



# In the Missouri Court of Appeals Eastern District

## DIVISION ONE

V.W.,	)	No. ED94269
	)	Consolidated No. ED94275
Respondent,	)	Appeal from Circuit Court of
	)	St. Louis County
v.	)	Cause No. 08SL-DR03584
	)	Honorable Dennis N. Smith
R.W.,	)	
	)	
Appellant.	)	Filed: November 30, 2010

### **Factual and Procedural Background**

This case concerns the division of property in a dissolution of marriage. Appellant (Husband) and Respondent (Wife) were married on 19 April 1997. At the beginning of the marriage Husband was the primary income-earner as an anesthesiologist. Wife was the shareholder in Pohlman Reporting Company (PRC). Since 1 October 2005 PRC has been a Chapter S corporation subject to pass-through taxation. Husband's income decreased throughout the marriage due to a reduction in his hours and a change in position. Wife's income dramatically increased during the marriage due to the success of her court reporting business. By the end of the marriage Wife was earning significantly more than Husband.

Wife filed for divorce on 5 June 2008. Husband then filed a cross petition. A

proceeding was held before a Special Master. At trial both parties presented experts who testified to the value of Wife's business, the amount of non-operating assets contained in PRC and the adequacy of her compensation. The trial court entered a Judgment of Dissolution on 3 November 2009 in which it adopted the recommendation of the Special Master, dividing the marital assets, and added an order for each party to pay the Special Master. Both parties appeal.

### **Discussion**

The standard of review in a divorce proceeding is the same as in any other court-tried case. *Foraker v. Foraker*, 133 S.W.3d 84, 92 (Mo.App. W.D. 2004). The trial court's judgment should be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law.

*Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The challenging party has the burden of demonstrating error. *Foraker*, 133 S.W.3d at 92.

Trial courts have considerable discretion in determining how to divide marital property. *Id.* at 100. Trial courts abuse that discretion only if the division is so highly weighted in favor of one party as to shock the sense of justice and indicate a lack of careful consideration. *Id.*

### **I**

Appellant's point on appeal is that the trial court misapplied the law in finding that the excess non-operating assets of PRC do not contain a marital component subject to division because PRC's retention of non-operating assets deprived the marital estate of what would otherwise have been deemed marital assets. Appellant argues that Respondent, as its sole shareholder, held unilateral control over PRC's assets and income,

and that the parties paid income taxes on the non-operating assets but Appellant was deprived of the benefits as a result of Vicki's decision not to distribute them. We agree.

Respondent is the sole shareholder of PRC which is an S corporation. All income of PRC passed through to both Appellant and Respondent who filed joint tax returns. In subchapter S corporations, taxes are not assessed against the business entities, but income and losses, including depreciation, pass through to the shareholders. *Blevins v. Blevins*, 249 S.W.3d 871, 874 (Mo.App. W.D. 2008). Filing jointly made both parties liable for the tax burden of the income derived from PRC. *In re Marriage of Thomas*, 199 S.W.3d 847, 864 (Mo. App. S.D. 2006); *D'Arcy and Assocs., Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 32 (Mo. App. W.D. 2004); 26 U.S.C. § 1 (2000). Thus, all income derived from PRC was during Appellant and Respondent's marriage was included on their joint tax return and has a marital component. *See Race v. Race*, 824 S.W.2d 509 (Mo. App. S.D. 1992).

Both experts valued the non-operating assets of PRC to be \$3,735,000, which included a condominium purchased for \$1,850,000.00 and encumbered with an indebtedness of \$1,000,000.00. The non-operating assets of PRC were additionally composed of investment accounts. Respondent used the condominium as her personal residence and never claimed that all or any portion of the non-operating assets were needed for the current, ongoing business needs of PRC. Both expert witnesses stated that none of these assets were needed for the ongoing operation of PRC. While the stock of PRC owned by Respondent is non-marital property, profits from non-marital property are marital property. *See Rickard v. Rickard*, 818 S.W.2d 711, 720 (Mo. App. S.D. 1991). If Respondent had utilized the profits of PRC for other purposes such as to open additional

offices or reduce corporate indebtedness those profits would have been deemed marital. See *Glen v. Glen*, 930 S.W.2d 519 (Mo. App. W.D. 1996), *Rogers v. Rogers*, 300 S.W.3d 56 (Mo. App. S.D. 2009). Therefore, it is incongruous to hold that profits allowed to accumulate, rather than used for business expansion, are no longer marital. In sum, the non-operating assets of PRC were in complete control of wife, unnecessary for the ongoing operations of the business and both spouses paid taxes on those assets. Respondent cannot retain marital property within a separate asset and call it non-marital property.

The trial court misapplied the law when it determined that PRC's non-operating assets did not contain a marital component as the assets were unambiguously included in the income of both spouses. If PRC was a sole-proprietorship, rather than a corporation, all earnings would be marital. See *Heineman v. Heineman*, 768 S.W.2d 130 (Mo. App. W.D. 1989). Thus, under the trial court's holding the form of a spouse's non marital business controls whether its undistributed earnings are marital or non marital.

The excess non-operating assets are owned by PRC. Since PRC was not joined as a party to the dissolution proceeding the trial court was unable to award Appellant a portion of the excess non-operating assets directly. *Comninellis v. Comninellis*, 99 S.W.3d 502 (Mo. App. W.D. 2003). However, PRC, though Respondent's non marital property, has a marital component equal to the value of the excess non-operating assets and the trial court should have divided that value between the parties in the form of an equalization payment from Respondent to Appellant. See *Skaggs v. Skaggs*, 301 S.W.3d 72 (Mo. App. S.D. 2009).

## II

In her first point on cross appeal, Respondent argues that the trial court erred in its division of property and debt. Specifically, she complains that the court erred in awarding Appellant more than half the marital estate and applying certain debt against total assets received by Respondent. Because this judgment alters the distribution of marital assets this point is moot, however, after the judgment of this court Appellant will receive 50.9 percent of the marital assets while Respondent will receive 49.1 percent. This does not shock the sense of justice nor does it indicate a lack of careful consideration.

Additionally, Respondent argues that the trial court erred in applying some debt against total assets received by Husband in making its division. The trial court must divide all “marital debts” in a dissolution decree. RSMo 452.330.1 (2008). Marital debt is all debt incurred subsequent to the marriage unless one of the exceptions in § 452.330.2 applies.<sup>1</sup> *Rawlings v. Rawlings*, 36 S.W.3d 795, 798 (Mo.App. W.D. 2001). Respondent has made no showing that any of the exceptions to the marital debts rule apply.

In her petition she alleges that the \$250,000 line of credit was collateralized by separate, not marital, property. However, she does not explain why, even if the debt was collateralized by separate property, it would mean this account was a separate debt.

Likewise, Respondent’s argument that the line of credit is not marital property because it

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<sup>1</sup> § 452.330.2 is the definition for marital property, but the court has held that the same definition can be applied to marital debt. *Rawlings*, 36 S.W.3d 795, 798. The exceptions to the marital debt rule are debt: 1) acquired by gift, bequest, devise, or descent; 2) acquired in exchange for debt acquired prior to the marriage or in exchange for debt acquired by gift, bequest, devise, or descent; 3) acquired by a spouse after a decree of legal separation; or 4) excluded by valid written agreement of the parties; and 5) the decrease in value of debt acquired prior to the marriage or pursuant to subdivisions 1) to 4), unless marital assets including labor, have contributed to such decreases and then only to the extent of such contributions.

was drawn without her knowledge is unconvincing. Debt is not precluded from being classified as marital simply because the other spouse did not participate in the decision to incur the debt. *Id.* The trial court specifically found that this debt was marital because it was incurred after the marriage began and did not fall into any exception. The trial court has broad discretion in dividing these debts and its division should only be disturbed with a clear showing of abuse of that discretion. *Id.* Point denied.

### **III**

In her second point on cross appeal, Respondent claims the trial court erred in classifying a particular bank account marital property because it was a custodial account and thus the property of the minor named on the account. Bank accounts held in custody for minors are properly categorized as marital property unless the party opposing that categorization presents evidence that the account was established as a custodial account pursuant to the Uniform Gift to Minors Act, §404.047. *Weiss v. Weiss*, 954, S.W.2d 456, 958 (Mo.App. E.D. 1997). The exhibit Respondent cites to as evidence that the account is custodial shows that the account was previously established and transferred to her daughter four days before Respondent filed her petition. There was sufficient evidence for the trial court to conclude that either the account was not established as a custodial account or that, based on the timing of the transfer, Respondent was trying to secret the account from consideration by the court. If a party secrets property in anticipation of a divorce, the court may order reimbursement. *Calia v. Calia*, 624 S.W.2d 870, 872 (Mo.App. W.D. 1981). Point denied.

### **Conclusion**

We affirm in part and reverse in part. While the trial court previously attempted

to divide the balance of the marital estate equitably its judgment failed to include the non-operating assets of PRC. This case is remanded so that the trial court may divide the \$3,735,000.00 of excess non-operating assets, reduced by the amount of non-operating assets of PRC existing on the date of marriage, equally among the parties.

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Kenneth M. Romines, J.

Roy L. Richter, C.J. and Gary G. Wallace, Sp., J. concur.