

**FILED**

IN THE COURT OF APPEALS OF TENNESSEE

**August 20, 1996**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

SUSAN LEE BARTLEY	:	HAMILTON CIRCUIT
	:	CA No. 03A01-9511-CV-00420
Plaintiff-Appellant	:	
	:	
	:	
vs.	:	HON. SAMUEL H. PAYNE
	:	JUDGE
	:	
	:	
	:	AFFIRMED IN PART,
WILLIAM EDGAR BARTLEY, III	:	MODIFIED IN PART,
	:	REVERSED IN PART, AND
Defendant-Appellee	:	REMANDED

DAVID M. SIBLEY, OF CHATTANOOGA, TENNESSEE, FOR APPELLANT  
R. DEE HOBBS, OF CHATTANOOGA, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sp.J.

The Plaintiff has appealed from the order of the division of marital property in a divorce proceeding where a divorce was granted to the parties pursuant to TCA § 36-4-129.

Plaintiff-Appellant Susan Lee Bartley filed suit for divorce against the Defendant, William Edgar Bartley, III, after

19 years of marriage, alleging irreconcilable differences and inappropriate marital conduct by the Defendant. In her complaint, as amended, she asked for a divorce, custody of their two minor children aged nine years and 12 years, child support, alimony, attorney's fees, an equitable division of marital property, and support for herself and children.

The record fails to show the husband filed an answer to the complaint. The complaint was filed on April 20, 1994. On June 24 an order was entered ordering the Defendant to pay the Plaintiff, as support, the sum of \$1,858 for the month of June and \$2,750 for the month of July.

In August, 1994, an agreed order of divorce was entered. As pertinent, the order declared the parties divorced pursuant to TCA § 36-4-129(b). The Defendant was to pay the Plaintiff \$4,000 as temporary support for the month of August and to pay Plaintiff \$5,000 as an advance on property settlement; the Defendant was to carry medical insurance on the children, but the permanent support was to be fixed later. The wife was to have temporary custody of the children with liberal visitation to the husband. Property values were to be determined as of the date of divorce, July 26, 1994. All other issues, including permanent child custody, the amount of permanent child support, alimony, attorney's fees, and the division of assets and liabilities were reserved until final hearing in the case.

An order of reference was entered by the court pursuant to a stipulation of the parties. The court ordered the issues of fact be referred to Thomas A. Harris, as special master to take testimony and report recommended findings of fact and conclusions

of law on the following issues: 1. permanent custody of the two minor children; 2. the amount of child support to be paid by the non-custodial parent; 3. the amount of alimony, if any, to be awarded; 4. the value of the parties' assets as of the date of divorce - specifically: A. 22.5% interest in Diversified Polymer Corporation, B. Southern Adhesives Co., C. the value of the residence of the parties; and 5. the division of marital assets and liabilities of the parties. The special master conducted an extensive trial on all issues.

The proof showed the parties were married in 1975, shortly after they were both graduated from the University of Tennessee at Chattanooga. After the marriage, the wife worked outside the home as a chemist for various companies in Chattanooga until the birth of their first child in 1982. After the birth of their first child, the wife devoted her time to being a housewife and mother, except for occasional part-time tutoring in the home, teaching piano, serving as organist in the church, and doing statistical work in the home. Her income was estimated to be not more than \$250 per month. The husband was employed by ALC Company of Georgia, which was engaged in carpet-backing manufacturing as well as adhesives.

In January, 1985, the husband, along with a Mr. Halyak and Mr. William Ellis, Jr., formed the Diversified Polymers Industries, Inc. (DPI) which manufactures water-based adhesives and coatings. They are the sole stockholders and principal operators of the company. It appears Mr. Ellis furnished the financing for the formation and start-up costs of the company. The husband, Mr. Bartley, is the technician for the company, Mr. Halyak is the salesman of the products, and it appears Mr. Ellis

handles the financial affairs of the company. Mr. Bartley owns 22.5% of the stock in the corporation, Mr. Halyak owns 22.5% and Mr. Ellis owns 55% of the stock. The value of Mr. Bartley's 22.5% of the stock in the corporation is the principal issue in this litigation.

When the corporation was formed, salaries of the stockholders were fixed and it was agreed the salaries would remain constant and when the corporation became profitable dividends would be paid on the basis of stock ownership. The base salary of Mr. Bartley was fixed at \$42,000 per year. The corporation operated at a loss for the years of 1985 and 1986. Each year since 1986 it has been increasingly profitable and a stockholders' dividend was paid for the first time in December, 1991, of \$61,000. In 1992 dividends of \$216,500 were paid; in 1993, \$215,000; and for the first eight months of 1994, January through August, dividends of \$390,000 were paid.

In 1989 or 1990 DPI was changed to an "S" corporation so that profits and losses pass directly to the stockholders. Mr. Bartley's share of the dividends in 1992 was \$66,080, in 1993, \$82,638, and for eight months of 1994 \$87,750.

Mr. Bartley also has an interest in a company known as Southern Adhesives. The evidence as to the ownership of that company is extremely skimpy but it appears to be a partnership between Mr. Bartley and Mr. Halyak, the other minority stockholder in DPI. Aside from the testimony of the expert witness as to the value of Southern Adhesives and Mr. Bartley's income from the company, the bulk of the testimony concerning the company is that of Mr. Bartley, as follows:

"Q. Explain to Mr. Harris what you do as Southern Adhesives, what you do and then how that's different from Diversified Polymer?

"A. A couple of things at Southern Adhesives. Number one, I will analyze products for other people, tell them what they are to where they can duplicate it.

From time to time I have access to distressed raw materials primarily given to me. I find a home for them. And Mr. Halyak and I find a home and sell them.

We also are able to take certain things and turn them into products, take scrap and resale [sic] it. So, that's primarily what Southern Adhesives does.

\* \* \*

"Q. Are you able to conduct this business during the same time you are involved in Diversified activities?

"A. Right.

"Q. There is no problem. Are you running a file of any corporate or employment structure with Diversified in doing this work?

"A. There is no agreements [sic] between us, no, sir, that says I would or would not do that.

"Q. So, as far as you're concerned, you are free to continue to earn income?

"A. Correct.

"Q. And frankly you have no desire to put Southern Adhesives in the tank?

"A. No.

"Q. Is there any objection from your co-shareholders about the time you spend for Southern Adhesives or your own accounts?

"A. The majority shareholder is not aware. The minority partner is, and he is a part of what I do or what we do."

The record shows Mr. Bartley had a net income from Southern Adhesives of \$25,313 in 1992, \$22,655 in 1993, and \$18,740 for the first eight months, January through August, in 1994.

Mr. Bartley's total income from his salary and dividends from DPI and Southern Adhesives was \$137,983 for 1992, \$153,134 for 1993, and \$152,994 for the first eight months of 1994.

The wife called as her expert witness Mr. Mike Costello, a certified public accountant, (CPA) with the firm of Costello, Strain & Company. He has special expertise in the valuation of closely held companies and corporations. He testified his method for appraising the value of Mr. Bartley's interest in both DPI and Southern Adhesives was the "Delaware Rule" which is a nationally recognized rule and has been adopted in Tennessee. See **Blasingame v. American Materials, Inc.**, 654 S.W.2d 659, 667 (Tenn.1983). He appraised the value of DPI stock as of the date of the divorce to be \$2,270,335 and the value of Mr. Bartley's 22.5% ownership interest to be \$446,976, rounded to \$450,000. He found the value of Southern Adhesives to be \$28,118, rounded to \$25,000.

The testimony of Mr. Costello is the only evidence in the record as to the value of DPI stock or Southern Adhesives. The parties stipulated the value of the remaining marital assets except for personal and household furnishings which were divided by agreement. It was agreed the residence had a value of \$119,500 incumbered by a mortgage of \$53,612, leaving an equity of \$65,888. It was also agreed they had a checking account of

\$26,506.84 together with the following securities: Kemper Money Market Fund \$17,362, American Capital Mutual Fund \$1,993, Pioneer II Mutual Fund \$1,698, Fidelity (IRA) \$8,503, Vanguard Star Fund (IRA) \$18,305, for a total of \$74,367. It was further agreed the wife had drawn an advance of \$9,000 and the husband had drawn \$6,000 from the marital properties.

Under the rules of the court, both parties were required to file an estimate of future monthly income and household expenses. The wife estimated her monthly income at \$250 and a need of \$4,495 per month to cover household expenses for herself and the two minor children. The husband filed an estimated monthly need for household expenses of \$6,139.62 but did not file an estimate of monthly income.

The wife testified she is unemployed but is attending the University of Tennessee at Chattanooga, studying education in preparation for certification as a teacher. She is taking a full course of 12 semester hours and hopes to take classes in student teaching. It appears it will be approximately an additional year before she is qualified for a salaried position. She estimated her starting salary will be \$22,000 to \$23,000 per year. She has elected to go into teaching rather than chemistry because teaching will give her more time for her children and will produce a better income.

Mr. Bartley, in his testimony, took issue with Mr. Costello on the value he fixed on both DPI and Southern Adhesives. He insisted the value fixed by Mr. Costello was excessive, but failed to suggest a preferred method of establishing a fair value. He admitted the book value of the

company would not represent a fair value. He suggested consideration of comparable sales. He stated several companies producing the same type of products had been sold in recent years but offered no proof as to their sales prices. In fact, he did not offer any evidence to contradict or even challenge the testimony of Mr. Costello.

The special master filed his report in November, 1994. He recommended the custody of the two minor children be awarded to the wife with reasonable visitation privileges to the father. He recommended the husband be required to pay \$1,400 per month for each child as child support and, since he has an annual income of approximately \$160,000, he be required to establish an educational and medical trust fund for each child, into which he should be required to pay \$4,800 per year for the older son and \$3,600 per year for the younger son until they reach their majority. He also recommended the husband be required to pay the wife \$1,000 per month for 12 months as rehabilitative alimony. In fixing the value of Mr. Bartley's interest in Diversified Polymer Industries, the special master recommended a valuation of Mr. Bartley's 22.5% at \$300,000. In his recommendation as to the value of Southern Adhesives, the special master apparently considered it to be a sole proprietorship of Mr. Bartley and recommended a nominal value of \$2,000. He recommended that the stock in DPI and the assets of Southern Adhesives be awarded to Mr. Bartley as a part of his marital property. He also recommended the residence be awarded to the wife as a part of her marital property at a value of the equity of \$65,888. He recommended these properties and the remaining properties be divided between the parties as follows:



TO WIFE	ITEM	TO HUSBAND
\$ 18,500.00	\$26,506.84 Bank Account	\$ 8,006.84
\$ 65,888.00	Home Equity	
	\$22.5% interest in Div'd Polymers	\$ 300,000.00
\$ 17,362.00	Kemper Money Market Fund	
	Mutual Funds	\$ 3,691.00
\$ 18,305.00	IRA's: Vanguard Fidelity	\$ 8,503.00
\$ 100,000.00	Cash	<\$ 100,000.00>
	Southern Adhesives	\$ 2,000.00
\$ 9,000.00	Advances from Marital Property	\$ 6,000.00
<hr/>		<hr/>
\$ 229,055.00	TOTALS	\$ 228,200.84

This division would leave the husband owing the wife \$100,000 to equalize a division of the marital properties. The master recommended the husband be permitted, if he so desired, to execute a note to the wife for the \$100,000 payable at the rate of \$20,000 per year, bearing interest on the unpaid balance at the rate of 7%, the first payment on the note to be due July 10, 1995, and future payments on July 10 each year until paid, with the note secured by a pledge of one-half of his stock in DPI and covered by life insurance on husband's life.

The special master recommended Mr. Bartley be required to continue to provide major medical and hospitalization insurance covering the two children until each reaches and age of 18. He should also pay all non-covered medical, dental, orthodontist, optometrist, prescription drugs, psychiatric and psychological expenses up to \$1,500 per year per child, with any

excess to be provided from the educational and medical trust fund or insurance purchased through the fund. He further recommended the medical coverage should be in effect while the children pursue higher education.

The special master recommended Mr. Bartley be required to keep his \$350,000 term life insurance policy in effect until the younger child reaches 18 years of age, the proceeds of the policy to be applicable to the payment of any indebtedness owed by the husband to the wife and the balance to be used for the benefit of the minor children, with the right to reduce the policy by 50% upon the older son's reaching age 18 and terminate it upon the younger son's attaining majority. He recommended the wife keep her \$250,000 term life insurance policy in effect for the benefit of the minor children. He also recommended that each party pay his or her own attorney's fees and retain the personal property as divided by them.

The husband, Mr. Bartley, filed the following objections to the master's report: 1. Child Support - The husband did not specifically object to the amount of child support, education and medical trust fund or uncovered medical expenses, but asked that the date of paying such expenses be allocated to the time he received his salary and dividends from DPI and Southern Adhesives. 2. Alimony - He asked that his alimony payments be adjusted to times he received dividends from DPI and income from Southern Adhesives. 3. Distribution of Assets - As his objection to the valuation of the business assets, he said he "objects to the valuation recommended by the Special Master in that such valuation considers speculative future earnings of the corporation. .... The Special Master has recommended a sum

certain payment to the Plaintiff as her share of Mr. Bartley's business interest. Mr. Bartley avers that a more appropriate method for realizing the Plaintiff's interest in this business is to simply allow her a percentage of the corporation's dividend income, thereby eliminating speculation regarding the worth of Mr. Bartley's stock."

Upon the hearing of husband's objections to the special master's report, the court rejected the master's report in part and entered a judgment on the following issues. In lieu of the payment of monthly child support payments of \$1,400 for each child and the payment of \$8,400 per year into an educational and health trust, as recommended by the master, the court ordered the husband to pay \$1,400 in semi-monthly installments plus an additional \$1,000 per month in quarterly installments. He was also ordered to pay post-high school educational expenses at a state-supported university.

Alimony payments were changed from the recommended \$1,000 per month rehabilitative alimony for 12 months to periodic alimony of \$900 per month for 18 months and for such other period of time as the court may order in the future.

The foregoing findings by the court are not at issue on this appeal and are affirmed.

The following findings of the court are at issue. As pertinent, the court made the following findings on these issues: "The Court declines, however, to accept the valuation placed by the Special Master on the Defendant's interest in Diversified Polymer Industries, Inc. since any realization of either party's

portion of such interest must come from future earnings rather than from any present value in the Defendant's shares themselves. Rather, the Court finds that the Plaintiff should be awarded a portion of such future earnings in the form of dividends as they are received by the Defendant. The Court establishes the Plaintiff's interest in Diversified Polymers Industries, Inc. at \$100,000.00 and the Defendant shall compensate the Plaintiff for her interest as provided below: 'The Plaintiff shall receive as her portion of Diversified Polymer Industries, Inc., the sum of \$100,000.00, which shall be paid by the Defendant, plus interest at seven percent (7%) from the date of entry of this Order, from future dividends received by the Defendant from this business. The Defendant shall pay at least one-third of the net income from each dividend. To insure a proper allocation of these future dividends between the parties, the Defendant shall provide accountings to the Plaintiff on at least a quarterly basis of such dividend earnings.' The Court also finds that the sole proprietorship operated by the Defendant and known as Southern Adhesive Consultants has any [sic] value as a going concern, but a division of the cash assets now held by the company will be made. .... [T]he Plaintiff received the parties' Kemper Money Market Account, and the balance of approximately \$7,300.00 should now be awarded to the Defendant. As for the personal bank account held by the Defendant that was valued at approximately \$26,500.00 both at the time of the divorce and again at the time of the Special Master's hearing, the Court finds that each party has now received approximately equal portions of those funds."

The wife says the court was in error in its holding on each of these issues. We must agree, and remand for further proceedings in part, reverse in part, and and modify in part.

We first consider the holding that the wife should receive only \$100,000 for her marital interest in DPI stock and that should be paid solely from the dividends of the corporation.

We cannot agree with the holding of the trial court that the value of the stock in DPI must be determined from its market value and consideration of future earnings is inappropriate. To accept the court's ruling would be to reject out of hand our supreme court's adoption of the Delaware Rule as the proper method for evaluating closely held corporations. See **Blasingame v. American Materials, Inc.** 654 S.W.2d 659, 667. The **Blasingame** court quoted with approval extensively the case of **Brown v. Hedahl's-Q B & R, Inc.**, 185 N.W.2d 249 (N.D.1971) as follows:

"It appears, as a matter of general law, that there are three primary methods used by courts in determining the fair value of shares of dissenting shareholders. These three methods are the market value method, the asset value method, and the investment or earnings value method. The market value method establishes the value of the share on the basis of the price for which a share is selling or could be sold to a willing buyer. This method is most reliable where there is an established market for the stock. The asset value method looks to the net assets of the corporation valued as a 'going concern', each share having a pro rata value of the net assets. The net assets value depends on the real worth of the assets as determined by physical appraisals, accurate inventories, and realistic allowances for depreciation and obsolescence. The investment value method relates to the earning capacity of the corporation and involves an attempt to predict its future income based primarily on its previous earnings record. Dividends paid by the corporation are considered in its investment value. Generally, all the elements involved in these methods are considered in determining the value of the dissenter's stock. ...."

In **Brown**, North Dakota adopted the Delaware rule requiring that all three methods be used in determining the fair value of a dissenter's shares, assigning such weight to each method as may be appropriate considering the type of business, the objectives of the corporation, and other relevant factors.

In **Brown**, the Supreme Court of North Dakota, in assigning the percentage of weight to be given each of the three valuation methods discussed guidelines to be considered as follows: 'Normally, where there is an established market for the stock of a corporation the

market price is given great weight. In other cases where there is no reliable market and none can be reconstructed, market price is not considered at all.' . . . . Normally, a higher value is assigned only in cases where the primary purpose of the corporation is to hold assets, such as real estate, for the purpose of allowing them to appreciate in value. . . . In other words, assets are weighed more heavily when they are held for appreciation purposes rather than for commercial retail or wholesale purposes designed to generate earnings. . . . Normally, in a commercial business, earnings are given great weight as the primary purpose of the business is to generate earnings and not to hold assets that will appreciate in value. . . . [E]arnings should ordinarily weigh heavily in determining the true value of the stock in a commercial corporation.

The court then said:

There are numerous other factors that expert witnesses may deem relevant on the question of the weight to be given each of the three methods, but the courts must make the final determination of the appropriate weight to be given each method as well as the ultimate value of the stock interest.

We adopt the Delaware rule requiring the use of all three methods in determining the fair value of a dissenting minority stockholder's shares.

Id. 667.

In fixing the value of the DPI stock, Mr. Costello applied the Delaware rule. He considered the three methods required by the rule and gave each one proper consideration. He found, however, the market value of the stock was a zero factor because there was no market value for the stock. The fixed assets factor was also considered of no value because there was no relationship between the fixed assets of the corporation and its earning capacity. The August, 1994, balance sheet of DPI shows, under fixed assets, as follows: Machinery & Equipment \$99,687.22; Accumulated Depreciation (\$84,808.23); Undepreciated value \$14,878.99; Current Assets: Cash \$67,748.04, Savings Certificate \$2,000, accounts receivable \$179,162.19, and Inventory \$118,725.54, for a total of \$367,635.87.

Mr. Bartley testified there was no market for his stock and the book value of the corporation did not represent the value of his stock. There was no evidence offered by the husband either before the special master or the trial court to establish the value of the 22.5% of the stock held by him. Also, the trial court offered no basis for fixing the value of the wife's interest in the stock at \$100,000. He did not offer any explanation as to the value he placed on the 22.5% of the stock in DPI. He offered an arbitrary figure at which he established the value of the wife's interest in DPI stock without reference to any evidence or authority supporting his holding.

The Appellee cites us to the cases of **Barnhill v. Barnhill**, 826 S.W.2d 443, 449 (Tenn.App.1991) and **Harrington v. Harrington**, 798 S.W.2d 244, and to TCA § 36-4-121(c) which requires an equitable division of marital property, which is not necessarily an equal one. We agree this is the rule in this jurisdiction, but let us look at the evidence and see if we can find any evidence which would support a finding that equity requires the wife's award for her interest in this marital asset to be limited to \$100,000 and that that amount should be paid to her at the rate of 30% of the dividends received by the husband from DPI each year. We find no such evidence. On the contrary, we find the evidence shows this would be unfair and inequitable.

The undisputed proof shows the parties started acquiring this stock, with its attendant increase in value, in January, 1985. The basis of this acquisition was a salary to the husband of \$42,000 per year and that salary would not be increased, but he would share in the profits of the corporation if and when it became profitable. It was seven years later, in

December, 1991, that a dividend was declared of approximately \$118,000 from which the parties received 22.5%, or approximately \$30,000. After 1991 the dividends of the corporation boomed. In 1992 the corporation paid \$293,080 in dividends and in 1993, \$366,733. In 1994 we have the payments of dividends for only the months of January through August, which were as follows: January \$75,000, April, \$50,000, June \$35,000, July \$130,000, August \$100,000 - total \$390,000. The husband received \$87,750 in dividends for this eight-month period. If we assume the last four months of the year were half as productive as the first eight months, the husband's dividends for the year would be equivalent to 1 1/3 times the total value placed on the wife's interest in this extremely valuable marital asset. In considering the equities of this property division, we must also take into consideration that the wife is receiving a single payment while the husband will probably continue to receive these payments for many years to come.

In the case of **Wallace v. Wallace**, 733 S.W.2d 102, 107 (Tenn.App.1987) this court, in addressing the determination of the value of closely held corporate stock as marital property, said:

A public corporation's value is most reliably determined using the market value method. **Blasingame v. American Materials, Inc.**, 654 S.W.2d 659, 666 (Tenn.1983). This method presumes that there is an established market for the corporation's stock which will enable the court to arrive at a price a willing buyer would pay for the stock. The stock in closely held corporations is rarely traded. Thus, it is improper to attempt to place a value of a closely held corporation using the method generally used to place a value on a public corporation. **Lotz v. Lotz**, 120 Cal.App.3d 379, 384, 174 Cal.Rptr. 618, 621 (1981).

The **Wallace** court, as pertinent, said, at 107:

The value of a marital asset is determined by considering all relevant evidence regarding value. **In**



**re Marriage of Rosen**, 126 Ill.App.3d 766, 81 Ill.Dec.840, 846-47, 467 N.E.2d 962, 968-69 (1984) and 27C C.J.S. Divorce Secs. 566 & 569 (1986). The burden is on the parties to produce competent evidence of value, and the parties are bound by the evidence they present. **In re Marriage of Deem**, 123 Ill.App.3d 1019, 79 Ill.Dec. 542, 546, 463 N.E.2d 1317, 1321 (1984); **In re Marriage of Larkin**, 462 N.E.2d 1338, 1344 (Ind.Ct.App.1984); and **Martin v. Martin**, 358 N.W.2d 793, 798 (S.D.1984). Thus the trial court in its discretion, is free to place a value on a marital asset that is within the range of the evidence submitted. **In re Marriage of Johnston**, Mont. 726 P.2d 322, 325 (1986) and **Hein v. Hein**, 366 N.W.2d 646, 650 (Minn.App.1985).

In fixing the wife's value in the DPI stock at \$100,000, the court failed to fix its value within a reasonable range of evidence in the record. The only evidence in the record relating to the value of the 22.5% in DPI is the uncontradicted testimony of Mr. Costello who fixed its value at \$450,000. The husband offered no evidence to the contrary. The qualifications of Mr. Costello are not questioned and his use of the Delaware rule in appraising the closely held corporation has been adopted in this jurisdiction.

We hold the 22.5% of the stock held by the husband in DPI has a value of \$450,000. The wife's marital interest in the stock is \$225,000. The order of the court in fixing the value of wife's interest in the stock will be modified accordingly, with interest as hereinafter fixed.

The court ordered the husband to pay the wife for her interest in the stock from future dividends received from DPI. He ordered the husband to pay her 1/3 of the net income from each dividend. No minimum amount nor time limit for full payment were set. We see many pitfalls in the order. The stockholders could decide to increase salaries and greatly reduce or cease paying

regular dividends. We hold the stock in DPI shall be awarded to the husband as part of his marital property. The husband shall pay the wife for her interest in the stock as follows: Upon the entry of a final decree, the court shall award the wife from the liquid assets which the court has ordered to be divided equally between the parties \$50,000 of the husband's portion of these assets; or the husband may elect to pay this amount in cash. If the husband's share of the liquid assets is insufficient to allocate this amount, the husband shall pay the difference in cash. A judgment shall be entered against the husband for \$175,000 which shall bear interest at the rate of 10% pursuant to TCA § 47-14-121 and § 47-14-123. On this judgment, the husband shall pay half of all dividends, after taxes, as received by him from DPI, but no less than \$25,000 per year, until the judgment and interest have been paid. Payments shall be applied first to interest and then to principal. The judgment shall be secured by life insurance on husband's life and a lien on one-half of the DPI stock.

In ordering a division of the assets of Southern Adhesives, the trial court presupposed this company to be a sole proprietorship owned by Mr. Bartley. The testimony of Mr. Bartley, as recited above, however, indicates the company is a partnership with Mr. Halyak. The judgment of the court on this issue is set aside and vacated and the case is remanded for further hearing on this issue. The court shall determine the ownership of the company and fix the value of the respective parties in this property.

The Appellant wife also says the court was in error in holding she received \$10,000 from the parties' Kemper Money

Market account prior to February 6, 1995. She also says the court was in error in holding she had received approximately one-half of the \$26,500 checking account. The wife argues there is no proof in the record to support these findings of the court. We are constrained to agree with the Appellant's insistence on this issue.

The wife also argues that if she did receive any money which was extracted from these accounts, it was for child support and living expenses to which she was entitled and should not be charged against her share of the marital assets. Although there is no proof in the record before us which shows this was or was not what transpired, the Appellee's brief tends to support this argument. In his brief, the Appellee points out that the parties were divorced in August, 1994. As pertinent, he further states: "Meanwhile, for the month of August, Mr. Bartley paid the Appellant \$4,000 as child support. No order requiring Mr. Bartley to pay any further child support was made until a hearing took place on February 6, 1995, at which time the trial court directed Mr. Bartley to pay child support in an amount totaling \$2,400 per month. From September of 1994 through February of 1995, however, the Appellant received a substantial sum of money from the bank account originally valued at \$26,500.06. .... Appellant received five payments (on October 2, 1994, November 7, 1994, December 2, 1994 and two payments on January 3, 1995), which totalled \$12,000." It would be inequitable to charge wife's marital property interest with funds used to pay child support and other expenses which should have been paid by the husband.

There is no proof in the record to support the holding of the court on these issues. The order of the court on these issues is reversed and the judgment of the court fixing child support and alimony will be amended to be effective as of the date of divorce, July 26, 1994. The case is remanded to the trial court for further proceedings. To the extent the judgment is not modified, reversed, or remanded, it is affirmed.

The case is remanded for further proceedings and the entry of a judgment in keeping with the proof and this opinion.

The cost of this appeal is taxed to the Appellee.

---

Clifford E. Sanders, Sp.J.

CONCUR:

---

Herschel P. Franks, J.

---

Don T. McMurray, J.