

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 11, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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. 2009AP1246

Cir. Ct. No. 2008FA24

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

TATYANA M. SMALL,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

v.

GERALD M. SMALL,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gerald Small appeals a divorce judgment dividing his and Tatyana Small's property and denying his request for maintenance. He

argues the circuit court erred by (1) including certain property in the marital estate, and (2) concluding he had sufficient income, without maintenance, to become self-supporting at a standard of living comparable to what he enjoyed during the marriage. Tatyana cross-appeals that part of the judgment dividing their property, contending the court should have treated certain assets as both property and income. We affirm.

BACKGROUND

¶2 Gerald and Tatyana Small were married in September 1991. Tatyana filed for divorce in January 2008. Following a trial, the parties submitted briefs addressing property division and Gerald's request for maintenance. As relevant here, Gerald argued two assets should not be included in the marital estate because they are his primary source of income: a federal civil retirement pension he receives in lieu of social security, and a land contract under which he receives payments for real estate he sold to his daughter. Gerald also argued \$8,250 in treasury bonds he gave his daughter after Tatyana filed for divorce should be excluded from the marital estate because Tatyana knew he intended to give them to his daughter when he purchased them. Tatyana argued all three assets were marital property subject to division.

¶3 With respect to maintenance, Gerald argued his request was appropriate because he is retired and unable to support himself at the same standard of living he had during the marriage. He contended Tatyana, by contrast, enjoys a relatively high earning capacity because she obtained advanced degrees during the marriage, which were paid for with marital assets.

¶4 The circuit court concluded the treasury bonds were marital assets. However, it excluded Gerald's civil retirement account and the land contract from

the divisible estate, observing, “[I]f this court were to treat the retirement account as property to be divided between the parties then this would be creating a circular flow of money because this [c]ourt would clearly need to award [Gerald] maintenance.” It likewise concluded that “it is best to treat [the land contract payments] as a stream of income”

¶5 The circuit court then evaluated Gerald’s request for maintenance. It concluded that because the property division permitted Gerald to retain his income stream, there was no credible evidence he needed maintenance “to become self-supporting at a standard of living reasonabl[y] comparable to that [he enjoyed] during the marriage.” The court also concluded fairness did not dictate Gerald receive maintenance. It reasoned that although marital funds were expended for Tatyana’s education, Gerald benefited from this expenditure through her increased earnings during the marriage and by receiving half the value of her retirement plans in the property division.

¶6 Gerald appeals the denial of his maintenance request and the court’s inclusion of the treasury bonds in the marital estate. Tatyana cross-appeals the court’s characterization of Gerald’s federal civil pension and the land contract as a stream of income.

DISCUSSION

¶7 The decision to award maintenance and the division of property in divorce cases are left to the sound discretion of the trial court. *Schorer v. Schorer*, 177 Wis. 2d 387, 409, 501 N.W.2d 916 (Ct. App. 1993); *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We sustain discretionary decisions as long as the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, arrived at a

conclusion that a reasonable judge could reach. ***Hatch v. Hatch***, 2007 WI App 136, ¶6, 302 Wis. 2d 215, 733 N.W.2d 648.

1. Maintenance

¶8 Gerald argues the circuit court erred in two respects when it denied maintenance. First, he argues the court's conclusion he is able to maintain an adequate standard of living without maintenance is "obvious error" because it does not permit him to enjoy the standard of living he enjoyed during the marriage. To that end, he contends the court incorrectly rejected certain of his claimed expenses as excessive even though "these are the level of those expenses that were *enjoyed during the marriage.*" (Emphasis Gerald's).

¶9 Gerald misapprehends the standard for determining whether maintenance is necessary. While "the standard of living for maintenance is a standard of living comparable to the one enjoyed during the marriage," ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 35, 406 N.W.2d 736 (1987), it is not a standard undiminished from the one enjoyed during marriage. Rather, "In the usual divorce, the socioeconomic levels of the parties cannot be maintained at the level they were before the divorce." ***Hubert v. Hubert***, 159 Wis. 2d 803, 820-21, 465 N.W.2d 252 (1990). Nor is there any presumption the onus of ensuring both parties enjoy a standard of living reasonably comparable to that enjoyed during marriage is entirely on the party from whom maintenance is sought. Instead, courts are to consider "the feasibility that the party seeking maintenance *can*

become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.” WIS. STAT. § 767.56(6) (emphasis added).¹

¶10 The circuit court thoroughly analyzed Gerald’s income and expenses. It found his income is approximately \$2,200 per month and that this is sufficient to meet his monthly expenses. It also found that Gerald, who is sixty-two and retired, “could supplement his current earnings with, at the very least, some type of part-time job or employment if he so chose.” These findings are not clearly erroneous.

¶11 Next, Gerald argues the circuit court failed to consider the fairness objective of maintenance because it discounted his contributions toward Tatyana’s education. This argument ignores the standard of review. The court considered Gerald’s contribution to Tatyana’s education, but rejected his argument that fairness dictated he should receive maintenance as a result. The court found that while Gerald indeed incurred costs from Tatyana’s educational pursuits, he also benefited from her increased earning power both during the marriage—in the form of higher household income—and after the marriage by receiving one-half the value of her retirement accounts. Thus, the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, arrived at a conclusion that a reasonable judge could reach. The circuit court, therefore, appropriately exercised its discretion.

¹ References to the Wisconsin Statutes are to the 2007-08 version.

2. Property Division

¶12 Gerald challenges one aspect of the property division on appeal: the circuit court's inclusion into the marital estate of the \$8,250 in treasury bonds he gave to his daughter. His argument appears to be that because both he and Tatyana intended them to eventually be gifted to his daughter, they did not really belong to the marital estate. Again, Gerald ignores the standard of review.

¶13 The circuit court acknowledged the parties may indeed have purchased the bonds with the intention of eventually gifting them. But it found the bonds were nevertheless marital assets, which Gerald chose, "during the pendency of this action ... to cash in [and] gift to his daughter." As stated above, the division of property in a divorce is left to the sound discretion of the circuit court. *LeMere*, 262 Wis. 2d 426, ¶13. It was well within the circuit court's discretion to include this marital asset in the divisible estate.

3. Cross-Appeal

¶14 In her cross-appeal, Tatyana argues the circuit court should have classified Gerald's civil pension and the land contract as "part 'stream of income' and part 'marital asset' to be divided by the parties." Tatyana provides no authority for this argument. In fact, the only citation in her cross-appeal is to *Dutchin v. Dutchin*, 2004 WI App 94, 273 Wis. 2d 495, 681 N.W.2d 295. However, we are left to guess what particular section of *Dutchin* Tatyana believes

supports her argument because she does not cite any specific page or paragraph.² Nor does Tatyana intimate how *Dutchin* supposedly provides authority for her position. *See M.C.I. Inc., v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we will not abandon our neutrality to develop argument). Although we doubt the case supports Tatyana's central claim that assets can be classified as both a stream of income and marital property, we decline her implicit invitation to puzzle out authority for this position from her vague citation.

By the Court.—Judgment affirmed.

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

² Both parties' briefs suffer from a lack of pinpoint citations and errors in citation format. WISCONSIN STAT. RULE 809.19(1)(e) requires appellate briefs to contain citations as set forth in the Uniform System of Citation and SCR 80.02. RULE 80.02 mandates that citation to specific portions of an opinion shall be either to page numbers or paragraphs, depending on whether the opinion was published before or after January 1, 2000. Failing to provide citations to the specific portions of an opinion relied on or in the form required by RULE 809.19(1)(e) and SCR 80.02, therefore, violates the rules of appellate procedure. Accurate citation to authority is not meant as an empty formalistic exercise, but to aid us in thoroughly evaluating the parties' respective claims. We warn both parties' attorneys that if further non-compliance with the rules of appellate procedure occurs, this court will not hesitate to invoke penalties or sanctions under WIS. STAT. RULE 809.83(2).

