

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2996

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JANET E. MCCRILLIS,

PETITIONER-RESPONDENT,

v.

HAROLD O. MCCRILLIS,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Harold McCrillis appeals from the judgment divorcing him from Janet McCrillis. Harold disputes the trial court's maintenance award and property division. We affirm the trial court's rulings on these matters.

Harold was seventy years old and Janet was fifty-eight when the court granted them a divorce in 1998, after thirteen years of marriage. Harold's income at the time of the divorce consisted of approximately \$2,800 per month from pensions and social security. Janet earned \$500 per month working part-time, with an earning capacity found to be twice that.

The trial court valued the marital estate at \$216,222 and divided it fifty-three percent to Harold and forty-seven percent to Janet, for reasons that are not relevant to this appeal. The trial court excluded from the estate the value of Harold's pension from Consolidated Papers, and instead treated the \$1,442 he received from it monthly as part of his income stream for maintenance purposes. The court also excluded the present value of Janet's survivor's interest in that pension. (Janet will receive \$1,442 per month after Harold dies, if she survives him.) After considering the disparity of income and Janet's age, living expenses and low earning capacity, the trial court awarded her \$750 per month maintenance until she turns sixty-five. On appeal, Harold challenges the court's treatment of his pension as income rather than property, and the decision to exclude from the marital assets Janet's survivorship interest in the pension.

The trial court properly used the Consolidated Papers pension to compute Harold's income for maintenance purposes. Harold contends that the law in Wisconsin required the trial court to treat the pension as property, and divide it as such. He cites a statement to that effect in *Steinke v. Steinke*, 126 Wis.2d 372, 380, 376 N.W.2d 839, 843 (1985). However, the rule stated in *Steinke* has been modified. The supreme court has subsequently stated that:

because of the infinite range of factual situations facing circuit courts in dividing property and determining maintenance and child support, [it is] inappropriate to enforce an absolute bar against counting a pension in the

property division and in the maintenance or support determination. Such an inflexible rule runs counter to the equitable nature of these determinations and to purposes underlying the broad legislative authorization that the circuit court consider relevant financial information in dividing the property and setting the level of maintenance and child support.

Cook v. Cook, 208 Wis.2d 166, 180, 560 N.W.2d 246, 252 (1997). Harold does not challenge the trial court's use of its discretion to reach that result, only the legal basis for it. *Cook* provides a sufficient legal basis for the exercise of that discretion.

The trial court also properly refused to divide the value of Janet's potential survivor annuity interest. That interest consists of full rights to the pension income after Harold dies. As Janet notes, if that interest is divisible, so is Harold's full use of the pension for the rest of his life after Janet's maintenance is terminated in seven years. Using the trial court's finding as to the parties' life expectancies, Harold can expect to have the pension to himself for the same period of time that Janet can expect to live after he dies (seven years). The record therefore supports the trial court's exercise of its discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

