

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2008

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. 2007AP2299

Cir. Ct. No. 2005FA210

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

SUSAN MAE BAUM-RIECHMAN,

PETITIONER-RESPONDENT,

v.

CHRISTOPHER ROBERT RIECHMAN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 BRIDGE, J. Christopher Riechman appeals a judgment of divorce from Susan Baum-Riechman. He challenges the division of a portion of his worker's compensation settlement, the valuation of those funds, the division of

real property owned by the parties, and the court's rulings regarding child support and maintenance. We conclude that the court properly exercised its discretion with respect to each of these issues and therefore affirm.

BACKGROUND

¶2 Susan and Christopher were married in 1995. They divorced in July 2007. Prior to their marriage, Christopher was injured in a compensable work related accident and sustained significant injuries. In 2004, Christopher settled his worker's compensation claim. Under the terms of the settlement, he received a lump sum payment of \$184,000. Of this amount, \$67,000 was paid directly to Christopher and was deposited by him into a bank account jointly held with Susan. The remaining \$117,000 was deposited into a restricted interest-bearing account in Christopher's name only. From this account, Christopher was allowed to withdraw \$1,000 per month plus any interest generated.

¶3 During their marriage, Christopher was the recipient of social security disability benefits in the amount of \$567.00 per month. He was also self-employed as a gunsmith for which he earned less than \$1,000 per year. From approximately 1996 until 2006, Susan was employed as a sales person and earned, on average, approximately \$1,700 per month. However, her employment was terminated for cause in the summer of 2006.

¶4 In 1999, the parties purchased a thirty-two acre parcel of land (hereinafter "Johnson Road property") as tenants in common with Christopher's father. According to the deed, Christopher's father owned fifty percent of the property and Christopher and Susan owned the remaining fifty percent. To pay for the property, Christopher, Susan, and Christopher's father jointly borrowed approximately \$57,600. At the time the property was purchased, Christopher's

father also had an individual debt secured by separate real estate. This debt was consolidated with the debt jointly incurred by all parties for the purchase of the Johnson Road property. The parties stipulated at trial that the fair market value of the Johnson Road property was \$131,000 with an outstanding mortgage of \$85,887.

¶5 In July 2005, Susan sought the dissolution of her marriage to Christopher. The parties stipulated to the placement and custody of their minor children, but were unable to reach an agreement regarding the division of property, maintenance, child support, and attorney's fees. A trial was held on those issues.

¶6 Relevant to the present appeal, the circuit court determined that included in the division of the parties' property was \$53,562 of the worker's compensation funds originally deposited in the parties' joint account. The court explained that this amount represented the amount remaining of those funds the day the divorce proceeding was commenced, less \$2,000 for a cash advance ordered by the court commissioner. Approximately one month before Susan commenced the divorce proceeding, Christopher deposited the then existing balance in the joint account into an account titled solely in his name. While the divorce proceeding was pending, Christopher withdrew the balance of that account in cash, which he initially kept in his tool box because he feared the account might be frozen by temporary order of the family court commissioner. Christopher ultimately spent all or nearly all of the money during the pendency of the divorce.

¶7 The circuit court also determined that the value of the parties' combined equity in the Johnson Road property was \$24,000, and awarded that amount to Christopher. After dividing the parties' assets and liabilities equally, the court ruled that Christopher was to pay Susan \$41,578 as an equalization

payment. The court further ruled that Susan was to pay Christopher monthly maintenance in the amount of \$245 for eight years and monthly child support in the amount of \$92. In determining the parties' monthly income, the circuit court determined that Susan's loss of employment amounted to "shirking," and that she had a monthly earning capacity of \$1,700. The court determined that for his part, Christopher had a monthly income of \$1,209. In calculating Christopher's monthly income, the court included Christopher's social security disability benefits in the amount of \$567, the parties' children's social security benefits in the amount of \$200, income from gunsmithing in the amount of \$42, and \$400 per month from the restricted account, which the court estimated was the monthly interest accruing on the account. Christopher appeals.

STANDARD OF REVIEW

¶8 A circuit court's decision with regard to the division of property in a divorce case is a discretionary determination. *Dutchin v. Dutchin*, 2004 WI App 94, ¶10, 273 Wis. 2d 495, 681 N.W.2d 295. To sustain a discretionary determination, we must be able to see that the court made a "reasoned application of ... the appropriate legal standard[s] to the relevant facts in this case." *Weberg v. Weberg*, 158 Wis. 2d 540, 546, 463 N.W.2d 382 (1990) (citation omitted). Accordingly, we will affirm the court's decision if the record shows that discretion was exercised and we perceive a reasonable basis for the court's decision. *Id.*

DISCUSSION

WORKER'S COMPENSATION BENEFITS

¶9 Christopher contends that the circuit court erred by determining that the funds from his worker's compensation award deposited in the joint account

were marital property subject to division. “When a party to a divorce asserts that property … is not subject to division, that party has the burden of showing that the property is non-divisible at the time of the divorce.” *Derr v. Derr*, 2005 WI App 63, ¶11, 280 Wis. 2d 681, 696 N.W.2d 170.

¶10 As a general rule, assets and debts acquired by either party before and during the marriage are divisible upon divorce. *Id.*, ¶10. Under the applicable case law, however, it is presumed that a person awarded personal injury settlement funds is entitled to the entire amount recovered for loss of bodily function, future earnings, and pain and suffering. *See Richardson v. Richardson*, 139 Wis. 2d 778, 780-81, 407 N.W.2d 231 (1987). The same is true with respect to future payments under a structured settlement of a personal injury claim, *Krebs v. Krebs*, 148 Wis. 2d 51, 57, 435 N.W.2d 240 (1989), and to payments already made. *Weberg*, 158 Wis. 2d at 548-49.

¶11 However, the circuit court may alter the presumed distribution. *See id.* at 550. *See also Richardson*, 139 Wis. 2d at 786; *Krebs*, 148 Wis. 2d at 58. In the present case, the circuit court determined that the presumption was overcome because Christopher donated these funds to the marriage.

¶12 “When an owning spouse acts in a manner that would normally evince an intent to gift property to the marriage, donative intent is presumed, subject to rebuttal by ‘sufficient countervailing evidence.’” *Derr*, 280 Wis. 2d 681, ¶33. Situations creating a presumption of donative intent include depositing non-divisible money into a joint bank account and expending non-divisible funds to acquire property, goods, or services that are generally used for the mutual benefit of the parties. *Id.*, ¶36-37.

¶13 In this case, Christopher deposited the contested funds in the parties' joint account. This, in and of itself, creates a presumption of donative intent on Christopher's part under the rule articulated in *Derr*. Beyond this legal presumption, however, the circuit court also made specific findings with respect to Christopher's subjective donative intent. The court found that when Christopher deposited the proceeds into the joint account, he evinced an intent to gift those funds to the marital estate. The court based its findings on evidence that Christopher planned to use the money to build a house, and also on Susan's testimony that the parties did not discuss or have an understanding that she was restricted from withdrawing the funds from the account.

¶14 Christopher testified at trial that his intent in establishing the joint account was for purposes of convenience only. The court, however, did not find credible what it characterized as "Christopher's self-serving testimony." The weight and credibility to be given to testimony is within the province of the circuit court. *Covelli v. Covelli*, 2006 WI App 121, ¶14, 293 Wis. 2d 707, 718 N.W.2d 260. The court also noted that Christopher acted contrary to his specified intent when he withdrew and spent the balance of the account because he feared the account might be frozen by a temporary order.

¶15 We are satisfied that the circuit court applied the correct law to the facts of record, and we see no basis for disturbing its determination that the worker's compensation settlement funds deposited in the joint account were converted to marital property.

VALUATION DATE

¶16 Christopher contends that the circuit court erred by valuing the funds placed in the joint account at the time the divorce proceeding was commenced, rather than as of the date of divorce. We disagree.

¶17 The valuation of the marital estate lies within the sound discretion of the circuit court. *Rumpff v. Rumpff*, 2004 WI App 197, ¶27, 276 Wis. 2d 606, 688 N.W.2d 699. We will uphold the court's valuation if we determine that it considered the relevant facts, applied the proper standard of law, and used a rational process to reach a conclusion that a reasonable judge could reach. *Id.*

¶18 Assets subject to property division in a divorce are generally valued as of the date of the divorce; however, special circumstances can warrant a deviation from this rule. *Schinner v. Schinner*, 143 Wis. 2d 81, 98, 420 N.W.2d 381 (Ct. App. 1988). In addition, although an equal division of property is presumed, the court may deviate from an equal division after considering each party's efforts to preserve marital assets. *Covelli*, 293 Wis. 2d 707, ¶29. Under WIS. STAT. ch. 767 (2005-06),¹ "recompense [is] available when one spouse has mismanaged or dissipated assets." *Id.*, ¶30. See WIS. STAT. § 767.63.

¶19 The circuit court did not explain the circumstances warranting a deviation from the general rule. We have stated that although the proper exercise of discretion contemplates the court adequately setting forth its reasoning, when the court fails to do so, we may search the record to determine whether it supports

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the court's decision. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. If the facts support the court's exercise of discretion, we will uphold the decision. *Franke v. Franke*, 2004 WI 8, ¶55, 268 Wis. 2d 360, 674 N.W.2d 832.

¶20 The record reflects that before the divorce action was commenced, the joint account had a balance of \$55,561.96. However, as noted above, in the months between when the action was commenced and when the judgment was entered, Christopher spent all or nearly all of this money, which he had concealed in a tool box because he feared the money might be frozen by court order. From these facts, it is reasonable to infer that Christopher dissipated the assets in an attempt to use them for his own benefit before they were made unavailable to him by court order. We are satisfied that the record supports the circuit court's decision, and that valuing the joint account prior to Christopher's depletion of the assets was a proper exercise of discretion.

JOHNSON ROAD PROPERTY

¶21 Christopher argues that the circuit court erred when it refused to order the sale of the Johnson Road property. He contends that the court had three alternatives: (1) convert the joint tenancy between Christopher and Susan into a tenancy in common; (2) order the sale of the property, which Christopher advocated; and (3) value the parties' equity in the property and allocate the asset to one party, which Susan advocated. Christopher argues that the second alternative, selling the property, would have been more advantageous. He does not, however, explain how the court erroneously exercised its discretion by selecting the third alternative.

¶22 We have stated that it is for the circuit court, not an appellate court, to choose among alternatives. *Garceau v. Garceau*, 2000 WI App 7, ¶11, 232 Wis. 2d 1, 606 N.W.2d 268. It is clear from the court's decision that it fully considered the possibility of ordering the property sold, but determined that valuing the parties' equity in the property and awarding it to Christopher was a preferable alternative. In its decision, the circuit court explained that a court-ordered sale of the property would be problematic if Christopher's father disputed any aspect of the sale or division of the sale proceeds because of uncertainty as to the court's jurisdiction to issue orders binding him to the sale. The court also noted possible complications arising out of the separate debt of Christopher's father, which was secured by the Johnson Road property. The court was not unmindful of the fact that the property might nevertheless need to be sold, and therefore subtracted from the parties' total equity an estimated amount of expenses related to the potential sale. The court considered all of the available options, including the sale of the property, and determined that valuing the equity was the best solution. The record supports the court's determination and we conclude that the court's decision not to order the sale of the Johnson Road property was not an erroneous exercise of discretion.

¶23 Christopher also argues that in valuing the parties' equity, the court should have deducted from the property's fair market value the property's total indebtedness, and then divided that amount by one-half, which would result in an equity valuation of \$22,556.50. However, this ignores the fact that a portion of the total secured debt on the property was not a marital debt. Christopher, Susan, and Christopher's father were jointly and severally liable for the total debt under the terms of the promissory note. It was not an erroneous exercise of discretion to not attribute to Christopher and Susan a debt that was not theirs to begin with. The

court fully considered all of the relevant financial aspects of the Johnson Road property, and its decision is fully supported by the record.

MAINTENANCE

¶24 Christopher contends that the circuit court erroneously exercised its discretion by including in Christopher's income for the purpose of calculating maintenance the social security benefits received by the parties' children, and by awarding him maintenance for only eight years, rather than indefinitely, in light of his disability.

¶25 In deciding the amount and duration of an award of maintenance, the court is to consider the factors set out in WIS. STAT. § 767.56.² *Finley v. Finley*,

² WISCONSIN STAT. § 767.56 provides as follows:

Upon a judgment of ... divorce ... the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.61.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) 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.
- (6) 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.
- (7) The tax consequences to each party.

(continued)

2002 WI App 144, ¶10, 256 Wis. 2d 508, 648 N.W.2d 536. These factors are designed to ensure that the spouse is supported according to the needs and earning capacity of the parties, and that a fair and equitable arrangement between the parties is achieved. *Id.*

Children's Social Security Benefits

¶26 Christopher first argues that the circuit court erroneously exercised its discretion by including the children's social security benefits in his income for purposes of calculating maintenance. He contends that these benefits should not be included because he may no longer receive the benefits if they are terminated by the federal government or if Susan receives primary custody of the children in the future. However, as Susan points out, the court may reexamine the issue of maintenance at a later date. *See WIS. STAT. § 767.59.*³ This provision allows the

- (8) 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.
- (9) The contribution by one party to the education, training or increased earning power of the other.
- (10) Such other factors as the court may in each individual case determine to be relevant.

³ WISCONSIN STAT. § 767.59 provides in pertinent part as follows:

(1c) Court authority. (a) On the petition, motion, or order to show cause of either of the parties, the department, a county department under s. 46.215, 46.22, or 46.23, or a county child support agency under s. 59.53(5) if an assignment has been made under s. 46.261, 48.57(3m)(b)2. or (3n)(b)2., 49.19(4)(h), or 49.45(19) or if either party or their minor children receive aid under s. 48.57(3m) or (3n) or ch. 49, a court may, except as provided in par. (b), do any of the following:

(continued)

circuit court to review and modify maintenance and/or child support in the future should there be a showing of a substantial change in circumstances.

¶27 Christopher also argues that the children's social security disability benefits should not be included in his income because the benefits cover the needs of the children. Dependent social security disability benefits, which we have characterized as "a substitute for the disabled parent's earnings," are to be applied to the child's current support and reasonably foreseeable needs. *Paulhe v. Riley*, 2006 WI App 171, ¶¶12, 17, 295 Wis. 2d 541, 722 N.W.2d 155. Thus, Christopher is correct that the benefits cover the needs of the children. That does not mean, however, that they cannot be included in his income for determining maintenance, and Christopher cites no legal authority to the contrary.

¶28 The benefits are not paid directly to the child, but rather to the child's representative payee, in this case, Christopher. *Id.*, ¶17. Christopher receives the benefit of this income and is free to use it for general household expenses such as paying rent or electric bills. This income serves as a substitute for his own earnings, and we conclude that it was properly taken into account by the circuit court in setting maintenance. We also reject Christopher's contention

1. Revise and alter a support or maintenance order as to the amount and payment of maintenance or child support and the appropriation and payment of the principal and income of property held in trust.

....

- (1f) **Support: substantial change in circumstances.** (a) Except as provided in par. (d), a revision under this section of a judgment or order as to the amount of child or family support may be made only upon a finding of a substantial change in circumstances.

that including the benefits in his income makes him dependent upon the children. As previously noted, the benefits are payable to Christopher to use at his discretion and he is not foreclosed from seeking a modification of the maintenance award if and when those benefits are no longer at his disposal.

Duration

¶29 Finally, Christopher argues that the court erred in failing to award him maintenance for an indefinite period of time. His concern is that that maintenance will end around the time the children reach an age when they are no longer eligible for support, and thus he will lose both support for the children and maintenance.

¶30 There is no requirement that a recipient spouse is entitled to one-half the other's salary for the rest of his or her life. *Enders v. Enders*, 147 Wis. 2d 138, 145, 432 N.W.2d 638 (Ct. App. 1988). However, when awarding limited-term maintenance, the circuit court is to take care that it does not prematurely relieve the payer spouse of a support obligation lest the former spouse become the obligation of taxpayers. *In re Marriage of LaRocque*, 139 Wis. 2d 23, 41, 406 N.W.2d 736 (1987).

¶31 After considering the factors set forth in WIS. STAT. § 767.56, as required, the circuit court determined that an award of maintenance for a term of eight years was appropriate. In reaching this decision, the court acknowledged Christopher's significant support needs given his mental and physical disability, but stated that in light of the parties' relatively short marriage, approximately ten years, an award of maintenance longer than the duration of the marriage would be "fundamentally unfair." The court further observed that,

[t]he difficulties which Christopher may face when maintenance stops is not due to any unfairness as between he and Susan. Any continuing financial needs beyond the 10 year range have more to do with limitations of social security disability and workers compensation payments. On balance, the court determines that a term of 8 years is fair to both.

¶32 The court considered Christopher's future financial situation, but rejected an extended award of maintenance. We conclude that the court's award is based on evidence in the record and that the court did not erroneously exercise its discretion when it set the term of the award at eight years.

CONCLUSION

¶33 For the reasons discussed above, the judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

