

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2016

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. 2015AP1976

Cir. Ct. No. 2014FA340

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

NICOLE C. MAHER,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER R. MAHER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
STEVEN G. BAUER, Judge. *Affirmed.*

Before Lundsten, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Christopher Maher appeals a judgment of divorce, challenging the property division and the maintenance award. We understand

Christopher to argue that the circuit court erroneously exercised its discretion by: (1) classifying Nicole Maher's student loan debt as divisible marital property; and (2) failing to give sufficient weight to Christopher's contribution to Nicole's education and training when awarding an unequal property division in Christopher's favor, in lieu of awarding Christopher maintenance. For the reasons set forth below, we affirm.

BACKGROUND

¶2 Following a trial, the circuit court issued a decision that included its findings of fact and conclusions of law. The court made findings that included the following as part of its decision not to award maintenance, as discussed below. These findings are not challenged by Christopher on appeal and they provide factual background for the issues presented in this appeal. The court found that: the parties had a medium-term marriage (approximately 14 years); the parties are both in their 40s and nothing in their health histories precludes either party from working; Nicole obtained a college degree and a law degree during the marriage and Christopher has some college education; both parties are working in their chosen professions and "should be able to support themselves;" the parties never enjoyed a steady high income and "lived on debt" during much of their marriage; there were no extraordinary tax consequences to either party; the parties made no agreement about maintenance; there was only a small reduction in Nicole's income while she was in school, but Christopher did perform more chores and forego certain opportunities during that time period;¹ and, Christopher shared in

¹ More specifically, the court found that Christopher, "to a small degree, subordinated his life to [Nicole's] education and career and has a claim to maintenance based on fairness."

the benefit of Nicole's increased income for several years after Nicole graduated from law school.

¶3 The following are additional undisputed facts potentially pertinent to issues raised on appeal.

¶4 No children were born to or adopted by Christopher and Nicole.

¶5 Nicole incurred student loans during the marriage, and approximately \$160,000 remained outstanding on this debt at the time of divorce. During the time that Nicole was in school, from 2000-01 and 2003-06, her income dropped slightly. Approximately \$3,000 was outstanding on Christopher's student loan debt at the time of divorce.

¶6 The court denied maintenance to both parties. In lieu of maintenance that would otherwise have been awarded to Christopher, the court awarded assets and debts that resulted in a significantly unequal property division in Christopher's favor. Specifically, the court awarded assets and debts to Christopher with a total *positive* value of approximately \$65,000, while awarding assets and debts to Nicole, including all of Nicole's student loan debt, with a total *negative* value of approximately \$102,000. Christopher now appeals.

DISCUSSION

¶7 “We review the trial court's findings with respect to property division and maintenance to determine whether the court properly exercised its discretion. In the absence of an erroneous exercise of discretion, the award will be upheld.” *Settipalli v. Settipalli*, 2005 WI App 8, ¶10, 278 Wis. 2d 339, 692 N.W.2d 279. We will affirm a circuit court's exercise of discretion unless the court “fails to consider relevant factors, bases its award on factual errors, makes an

error of law, or grants an excessive or inadequate award.” *Olski v. Olski*, 197 Wis. 2d 237, 243 n.2, 540 N.W.2d 412 (1995).

I. NICOLE’S STUDENT LOAN DEBT AS DIVISIBLE PROPERTY

¶8 Christopher argues that the circuit court “erroneously exercise[d] its discretion” in considering Nicole’s student loan debt as divisible property.² As we now explain, we reject Christopher’s argument because Christopher fails to convince us that Nicole’s student loan debt falls into any of the statutory exceptions to the property division rule, and also fails to provide any other viable argument as to why this debt should be excluded from the divisible property.

¶9 The general rule governing property division is that assets and debts acquired by either party before or during the marriage are divisible upon divorce. *See McLaren v. McLaren*, 2003 WI App 125, ¶8, 265 Wis. 2d 529, 665 N.W.2d 405. Statutory exceptions are made for property acquired (1) by gift, (2) by reason of death, or (3) with funds from either of the first two sources. WIS. STAT. § 767.61(2)(a) (2013-14).³

¶10 Classifying property as divisible or non-divisible does not involve an exercise of discretion on the part of the circuit court. *See Derr v. Derr*, 2005 WI App 63, ¶¶9-10, 280 Wis. 2d 681, 696 N.W.2d 170. Instead, “[u]nder WIS. STAT.

² Christopher asserts for the first time in his reply brief that “the issue in this case does not involve whether or not the student loan debt was divisible upon divorce. The issue in this case ... is whether or not the court properly considered Nicole’s student loan debt as a part of the property division” We do not discern a coherent distinction in this assertion, and we do not discuss it further.

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

§ 767.[61], property (and presumably debt) subject to division includes *all* property of the parties acquired before or during the marriage, *unless specifically exempted by statute*. The specific exemptions are found in § 767.[61](2)(a).”⁴ *Id.*, ¶45 (emphasis added). However, once a circuit court has decided what constitutes divisible property, the “court’s decision on how to divide *divisible* property is discretionary.” *Id.*, ¶9 (emphasis in original).

¶11 Consistent with the principles set forth in *Derr*, the circuit court here determined the debts and assets that Christopher and Nicole acquired before and during the marriage that were subject to division. Having done that, the court proceeded to divide this property as stated above: an award of over \$65,000 to Christopher, and approximately negative \$102,000 to Nicole. The court explained that “maintenance would have been awarded” to Christopher “if the property was not divided” in such an unequal manner in Christopher’s favor.

¶12 Christopher argues that the court “erroneously exercised its discretion” in considering Nicole’s student loan debt in the property division, and that instead the court should have exercised its discretion to assign this debt to Nicole alone, not counting it as a part of the divisible property. To clarify, while Christopher’s briefing regarding the property division is difficult to track, we understand him to take issue only with the inclusion of Nicole’s student loan in the divisible property, as we discuss below. Christopher does not appear to challenge the court’s exercise of discretion in dividing what the court deemed to be divisible

⁴ When we decided *Derr v. Derr*, 2005 WI App 63, ¶¶9-10, 280 Wis. 2d 681, 696 N.W.2d 170, the property division statute, currently WIS. STAT. § 767.61 (2013-14), was found at WIS. STAT. § 767.255 (2003-04). The statute has since been renumbered but it has not changed in any pertinent way.

property unequally in Christopher's favor. He concedes that the "court considered all of the factors" set forth in WIS. STAT. § 767.61(3)(a)-(m) and that the court's decision was "clear that it was not awarding maintenance to Christopher in favor of an unequal property division for Christopher."⁵ Apart from the student-loan-as-divisible-property issue, then, we understand Christopher to be arguing that the court should have awarded him maintenance either in addition to or in lieu of the unequal property division in his favor. We address the court's decision not to award Christopher maintenance in the section of this opinion that follows this discussion.

¶13 With that clarification, Christopher's property division argument is based on the faulty premise that the circuit court could have exercised its discretion to exclude Nicole's student loan debt from the property division. As explained above, a circuit court's classification of property as divisible or non-divisible does not involve an exercise of discretion but, instead, the inquiry involves finding facts and then applying WIS. STAT. § 767.61 to those facts. *See Derr*, 2005 WI App 63, ¶45; *see also id.*, ¶46 ("divisible debts include[] obligations of either party acquired before or during the marriage, unless specifically exempted by statute").

⁵ More precisely, in a puzzling approach, Christopher first concedes in his principal brief that the court considered the WIS. STAT. § 767.61(3)(a)-(m) factors and divided the property unequally in his favor in lieu of awarding him maintenance, but then subsequently argues that it is unclear what rationale the court used in dividing the property. In any case, based on our review of the circuit court's decision, we conclude that Christopher's first position is correct. The court addressed the pertinent facts, including Nicole's student loan debt, in addressing the factors, and made clear that it would be substituting a Christopher-favorable property division for a Christopher-favorable maintenance award. Christopher does not argue that the court relied on inaccurate information, made inaccurate calculations, or otherwise erred in any manner in arriving at the particular division it did.

¶14 Applying a de novo standard of review, we conclude that the circuit court properly classified Nicole’s student loan debt as divisible property. We reject Christopher’s argument to the contrary for at least the following reasons: (1) Christopher does not assert that Nicole’s student loan debt falls into any of the statutory exceptions provided in WIS. STAT. § 767.61(2)(a) as set forth in ¶9 above; (2) we conclude that Nicole’s student loan debt does not fall into any of these exceptions; and (3) Christopher offers no other viable argument in support of his position that Nicole’s student loan debt is not divisible property.

II. UNEQUAL PROPERTY DIVISION IN LIEU OF MAINTENANCE

¶15 Having concluded that the circuit court did not err in including Nicole’s student loan debt in the divisible property and that the court did not improperly exercise its discretion in dividing the divisible property, we turn now to Christopher’s challenge to the court’s decision not to award Christopher maintenance. The circuit court denied Christopher’s request for maintenance based on the court’s determination that both the support and fairness objectives of maintenance were satisfied in this case through the significantly unequal division of property in Christopher’s favor. Christopher argues that, in denying maintenance, the court improperly exercised its discretion by failing to adequately compensate Christopher for his contributions to Nicole’s education and earning capacity and failing to “properly address” Christopher’s needs in terms of earning capacity and income.

¶16 Circuit courts are to consider ten factors in determining whether maintenance is appropriate, and if so, how much and for how long. *See* WIS.

STAT. § 767.56(1c).⁶ The maintenance statute is “designed to further two objectives: support and fairness.” *Finley v. Finley*, 2002 WI App 144, ¶10, 256

⁶ WISCONSIN STAT. § 767.56(1c) (2013-14) provides that:

Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time, subject to sub. (2c), after considering all of the following:

- (a) The length of the marriage.
- (b) The age and physical and emotional health of the parties.
- (c) The division of property made under s. 767.61.
- (d) The educational level of each party at the time of marriage and at the time the action is commenced.
- (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (g) The tax consequences to each party.
- (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
- (i) The contribution by one party to the education, training or increased earning power of the other.

(continued)

Wis. 2d 508, 648 N.W.2d 536. The support objective ensures that a spouse “is supported in accordance with the needs and earning capacities of the parties.” *Id.* The fairness objective “ensures a fair and equitable arrangement between the parties in each individual case.” *Id.* In considering the fairness and support objectives when one party has contributed to the education or earning capacity of the other before the full economic benefit of the contribution is realized, a court may compensate a party for his or her contributions through maintenance, property division, or some combination of the two. *See Haugan v. Haugan*, 117 Wis. 2d 200, 207-08, 343 N.W.2d 796 (1984).

¶17 We have already summarized, in the background section of this opinion, the circuit court’s findings of fact pertinent to the factors, and we will not repeat the results of that fact finding here. The court noted, as part of its maintenance analysis, that it would be ordering an unequal property division greatly in Christopher’s favor, “which is interrelated to the maintenance decision.”

¶18 The court expressed concern regarding the fact that, if Nicole were required to make monthly maintenance payments to Christopher, Nicole might be unable to make her debt payments, which could disqualify her from her then-current job at a mortgage company. Based on a goal of balancing fairness reasons for awarding Christopher maintenance with the practical realities of Nicole’s employment situation, the court decided to order an unequal property division in Christopher’s favor in lieu of maintenance.

(j) Such other factors as the court may in each individual case determine to be relevant.

¶19 Christopher's arguments are at times hard to follow, but we understand him to argue that the court's decision not to award maintenance inadequately accounted for Christopher's contributions, needs, and earning capacity and therefore failed to adequately address both the support and fairness objectives of maintenance.

¶20 However, Christopher fails to provide any basis for us to question the court's explanation for its maintenance decision, whether regarding the court's concern about Nicole's ability to stay current on her debt payments in order to retain her employment or any other pertinent fact. And, as to the focus of Christopher's argument on appeal, the court explicitly considered the fact that Christopher made real but modest sacrifices to further Nicole's education and career in light of the dual objectives of support and maintenance, and Christopher does not argue that the court clearly erred in finding his contributions to have been modest. The court also relied on the facts that Nicole's income dropped only slightly when she was in school and that Christopher shared in several years of Nicole's increased income after Nicole graduated from law school. Based on these facts, the court was free to exercise its discretion to accord Christopher's modest contributions greater or lesser weight in the context of the maintenance determination. In sum, the court addressed and considered each of the pertinent factors in WIS. STAT. § 767.56 factors, as well as the support and fairness objectives of maintenance, and Christopher provides us with no coherent basis not to defer to the court's exercise of discretion.

CONCLUSION

¶21 For the foregoing reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

