

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2014AP2243

Cir. Ct. No. 2013FA539

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ERIKA M. WEBER F/K/A ERIKA M. WALWORK,

PETITIONER-RESPONDENT,

V.

GAVIN M. WALWORK,

RESPONDENT-APPELLANT.

APPEAL from judgment of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Gavin M. Walwork appeals the property-division portion of the judgment granting him and Erika M. Weber, f/k/a Erika M.

Walwork, a divorce. The issues are whether the trial court improperly allocated an income tax liability, impermissibly double counted an asset, and failed to make an order regarding the 2014 income taxes. We affirm.

¶2 Gavin and Erika married in 2010 and divorced in 2014. They had one child. During the marriage they kept their financial lives largely separate.

¶3 When they married, Gavin owned Guidance Mortgage. Guidance held a mortgage broker's license, which required a net worth of \$100,000 to maintain. During the marriage, Gavin and Guidance acquired a mortgage banker's license. Maintaining a banker's license requires a net worth of \$250,000.

¶4 The parties' 2012 joint tax return resulted in a federal and state tax liability of \$142,406. Gavin testified that he deferred paying the tax debt to avoid Guidance's net worth falling below \$250,000 and jeopardizing its bonding. In 2014, the IRS informed him that a tax lien would be imposed if a substantial payment was not made. Gavin took out approximately \$110,000 in loans against his 401(k) plan and life insurance policies to pay down the debt.¹ He satisfied the 2012 state tax liability and paid the federal tax liability down to \$47,000. Gavin had not yet filed 2013 income tax returns at the time of the June 2014 divorce, but estimated a combined state and federal income tax liability of \$56,000.

¶5 In 2014, Gavin transferred 8,490 shares of MGIC stock to Guidance to shore up its finances. He testified that he owned 950 shares on the date of the

¹ Gavin owned his 401(k) before the marriage but made some contributions to it during the marriage. One of the life insurance policies was purchased during the marriage.

marriage and purchased the remainder with his income during the marriage. The additional 7,540 shares had a value of \$68,840 at divorce.

¶6 The trial court found that Gavin and Erika had chargeable estates of, respectively, \$406,539 and \$56,673. It ordered Gavin to make a \$174,933 equalization payment to Erika, awarded him the \$68,840 MGIC stock, and assigned him the \$103,000 combined 2012 and 2013 income tax debt. It declined to make any order as to the 2014 income taxes. Gavin appeals.

¶7 Gavin contends the court committed reversible error by not giving him a credit or offset in the property division for the income tax liability and the value of the “double-counted” MGIC stock. Doing so would have reduced his chargeable estate to \$234,699 and resulted in an \$89,013 equalization payment due to Erika, roughly half the amount ordered.

¶8 We review a trial court’s decision on property division at divorce for an erroneous exercise of discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. A court properly exercises its discretion if it considers the facts of record, applies the correct legal standard, and uses a rational process to reach a decision that a reasonable court could reach. *Id.*

¶9 Property division is within the trial court’s sound discretion. *See Weiss v. Weiss*, 122 Wis. 2d 688, 692, 365 N.W.2d 608 (Ct. App. 1985). A court begins with the presumption that property should be divided equally but may deviate from that presumption after considering twelve enumerated factors. WIS. STAT. § 767.61(2), (3) (2013-14); *see also LeMere*, 262 Wis. 2d 426, ¶¶16-17. The court may give the factors varying weight. *See LeMere*, 262 Wis. 2d 426, ¶25. A discretionary decision will be sustained on appeal if the trial court examined the relevant facts, applied a proper standard of law and, using a rational

process, reached a decision that a reasonable judge could reach. *Schumacher v. Schumacher*, 131 Wis. 2d 332, 337, 388 N.W.2d 912 (1986).

¶10 Gavin and Erika both requested an unequal division of the marital estate. Following WIS. STAT. § 767.61(3), the trial court considered the relative brevity of the marriage, the parties' ages and demonstrated income abilities, including the market-driven nature of Gavin's, the parties' separation of income and debt, Erika's assumption of child-care expenditures and Gavin's of the tax obligations, the assignment to each of the home in which each resided and the attendant mortgage(s), the parties' insurance policies, the tax consequences, and the nonnecessity of maintenance to either, except to hold it open for one year for Erika to "protect her from ... [Gavin's] substantial debts."

¶11 As to the tax liability, the court considered that Gavin agreed to handle the income tax payments during the marriage and that, until the divorce, Erika was unaware of the tax obligation and Gavin's loans from his 401(k) and insurance policies. The court accepted Gavin's explanation that he deferred paying his income taxes and then borrowed money so as to maintain the minimum net worth required by his mortgage banker license. It also noted that while fund shifting was a legal, acceptable accounting practice, in retrospect it may have proved to be not the wisest of business decisions. The court explained:

[Erika] doesn't really have the kind of income earning ability to pay those [income tax obligations] off in the future. It would be a tremendous burden on her. He's the one who made the business decisions and now the divorce intervenes and catches him in the middle of that business decision where he hasn't paid it off. It would be more fair even if it means an unequal division of the estate accumulated while they were married, it would be more fair for him to be solely responsible.

¶12 Although Gavin asked for an unequal property division, he contends the one the court settled on is unfair, in part because he was “forced” to maintain value in Guidance in excess of \$250,000. We see no misuse of discretion in this aspect of the property division, however. His business decision to acquire a mortgage banker’s license worked to his advantage when the market was on the upswing. The court fully explained why it allocated the tax liability to Gavin. When a trial court makes a discretionary decision using the proper reasoning process, the result need only be one that a reasonable judge could reach. That a different result also might be reasonable does not mean the result here was not.

¶13 Gavin next asserts that the trial court impermissibly double counted the MGIC stock, by counting it in both the Guidance valuation and in his chargeable property. We disagree.

¶14 Although the MGIC stock was a marital asset, the court awarded it to Gavin. Gavin’s expert, CPA Scott Wildman, valued Guidance as of December 31, 2013. Gavin “pledged” the stock in March 2014. He did not ask Wildman to update the valuation before the June trial, nor did Gavin provide any facts to support his statement that the stock made up for lost value. The valuation of Guidance thus never included the MGIC stock. Gavin is the sole owner of Guidance, he still owns the MGIC stock, whether under the aegis of Guidance or in his own portfolio. The court did not double count it.

¶15 The last issue is whether the trial court erred by not making an order about the 2014 income taxes. The court said, “Now, I don’t know what to do about 2014 [taxes]. Nobody showed me that they had a marital agreement. Marital property law says it’s half and half. So I don’t really know anything about it and I make no order about 2014.” Gavin concedes that he did not raise the issue

below but argues that he nonetheless can circumvent the waiver rule because the trial court raised the issue itself. Once more we disagree.

¶16 If Gavin believed an order was required, the trial court's express reference to the 2014 taxes should have served as a clear prompt for him to request one. He did not. By abandoning the claim in the trial court, Gavin has waived his right to this court's review of the claim. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

By the Court.—Judgment affirmed.

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

