

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2012

Diane M. Fremgen
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. 2011AP1909

Cir. Ct. No. 2010FA576

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

CARI LYNN SCHUMACKER , N/K/A CARI LYNN PETERS,

PETITIONER-APPELLANT,

V.

DAVID JOSEPH SCHUMACKER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cari Lynn Schumacker appeals from the judgment divorcing her from David Joseph Schumacker and from the circuit court order denying her motion to reconsider aspects of the judgment. On appeal, Cari

challenges the circuit court's maintenance award and the court's refusal to include funds David inherited in the marital estate for purposes of the property division. We affirm because the circuit court properly exercised its discretion with regard to maintenance and the property division.

¶2 The Schumackers were married for twenty-one years and had three children, two of whom were minors at the time of the divorce. David worked outside the home; Cari did not work outside the home during the marriage. The circuit court undertook a lengthy analysis of the evidence and made extensive and thorough findings of fact and conclusions of law relating to maintenance and property division.

¶3 Cari challenges the circuit court's maintenance order. The amount and duration of maintenance are discretionary with the circuit court, and the award will be upheld unless the court misused its discretion. *Bisone v. Bisone*, 165 Wis. 2d 114, 118, 477 N.W.2d 59 (Ct. App. 1991). Discretion is properly exercised when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). We will not reverse the circuit court's factual findings unless those findings are clearly erroneous. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989).

¶4 "Maintenance 'is designed to maintain a party at an appropriate standard of living, under the facts and circumstances of the individual case.'" *Forester v. Forester*, 174 Wis. 2d 78, 89, 496 N.W.2d 771 (Ct. App. 1993) (citation

omitted). In reviewing a maintenance award, we consider whether the circuit court's application of the WIS. STAT. § 767.56 (2009-10)¹ factors achieves both the fairness and support objectives of maintenance. *Forester*, 174 Wis. 2d at 84-85. A circuit court misuses its discretion if it misapplies or fails to apply the statutory factors, or if it fails to fully consider the dual objectives of maintenance. *Id.* at 86.

¶5 The court intended that its ten-year maintenance order would encourage David's industriousness and potential in business. The court also wanted to encourage Cari to rejoin the workforce² and contribute to her own support with an eye toward becoming self-supporting by the end of the maintenance term.

¶6 The circuit court made findings about the parties' income. The court found that in the decade before the divorce, David earned between \$150,000 and \$200,000 annually. The court found that despite David's significant earnings, the family's lifestyle was not extravagant. The parties spent money primarily on their children, but they also took extravagant vacations. The court used David's 2011 projected income of \$263,000 to establish the parties' standard of living during the marriage. The court found that David's \$520,196 income in 2010 was artificially high and that the 2011 projected income more closely reflected the parties' financial history. The court intended for Cari to live at the standard of living the parties enjoyed during the lengthy marriage, not that afforded by the high level of income achieved in 2010, the year immediately preceding the divorce. The court

¹ All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The court found that the child placement arrangements halved Cari's responsibility for direct child care.

also attributed \$20,000 in annual income to Cari based upon a vocational evaluation.

¶7 The circuit court considered the parties' levels of education, earning capacities and ability to live at the marital standard, the parties' agreement to share the cost of private school tuition for their minor children, Cari's contributions to David's business and how she facilitated David's ability to earn income.³ The court found that Cari's budget for food and house maintenance was too high and that her variable costs appeared inflated.

¶8 The circuit court awarded maintenance for a ten-year term and divided the parties' disposable income as follows: fifty-five percent to David and forty-five percent to Cari, calculated as \$42,000 in annual maintenance and \$34,620 in annual child support.⁴ In so dividing the parties' income, the court considered that resources had to be added to funds already set aside for the children's college educations, and Cari had to locate health insurance while David would continue providing health insurance to the children. The court noted that the last three years of maintenance would coincide with the emancipation of the parties' youngest child, and Cari would have an opportunity to make decisions about her living situation and establishing herself in the workforce. The court capped David's income subject to maintenance at \$300,000 for the first five years and \$350,000 for the second five years. The court reasoned that a cap would give David an incentive to either earn more income or retire and pay his postdivorce

³ The court specifically found that David turned down more lucrative employment opportunities to avoid relocating the family and excessive travel away from the family.

⁴ Cari does not dispute child support on appeal.

obligations out of his other assets.⁵ The court found that both parties could live comfortably based upon the maintenance order.

¶9 On appeal, Cari challenges the cap on David's income. Cari construes the cap as an attempt to preclude any request to modify maintenance based upon a substantial change in circumstances. We disagree. The maintenance order does not preclude a motion to modify maintenance based on a substantial change in circumstances. Cari also offers various, hypothetical scenarios under which she would be prejudiced by the court's maintenance order. We do not consider hypothetical scenarios.

¶10 Cari next argues that the court erred when it capped David's income as an incentive for David to earn income that would not be subject to maintenance. We see no error. We first note that the court capped maintenance at a level above the \$263,000 income it found for David. Therefore, Cari was not harmed, and the objectives of support and fairness were not undermined. Second, Wisconsin courts have recognized that a court may consider giving a maintenance payor an incentive to succeed in the workplace. *Schmitt v. Schmitt*, 2001 WI App 78, ¶20, 242 Wis. 2d 565, 626 N.W.2d 14.

¶11 Cari argues that the circuit court should have set maintenance based on David's actual 2010 income of \$520,196, not his projected 2011 income of \$263,000. We resolve this issue as follows: the court determined maintenance based on available income.⁶ Cari does not point us to those portions of the record

⁵ David came out of retirement to start his business, Dairy=Bond, L.L.C.

⁶ We recall that the circuit court found that Cari's budget was inflated.

that substantiate that David regularly earned in excess of \$263,000 per year. In fact, since he founded his company, Dairy=Bond, L.L.C., David had earned \$203,277 in 2008 and \$246,224 in 2009. The court explained that it was not going to base the marital standard of living upon David's 2010 income because the 2010 earnings were far above the norm of David's earnings history, in part because the company received payments on various consulting contracts that ended in 2010. The court found credible David's submission, exhibit 36, which projected company income through 2019. The circuit court found less credible the evidence Cari submitted about David's income. The court did not err in setting David's income at \$263,000 per year.

¶12 Cari argues that in awarding maintenance for only ten years, the circuit court did not consider her ability to become self-supporting and anticipated that she could support herself by liquidating assets she received in the property division. Under WIS. STAT. § 767.56(6), the circuit court should consider the feasibility that the maintenance recipient can become self-supporting at a standard of living reasonably comparable to the marital standard and the length of time necessary to reach this goal. David points out that Cari testified that she intended to enroll in technical college courses and that she had included in her budget funds for full-time enrollment at the University of Wisconsin-Milwaukee. The court credited Cari's intention to resume her education to further her return to the workforce.

¶13 We do not agree with Cari that the circuit court anticipated that she would have to liquidate assets received in the property division to support herself when maintenance ends. Rather, it is clear from the context of the circuit court's remarks that the court was talking about how Cari would be able to make choices

about employment and her living situation once her children were no longer minors.

¶14 Cari argues that the circuit court undervalued her contributions to the marriage, family and David's earning capacity. The court found that Cari's role as a stay-at-home parent contributed to the welfare of the family and David's earning capacity. Cari does not suggest how the court's alleged disregard for her contribution renders the maintenance order unfair when the court divided the parties' disposable income with due regard for all the facts and circumstances found by the circuit court.

¶15 Cari complains that the circuit court erroneously relied upon David's verbal promise to pay for the children's college education. We see no error. Even though the court took into account that David intended to bear these expenses, the court nevertheless set maintenance at a level that approximated the marital standard of living in light of the parties' disposable income.

¶16 We observe that it was within the circuit court's discretion to consider David's intent to pay his children's college education expenses. *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶38, 269 Wis. 2d 598, 676 N.W.2d 452. David offered evidence that he had earmarked \$102,000, the balance of an inheritance from his father, for the children's education. Additional funds would be required to cover the college expenses for all three children. It is undisputed that the parties were paying for the college education of their then college-aged child. *Id.*, ¶46 (it is appropriate to consider evidence that financing the children's college educations was part of the parties' marital arrangement and would have been part of the standard of living had the marriage not ended). The court

properly considered David's intention to pay for college when it established maintenance.

¶17 We conclude that the circuit court's maintenance award was a proper exercise of discretion.

¶18 Cari next argues that the circuit court erroneously classified \$102,000, the funds remaining from David's 2000 inheritance from his father, as property not subject to division at divorce. Cari concedes that the funds were inherited and that the inherited funds were identifiable in the marital accounts. Cari's challenge focusses on whether the funds lost their character as David's nonmarital property when David commingled the inherited funds with marital funds.

¶19 A circuit court's decision regarding property division is discretionary. *Steinmann v. Steinmann*, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145.

¶20 Under WIS. STAT. § 767.61(2), inherited property is generally exempt from division at divorce if the property retained its identity and character. *Steinmann*, 309 Wis. 2d 29, ¶¶26, 29. The party claiming that property should be exempt from division at divorce bears the burden of establishing that claim. *Id.*, ¶26. If that burden is met, the opposing party must establish that the property is either not inherited or has "otherwise lost its exempt status because its character or

identity has not been preserved.” *Id.* (citation omitted). Identity is not at issue in this case.⁷

¶21 Character “addresses how parties have chosen to title or treat non-marital assets.” *Id.*, ¶29 (citation omitted). Commingling of nonmarital and marital funds does not necessarily transmute nonmarital property into marital property if the property can still be traced to its individual source. *Id.*, ¶30, n.14. “[T]he donative intent of the owner of the exempt property” can be relevant. *Id.*, ¶29 (citation omitted).

¶22 David testified that education was an important family value and that the inherited funds were to be devoted to that purpose. Cari does not argue that David did not have this intent when he commingled the funds. The circuit court found that David intended to apply the funds to the children’s educations. The circuit court’s credibility determination is binding on us. *Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶23 Where there is evidence of donative intent, transmutation by commingling is not the only ruling open to the circuit court. *Steinmann*, 309 Wis. 2d 29, ¶30 and n.14. The circuit court considered all of the facts surrounding these funds and concluded that merely placing these funds into a joint marital account did not determine their character for purposes of the property division.

⁷ Identity “addresses whether the gifted or inherited asset has been preserved in some present identifiable form so that it can be meaningfully valued and assigned.” *Steinmann v. Steinmann*, 2008 WI 43, ¶29, 309 Wis. 2d 29, 749 N.W.2d 145 (citation omitted). Identity is not at issue in this case because the parties agree that the \$102,000 balance remains from the funds David inherited.

The law permitted the court to designate the inheritance as nonmarital property and exclude it from the property division.

¶24 We affirm the circuit court's discretionary decisions regarding maintenance and the property division.

By the Court.—Judgment and order affirmed.

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

