

NOTICE
This order was filed under Supreme
Court Rule 23 and may not be cited
as precedent by any party except in
the limited circumstances allowed
under Rule 23(e)(1).

2011 IL App (4th) 100800-U

Filed 9/26/11

NO. 4-10-0800

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of)	Appeal from
RANDY W. JENSON,)	Circuit Court of
Petitioner-Appellee,)	Macoupin County
and)	No. 07D267
KIMBERLY S. JENSON, n/k/a KIMBERLY S.)	
BACKSTROM,)	Honorable
Respondent-Appellant.)	Patrick J. Londrigan,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.

Presiding Justice Knecht and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court had sufficient evidence before it to determine the value of the business held as marital property and did not abuse its discretion in distributing the marital property. Therefore, we affirm the trial court's judgment.

¶ 2 On August 9, 2009, the trial court entered an order granting petitioner, Randy W. Jenson, and respondent, Kimberly S. Jenson, now known as Kimberly S. Backstrom, a dissolution of marriage. As part of the order, the court awarded Randy ownership of Subsurface Consultants, Inc. (business), a business jointly owned by Randy and Kimberly, and awarded Kimberly \$30,000 for her interest in the business. Kimberly appeals the court's valuation of the business. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties are aware of the facts of this case and the evidence presented to the

trial court during their divorce proceedings. We discuss that evidence only to the extent necessary to put the parties' arguments in context.

¶ 5 In December 2007, Randy filed a petition for dissolution of marriage. In March 2008, the trial court entered a temporary order that directed (1) Randy to pay Kimberly \$4,000 a month as maintenance; (2) Randy to pay Kimberly's health insurance premiums, car payments, and car insurance premiums as they came due; and (3) Kimberly to vacate the marital property so Randy could occupy it by March 29, 2008. Randy made the ordered payments for a total of 30 months (March 15, 2008, through August 15, 2010).

¶ 6 While the matter was still pending before the trial court, the parties were able to agree to a distribution of the marital residence and individual retirement accounts. The court adopted those agreements. Per the order, Randy retained the marital residence and surrounding 95 acres in exchange for a \$160,779 payment to Kimberly, which represented 50% of the equity in the marital residence and surrounding property. A separate order split the monies in the parties' individual retirement accounts evenly, with Randy agreeing to pay Kimberly half the difference between the two accounts.

¶ 7 The evidence before the trial court consisted of two days of testimony (March 18, 2010, and April 12, 2010) and various exhibits entered by both parties. The parties were the only witnesses to testify to the value of the business. In pertinent part, the evidence showed the following.

¶ 8 Randy and Kimberly were married on September 10, 1990. The marriage was Randy's third and Kimberly's second. The marriage did not produce any offspring, but Kimberly had an eight-year old son that lived with the couple. Four months prior to the marriage, Randy

purchased the business from his former boss, Randy Lambert, for \$60,000. According to the sales contract, the purchase price was apportioned as follows: \$34,247 for equipment, \$25,000 for a covenant not to compete, and \$753 for goodwill and the company name. The business specialized in locating underground utility lines for construction companies. Initially, Randy was the sole owner, operator, and employee of the business, but, after marrying Randy, Kimberly was given a 50% ownership share of the business and served as an officer and director. Kimberly worked 10 to 20 hours a week as a bookkeeper for the business and also maintained the couple's household, which she claimed allowed Randy to focus on work. Prior to the marriage, Kimberly worked as a secretary at Scott Air Force Base. After the couple separated in 2007, Randy took over the bookkeeping duties.

¶ 9 Randy testified that Kimberly was made an owner, director, and officer of the business at the suggestion of his accountants, who informed him it would be advantageous for tax purposes. In addition, Randy stated that salaries were paid out to Kimberly and him on an alternating basis, also at the advice of his accountants. Over time, Randy was able to build up the business and increase both income and profits. The couple's 1991 joint tax return shows that Randy reported income of \$23,920, and Kimberly reported income of \$18,731, for a total of \$42,651. Randy's income was paid by the business, while Kimberly's income was paid by Scott Air Force Base. Kimberly quit her secretarial job soon thereafter. The 1990 corporate tax return for the business shows gross receipts of \$35,121 with \$23,442 in compensation paid to Randy, who was the sole owner, director, and officer at the time.

¶ 10 Corporate tax returns from 2001 through 2006 were also entered into evidence. The tax returns show the following: (1) 2001 gross receipts of \$242,065 with \$117,000 in

compensation paid to Kimberly; (2) 2002 gross receipts of \$234,979 with \$130,000 in compensation paid to Randy; (3) 2003 gross receipts of \$267,339 with \$130,000 in compensation paid to Randy; (4) 2004 gross receipts of \$228,970 with \$130,000 in compensation paid to Randy; (5) 2005 gross receipts of \$238,016 with \$136,500 in compensation paid to Randy; and (6) 2006 gross receipts of \$216,604 with \$143,000 in compensation paid to Kimberly.

Throughout the course of the marriage, the business also paid the parties' health insurance premiums, car insurance premiums, gas and auto maintenance expenses, phone bills, and car payments. The 2006 corporate tax return also showed a total of \$175,937 in unappropriated retained earnings, down approximately \$4,500 from the previous year. Kimberly testified that the business had retained earnings of \$107,000 in 2006, though it is unclear where she got that figure.

¶ 11 According to Randy, the business derived all of its value from his reputation and personal contacts. The companies he worked with had been longtime customers who trusted and respected him. Randy believed that the business would have little to no value without him and, therefore, would not have much resale value. Randy further testified that other than his abilities, the business' only assets were four underground locators (valued at \$3,000 to 4,000 each), a work van (worth less than the \$15,000 still owed on the loan), spray paint and flags (with a nominal value), and a business checking account, which contained approximately \$42,000 at the time of trial but had a balance of approximately \$87,000 when the couple separated in 2007. Randy stated the business did not have an account containing the \$175,937 in retained earnings, and he had no idea how the accountants tracked that information. According to Randy, business was down about 25% in 2010 as compared to the previous year.

¶ 12 Kimberly admitted that Randy was the only person who performed field work for the business, but she believed she could learn the business and be just as successful as Randy. Beyond the corporate tax returns referenced above, a statement showing the balance of the company checking account as of November 30, 2007, and Kimberly's testimony regarding retained earnings, no other evidence of the value of the business was introduced by Kimberly, nor was any evidence of any other corporate bank accounts belonging to the business. Neither party offered any expert testimony regarding the value of the business.

¶ 13 It was shown that between December 2007 and March 2008, Kimberly obtained the following amounts: (1) \$23,000 from the couples' joint checking account; (2) \$10,000 from a check made out to the business by a customer; and (3) \$4,640 in farm rent. In addition, Randy alleged that Kimberly had borrowed \$30,000 from the business and introduced a purported loan agreement into evidence in the form of a promissory note. Kimberly did not dispute taking the \$37,640 listed above but denied ever entering into a loan agreement with the business or receiving any money in connection with the purported loan agreement. The promissory note Randy offered into evidence was signed electronically and did not contain Kimberly's signature. It was further shown that Kimberly had received unemployment compensation in the amount of \$700 per month for six months in 2008, while she was receiving \$4,000 per month in maintenance. Kimberly was unable to obtain employment during the pendency of the divorce, though she testified she had applied for several jobs. Kimberly believed her age (55) might hinder her employability and claimed she would never be able to match the earning capacity of Randy, who made \$125 an hour.

¶ 14 At the close of evidence, both parties rested almost entirely on their previously

filed position statements. Randy's position statement, in pertinent part, requested that the trial court award him all interest in the business, including all accounts, assets, and stock. In addition, Randy requested that the court order Kimberly to repay the \$37,640 she took "out of the business," as well as the \$30,000 she allegedly borrowed from the business. Kimberly's position statement, in pertinent part, requested half of the monies in the business checking account, which she claimed totaled \$86,714.69 as of December 15, 2007, as well as compensation for her 50% stake in the business. At closing, Kimberly also requested a share of the business' retained earnings.

¶ 15 On August 9, 2010, the trial court entered an order of dissolution, which also resolved the remaining matters before the court. In pertinent part, the order contained the following provisions: (1) Randy was to pay Kimberly \$3,000 per month in maintenance subject to review after one year on motion of Kimberly and a demonstration of continued need; (2) Kimberly was required to assume payment for her insurance premiums and car loan; (3) Randy was awarded the business "including all stock, equipment and all other assets;" (4) Kimberly was to repay the business the sum of \$37,640 for the monies she took, but the \$30,000 loan from the business was forgiven; (5) all personal property, *i.e.* furniture, *et cetera*, was spilt evenly; and (6) each party was responsible for their own attorney fees. Significantly, in an earlier judgment letter sent by the court to counsel for both parties on July 28, 2010, the court stated that "the \$30,000 loan from the business does not have to be repaid and is [Kimberly's] only claim of a business asset."

¶ 16 Kimberly filed a motion to vacate the order of dissolution, arguing, *inter alia*, that the trial court erred in calculating the amount she took from the business as \$37,640 when only

the \$10,000 check was business related. The motion did not contain any objection to the distribution of the business or its assets. In September 2010, the court entered an amended order reducing the amount Kimberly owed the business to \$10,000, payable within 30 days. All other provisions related to the business remained the same.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Kimberly argues the trial court erred in failing to assign a value to the business. More specifically, Kimberly argues that the court did not have sufficient evidence before it to assign a value to the business; thus, the court could not have made an equitable distribution of the marital assets. In the alternative, Kimberly argues that the court undervalued the business, which resulted in an inequitable distribution of the marital property. Finally, Kimberly argues the court erred by awarding the business to Randy and offsetting the award with maintenance to her, rather than granting her a larger portion of the marital property. For the following reasons, we disagree and affirm.

¶ 20 A. Did Kimberly Forfeit Any Challenge to the Sufficiency of Evidence on Business Value?

¶ 21 Kimberly argues that the trial court did not have sufficient evidence before it to make a determination of the value of the business she co-owned with Randy, or, in the alternative, that the court undervalued the business. Randy counters that this issue has been forfeited by Kimberly, due to her failure to raise it before the trial court. See *In re Marriage of Culp*, 399 Ill. App. 3d 542, 550, 936 N.E.2d 1040, 1047 (2010) ("Issues not raised before the trial court are [forfeited] on appeal" (internal quotation marks omitted) (alteration in original).). While Kimberly admits she did not raise this issue before the trial court, she asserts that her failure to

present evidence as to the valuation of the business does not forfeit her right to appeal on the issue. We agree with Kimberly that the issue of valuation is not forfeited. See *In re Marriage of Deem*, 123 Ill. App. 3d 1019, 1023, 463 N.E.2d 1317, 1321 (1984) ([T]he failure to offer evidence of the value of [marital] assets does not necessarily waive the right to appeal on [the issue of insufficient evidence of value]."); see also *In re Marriage of Reib*, 114 Ill. App. 3d 993, 998, 449 N.E.2d 919, 924 (1983) ("[A]bsent sufficient evidence of the present value of the assets, an award by the trial court which apportions the disposition of property is inappropriate under Section 503 of the [Illinois Marriage and Dissolution of Marriage] Act.").

¶ 22 "The valuation of assets in an action for dissolution of marriage is a question of fact for the trial court to determine." *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 975, 605 N.E.2d 670, 677 (1992). However, section 503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/503 (West 2010)) does not require that the court make a specific finding of value as to each marital asset prior to making an equitable distribution of the marital property. *In re Marriage of McHenry*, 292 Ill. App. 3d 634, 638, 686 N.E.2d 670, 673 (1997). "The [Dissolution] Act only requires the court to consider the value of the property apportioned to each spouse and that there be sufficient evidence of value in the record to allow review of the trial court's distribution." *Id.* However, absent sufficient evidence before the court to make a determination of the value of an asset, such as a business, the matter must be remanded, as there cannot be an equitable distribution of property without first determining the value of that property, nor can a reviewing court adequately review the judgment without such evidence. See *In re Marriage of Leon*, 80 Ill. App. 3d 383, 385-86, 399 N.E.2d 1006, 1008-09 (1980).

¶ 23

B. Standard of Review

¶ 24 In valuing a business, a court should look to (1) fixed assets, including cash and equipment; (2) other assets, including accounts receivable and work that has been performed but not billed or collected; (3) goodwill of the practitioner in his business as a going concern; and (4) liabilities of the business. *Tietz*, 238 Ill. App. 3d at 975-76, 605 N.E.2d at 678. However, personal goodwill, goodwill that is attributable solely to the talents of an individual and does not inure to the benefit of the company, should not be considered in the valuation of a business. *In re Marriage of Talty*, 166 Ill. 2d 232, 240, 652 N.E.2d 330, 334 (1995). Remand is improper where the complaining spouse presented no evidence on the value of an asset despite the presentation of such evidence by the opposing spouse, or where some evidence was presented and the parties had an opportunity to introduce further evidence but failed to do so. *Deem*, 123 Ill. App. 3d at 1023-24, 463 N.E.2d at 1321. The trial court must resolve any conflicts in testimony regarding valuation, and its findings will not be reversed unless they are against the manifest weight of the evidence or constitute an abuse of discretion. *Tietz*, 238 Ill. App. 3d at 975, 605 N.E.2d at 678.

¶ 25 C. Did the Trial Court Have Sufficient Evidence Before It to Value the Business?

¶ 26 Kimberly argues the trial court had insufficient evidence as to fixed assets, other assets, goodwill, and liabilities. She claims the only information before the court related to the value of the business was proof of a business bank account "valued at times between \$42,000 and \$87,000." We believe the record belies Kimberly's assertion as to all four categories of evidence.

¶ 27 Fixed assets include cash and equipment. Randy testified that the business' equipment consisted of 4 underground locators worth approximately \$12,000 to \$16,000 total, a van that was worth less than the approximately \$15,000 he still owed on the loan, and spray paint

and flags, which had a nominal value. Randy further testified that the business checking account had approximately \$42,000 in it at the time of trial and represented all the cash the business had. Kimberly did not know the current balance of the business checking account but introduced a bank statement from November 30, 2007, showing a balance of \$87,763.40. In addition, Kimberly introduced corporate tax returns for the years 2001 through 2006 that showed the business reported retained earnings in the amount of \$175,937 as of 2006. Randy testified the business did not have an account that held the retained earnings, and Kimberly did not offer any contradicting evidence.

¶ 28 Other assets include accounts receivable and unbilled or uncollected services. Kimberly claims that no evidence was offered by either party on this issue. However, Kimberly herself offered the business' corporate tax returns, which included a section for the valuation of accounts receivable. Significantly, no accounts receivable were listed on any of the corporate tax returns between 2001 and 2006. Therefore, the trial court could properly assume the business did not have any accounts receivable or that they were *de minimus*.

¶ 29 Goodwill consists of the inherent value of a business and has been described as the "ability to acquire future income." (Internal quotation marks omitted.) *Talty*, 166 Ill. 2d at 238, 652 N.E.2d at 333. However, as discussed above, where goodwill is attributable to an individual, it should not be included in the valuation of the business. Randy testified that he was the sole employee of the business and relied on his reputation and personal contacts for business. He further stated the business would have little to no value without him. Kimberly did not dispute that Randy was the sole employee of the business, outside of the bookkeeping work she performed, nor did she offer any proof of an alternative valuation of the business. Also significant

to this issue is the original purchase contract offered into evidence by Randy. The purchase contract lists the amount paid for goodwill as \$753, which suggests that there was little goodwill inherent in the company when it was purchased. Based on the evidence before the trial court, it was perfectly reasonable to conclude that any goodwill in the business was personal to Randy and to estimate the goodwill value of the business as nominal.

¶ 30 The last category which must be considered is liabilities of the business. Again, Kimberly claims no evidence was offered as to the liabilities of the business. However, Randy's un rebutted testimony establishes that he owed approximately \$15,000 on a work van. Because Kimberly offered no evidence pertaining to the liabilities of the business, the trial court could properly accept Randy's testimony as true.

¶ 31 As we previously stated, remand is improper where uncontroverted evidence was offered by one party as to the complained-of value or where the opportunity to present evidence was not taken. Significantly, we note that Kimberly kept the books of the business for 14 to 15 years yet offered little to no evidence as to the existence of any business accounts other than the checking account or any other assets at all. On the other hand, Randy offered testimony, largely un rebutted by Kimberly, pertaining to all the different categories the trial court was required to consider. Even where the evidence was conflicting as to an asset of the business, the court had the authority to resolve the conflict in Randy's favor. We conclude the court had sufficient evidence to determine the value of the business in this case.

¶ 32 When added together, the four categories listed above amount to the following totals: (1) fixed assets \$73,000 (assuming the checking account contained \$42,000, and the work van was worth \$15,000); (2) other assets \$0; (3) goodwill \$753 (the original amount paid for

goodwill); and (4) liabilities \$15,000. After adding the assets and subtracting the liabilities, the remaining value of the business is approximately \$58,753. If the cash value (\$42,000) and goodwill (\$753) are then subtracted and the value of the work van (\$15,000) is included, you have an equipment value of roughly \$31,000, which is close to the \$34,247 Randy paid for equipment when he first purchased the business in 1990. Taking into account the \$25,000 Randy originally paid for a noncompete covenant and the \$753 for goodwill, you have a total business value of roughly \$56,753, which is close to the original \$60,000 purchase price Randy paid in 1990. (The fact that the business has not appreciated over time can be attributed to the fact that it relies heavily on personal goodwill for its value, which is not considered in the purchase price. This is evident since the business has such few assets yet has gross receipts over \$200,000 a year.)

¶ 33 The trial court granted Kimberly a \$30,000 credit against a loan she received from the business as her sole claim to the assets of the business. This is equal to roughly half the value of the business as calculated above. Kimberly had an opportunity to show that the business was worth more than Randy claimed, but she failed to do so. The trial court had sufficient evidence before it to determine the value of the business, and based on the evidence in the record, we cannot say the distribution of the marital business was an abuse of the court's discretion or against the manifest weight of the evidence. We affirm the court's judgment.

¶ 34 D. Contingent Arguments on Maintenance

¶ 35 Kimberly next argues that the trial court improperly granted her maintenance payments to offset the award of the business and its income-earning potential. She contends that the court should have granted her a greater interest in the remainder of the marital property. In the alternative, Kimberly argues that the court erred in granting too little maintenance. However, we

need not address these arguments as they rely on the success of Kimberly's initial contention that the court erred in valuing the business either because it did not have sufficient evidence or because it undervalued the asset. Because we rejected Kimberly's arguments on these matters, we need not reach the contingent arguments. However, we note that the parties entered into settlement agreements as to the marital residence and the retirement account, which were ratified by the court. Those two assets represented the bulk of the remaining marital property. The agreement the parties entered into was binding on the court, outside of a finding of unconscionability. Thus, Kimberly cannot now argue that she should have received a larger portion of the equity in the marital residence or the retirement accounts. See 750 ILCS 5/502(b) (West 2010).

¶ 36

III. CONCLUSION

¶ 37

For the foregoing reasons we affirm the trial court's judgment.

¶ 38

Affirmed.