** 103 Wis.2d 327, 343, 309 N.W.2d 343, 351 (Ct. App. 1981), this court set forth the methodology for assessment of fees. The trial court must determine: (1) the need of the spouse seeking fees; (2) the ability of the other spouse to pay; and (3) that "the total fee is reasonable (this provides guidance in determining what is a reasonable contribution)." ***Holbrook*** further stated that the trial court must first find what the total fee is, and whether it is reasonable. Without this determination, we cannot review the reasonableness of the contribution.

Unfortunately, because the record contains no evidence of Ms. Posner's total fee,[6] we are unable to determine Mr. Posner's contribution, if any. We point out that the issues of need and ability to pay are intertwined with the parties' total fiscal position. Thus, we must reverse and remand this issue to the trial court for further fact finding. In sum, we affirm the trial court's valuations, but remand the matters of maintenance and attorney fees for further hearing.

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

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

[6] Ms. Posner testified that she had paid counsel $50,000, and anticipated that her counsel would possibly charge another $40,000 to $50,000. This court may not determine an issue of fact, even upon invitation of the parties. We will not assume an amount based on a "possibility," particularly where the fact, the amount of a fee, was readily ascertainable and could have been presented to the court at the conclusion of the trial or shortly thereafter.