

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 27, 1996

NOTICE

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.

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

No. 95-2534

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

In re the Marriage of:

RALPH C. STAYER,

**Petitioner-Appellant-
Cross Respondent,**

v.

CATHARINE B. STAYER,

**Respondent-Respondent-
Cross Appellant.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Ralph C. Stayer appeals and Catharine B. Stayer cross-appeals from the judgment of divorce. The dispositive issues are: (1) Ralph's challenge to the trial court's refusal to enforce the parties' postnuptial agreement (PNA) after concluding that it was procedurally and substantively

unfair to Catharine; and (2) Catharine's challenge to the valuation of Ralph's Johnsonville Foods, Inc., stock. We reverse on the appeal because we conclude that the trial court should have enforced the PNA. On the cross-appeal, we affirm the trial court's valuation of the Johnsonville stock.

Ralph and Catharine were married in 1970. Ralph worked in his family business, Johnsonville Foods. Catharine taught occasionally but was primarily a homemaker. On December 31, 1986, the parties entered into a postnuptial agreement to classify the bulk of their current assets as separate property in light of the then-recently enacted Wisconsin Marital Property Act. The parties were represented by separate counsel. Catharine disclosed assets valued at \$3,448,885, the bulk of which was proceeds from the sale of her stock in her family's business, the Bemis Manufacturing Company. After tax liability on the stock sale, Catharine's net estate was \$2,846,558 as of December 31. Ralph declared assets worth \$2,494,719, including Johnsonville stock which he estimated was worth \$1,325,000 as of December 31.

During the divorce, Catharine argued that Ralph did not fairly and reasonably disclose his financial status at the time they entered into the PNA because he inaccurately valued his Johnsonville stock. She presented expert testimony that the value of Ralph's interest in Johnsonville Foods was \$2,591,000 as of the date of the PNA. Ralph presented expert testimony that the fair market value of his stock at that date was \$1,454,000, some \$129,000 more than he stated in the disclosure accompanying the PNA.

The trial court considered several factors in declining to enforce the PNA. First, it found that the parties ignored specific provisions of the agreement, such as the agreed-upon allocation of family living expenses, and generally handled their financial affairs as they had prior to the agreement. Second, in January 1989, the parties' home was destroyed by fire and they decided to build a new home. During this period, Ralph was heavily involved in business activities and Catharine oversaw construction of the multi-million dollar home. She used \$1.7 million of her separate property to cover construction expenses. Third, the court found that the value of Catharine's assets was approximately the same at the divorce as at the time of the PNA. Ralph's assets, however, had increased substantially. Notably, Ralph's Johnsonville stock was now worth between \$7.5 and \$15 million.

The court found that Ralph's valuation of the Johnsonville stock for the PNA was not based on a specific formula or a generally accepted valuation method. While the estimate may have been fair, the court concluded that it was not reasonable under the circumstances. The court found that Catharine's financial disclosure was highly accurate because it was based upon the recent sale of her Bemis Manufacturing Company stock. In light of the accurate financial picture offered by Catharine, it was not reasonable for Ralph to provide a less accurate financial picture. Therefore, the court concluded that the PNA was procedurally unfair to Catharine.

Turning to the issue of substantive fairness, the court cited the following factors. First, the Johnsonville stock had increased from approximately \$5000 to \$9000 per share at the time of the PNA to approximately \$24,000 to \$50,000 per share at the time of the divorce. The court found that this large increase was "totally unanticipated by the parties." Second, the parties ignored some of the PNA's provisions, particularly the allocation of family living expenses to be paid from their separate property. Third, when the parties entered the PNA, neither anticipated that Catharine would substantially deplete her separate property to build a new residence. The court concluded that the PNA was substantively unfair to Catharine and declined to enforce it.¹ Ralph appeals.

When dividing property in a divorce, § 767.255(3)(L), STATS., directs the trial court to consider:

Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall

¹ In a later decision, the trial court divided the parties' property and awarded maintenance.

presume any such agreement to be equitable as to both parties.²

An agreement is inequitable under § 767.255(3)(L), STATS., if any of the following requirements are not met: (1) each spouse has made a fair and reasonable disclosure to the other of financial status; (2) each spouse has entered into the agreement voluntarily and freely;³ and (3) the substantive provisions of the agreement dividing the property upon divorce are fair to each spouse. *Button v. Button*, 131 Wis.2d 84, 89, 388 N.W.2d 546, 548 (1986). The first two requirements of procedural fairness must be evaluated at the time the agreement was executed. *Id.* The last requirement of substantive fairness is assessed at the time of the agreement's execution and, if circumstances have significantly changed since the agreement, at the time of divorce. *Id.* The burden of showing that the agreement is inequitable is upon the spouse challenging the agreement. *Id.* at 93-94, 388 N.W.2d at 550. A determination of inequitableness requires the circuit court to exercise its discretion based upon the facts and the applicable law. *Id.* at 99, 388 N.W.2d at 552. However, whether Ralph's disclosure was reasonable presents a question of law which we review independently of the trial court's determination. See *Wassenaar v. Panos*, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983).

The trial court ruled that Ralph did not make a reasonable disclosure of his financial status at the time the parties entered the PNA. We will address this procedural fairness issue first.

The trial court found that Ralph vaguely recalled referring to the Stockholders Agreement in 1986 when he valued his Johnsonville stock. Ralph testified that he arrived at \$1,325,000, his best estimate of the value of his Johnsonville stock, after valuing the company in light of the Stockholders Agreement⁴ which required Ralph to offer his shares first to the company and

² We refer to the 1993-94 statutes. The text of this provision of the statutes has not changed since the parties entered their PNA. The number of the statute was changed from § 767.255(11), STATS., to § 767.255(3)(L) by 1993 WIS. ACT 422.

³ There does not appear to be any issue regarding the voluntary and free nature of Catharine's assent to the PNA. Accordingly, we will not address this factor.

⁴ Ralph actually owns voting trust certificates which correspond on a one-for-one basis with

restricted the sale of shares to parties not subject to the Stockholders Agreement. Ralph's valuation did not contemplate any scenario in which the stock would be sold to parties outside the Stockholders Agreement.

Catharine testified that she did not know how Ralph valued the Johnsonville stock but accepted his figure because she trusted him to tell the truth. Catharine testified that at the time of the PNA negotiations, she had recently concluded the redemption of her Bemis stock and "was pretty well knowledgeable because of this on how you value, how difficult it is to value stock in a privately, closely-held family company." Catharine understood that a range of values was possible. The parties agreed at the time the PNA was drafted that Catharine's estate was larger than Ralph's, but that Ralph's assets would probably increase over time. Catharine, who had separate counsel, made no independent effort to confirm Ralph's valuation of his stock even though she understood the difficulty in arriving at such a value.⁵ However, she did not expect to see the dramatic growth in Johnsonville that occurred after the parties signed the PNA. Although she believed the PNA was equitable at the time she signed it, she came to believe that Ralph did not fairly and reasonably disclose the value of his Johnsonville stock and that the PNA did not serve the purpose for which it was intended: to assure that the parties' estates were relatively equal.

We disagree with the trial court that simply because Catharine's valuation of her estate was more precise, Ralph's disclosure was unreasonable. An agreement can be fair and reasonable even where one party does not seek an independent appraisal of an asset. See *Gardner v. Gardner*, 190 Wis.2d 216, 231, 527 N.W.2d 701, 705-06 (Ct. App. 1994). "The purpose of a fair and reasonable disclosure is to guard against the possibility that '[a] party might not have entered into the agreement had she or he known the facts.'" *Id.* at 232, 527 N.W.2d at 706 (quoted sources omitted).

The facts were known to Catharine at the time of the agreement. She had separate counsel and was familiar with the difficulties associated with

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voting shares held by the voting trust. The Stayer family holds all the voting trust certificates.

⁵ She acknowledged that at the time of the PNA, Ralph was not interested in selling his stock.

valuing a closely-held corporation. The PNA treated as separate property the appreciation of assets deemed separate property under the PNA. Ralph's largest asset was stock. Catharine's largest assets were cash and investment accounts. It was possible that the value of Ralph's stock would increase faster than Catharine's investments. The framework of the agreement was clear to the parties.

Catharine argues that Ralph was obligated at the time of entry into the PNA to value the Johnsonville stock without considering the Stockholders Agreement. We disagree. The Stockholders Agreement was an appropriate consideration. Absent certain circumstances, Ralph was not free to sell his stock in the marketplace and this had an adverse impact on its value. The trial court recognized this when it accepted the opinion of Ralph's expert, John Emory, that the Stockholders Agreement limits the marketability of Ralph's minority stake in the company and depresses the shares' value.

Finally, a de minimis failure to disclose will not invalidate an agreement. *Schumacher v. Schumacher*, 131 Wis.2d 332, 338, 388 N.W.2d 912, 914-15 (1986). Here, Ralph's expert's valuation is \$129,000 more than the value Ralph offered in 1986, a small percent of Ralph's total net estate. Increasing Ralph's \$1.3 million stock valuation by \$129,000 still yields Ralph a smaller estate than Catharine on the date of the PNA.

We turn to the trial court's conclusion that the PNA was substantively unfair to Catharine. There is no question that changes occurred within the marriage which had significant financial consequences. However, these changes—the dramatic increase in the value of Ralph's interest in Johnsonville, for example—were anticipated by the PNA.

The destruction of the parties' home and replacement by a substantially more expensive home did not render the PNA substantively unfair. Catharine testified that the multi-million dollar home "just kind of got out of hand" She acknowledged that the house is overbuilt for the community and that she and Ralph knew they would never recover the cost of constructing the house. While Catharine invested a substantial amount of her separate property in the home, the balance of the cost was financed by an \$800,000 loan upon which Ralph has made payments. Furthermore, the house

is classified marital property under the PNA. Finally, the PNA contemplated that the parties might change their residence during the course of the marriage.

In framing a substantively fair PNA, "the parties should consider the circumstances existing at the execution of the agreement and those reasonably foreseeable." *Button*, 131 Wis.2d at 97, 388 N.W.2d at 551. Here, the parties did so. It was reasonably foreseeable that the value of the Johnsonville stock would increase and the parties would acquire a new residence during the marriage.

In sum, we conclude that the trial court misused its discretion when it vitiated the PNA because its reasons for doing so are not supported by the law governing the procedural and substantive fairness of postnuptial agreements. Having so held, we need not address Ralph's other appellate issue challenging the trial court's treatment of the appreciated value of the Johnsonville stock. We remand this matter to the trial court with directions to enforce the PNA. The trial court may revisit any issues of property division or maintenance affected by enforcement of the PNA.

On cross-appeal, Catharine challenges the trial court's valuation of the Johnsonville stock for purposes of property division in the absence of an enforceable PNA. Although we have upheld the PNA which provides that the stock and its increase in value are Ralph's separate property, the trial court may still consider the stock's value in dividing the parties' non-separate property and determining maintenance. See §§ 767.255(3) and 767.26, STATS. However, we need not address Catharine's other issues relating to the consequences for the marital estate of appreciation of the Johnsonville stock because the PNA declares appreciation to be separate property. Because we have upheld the enforceability of the PNA, these issues are moot.

We will not disturb the trial court's valuation of a closely-held corporation unless that finding is clearly erroneous. See *Schorer v. Schorer*, 177 Wis.2d 387, 396, 501 N.W.2d 916, 918-19 (Ct. App. 1993). The trial court assesses the weight and credibility of the expert testimony, and where there is conflicting testimony the trial judge is the ultimate arbiter of the credibility of the witnesses. *Id.* at 396-97, 501 N.W.2d at 919. If the trial court accepts the testimony of one expert over that of another, and the first expert's testimony is

sufficient to support the trial court's conclusion, the trial court must be sustained. *Id.* at 397, 501 N.W.2d at 919. Trial courts are not required to accept a particular method of valuation. *Id.* at 399, 501 N.W.2d at 920. However, fair market value must be determined and that depends upon the credibility of the expert and the methods and approaches employed by him or her in valuation. *Id.*

The trial court heard two experts. Emory, Ralph's expert, valued the Johnsonville stock at \$7,307,495. Todd Mueller, Catharine's expert, set the value at \$15,185,290. The trial court found that Mueller valued Ralph's stock based upon a hypothetical sale of the entire company, while Emory based his value upon a hypothetical sale of only Ralph's interest in the company, thereby reflecting that Ralph held a minority stake and that his stock is subject to a Stockholders Agreement which depresses the stock's value by restricting marketability to outside third parties. The court found Emory's valuation more credible because he considered relevant factors and his opinion was "rooted in an analysis which considers salient, pragmatic components and works to a cogent, well-reasoned conclusion."

The court rejected Mueller's valuation for a number of reasons. First, Mueller virtually ignored the Stockholders Agreement and premised the value of the stock on Ralph's de facto control of the business. The court found that while Ralph functions as chief executive officer, he does not have a controlling interest in the corporation. Second, Mueller based his valuation on a supposition that all of the company's stock would be sold at one time. However, the court found that neither Ralph nor any of his family members were interested in selling the company.

The trial court's findings regarding the experts' valuations are not clearly erroneous. The trial court was charged with assessing the credibility of the witnesses and found Emory to be more credible than Mueller.

Catharine criticizes the trial court for finding that the Stayer family was not interested in selling Johnsonville, pointing to a 1993 negotiation with the Sara Lee Corporation to sell Johnsonville. The trial court inferred from the fact that the transaction with Sara Lee was not completed that the Stayers did not desire to sell Johnsonville. Furthermore, members of the Stayer family

testified that they were not interested in selling the company. We must accept a reasonable inference drawn from credible evidence by a trier of fact. *Id.* at 397, 501 N.W.2d at 919.

Having held in Ralph's appeal that the trial court erred in declining to enforce the PNA, we reverse and remand to the trial court with directions to enforce the PNA. In light of this holding, the trial court may revisit issues of property division and maintenance which will be affected by our holding that the PNA is enforceable. On the cross-appeal, we affirm the trial court's valuation of Ralph's Johnsonville stock in accord with the Emory opinion.

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

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