

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 5, 2003

Cornelia G. Clark
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. 03-0346
STATE OF WISCONSIN

Cir. Ct. No. 01FA001508

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

REBECCA A.J. THOMAS,

PETITIONER-APPELLANT,

V.

JASON MICHAEL THOMAS,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Rebecca A.J. Thomas appeals from a judgment of divorce and challenges the property division. She contends that Jason Michael Thomas's military enlistment bonus and her student loans should have been

divided as marital property. She also argues that the circuit court erroneously exercised its discretion when it refused to enforce the parties' agreement that Jason would pay Rebecca one-half of his net income while the divorce was pending. We affirm the judgment.

¶2 The parties were married on December 31, 1997. They separated in September 2001 when Jason enlisted in the military. Jason qualified for a \$20,000 enlistment bonus payable over four years of service. At the time of trial he had received \$5,000 of the \$20,000 bonus. During the pendency of the divorce, the parties orally agreed that Jason would pay Rebecca one-half of his net pay. Through December 2001, Jason's paycheck was deposited in the parties' joint checking account. Jason paid additional sums in 2002 but made no payments after March 2002.

¶3 The circuit court equally divided the marital property. Rebecca, who kept the parties' home, was ordered to make a \$22,035.88 equalizing payment to Jason. The judgment designated the parties' existing debts (other than the mortgage) as nonmarital debts. Thus, Rebecca was solely responsible for \$8,900 in student loans she incurred prior to the marriage but while the parties were living together. The circuit court denied Rebecca's request that Jason pay \$5,163 to compensate her for his missed income payments under the parties' oral agreement.

¶4 Rebecca first argues that the circuit court erred in not valuing Jason's \$20,000 military bonus as a divisible marital asset. Whether an asset constitutes a marital asset is a question of law we review independently. *Hubert v. Hubert*, 159 Wis. 2d 803, 811-12, 465 N.W.2d 252 (Ct. App. 1990); *Weiss v. Weiss*, 122 Wis. 2d 688, 692, 365 N.W.2d 608 (Ct. App. 1985).

¶5 The circuit court refused to divide the bonus, finding that it was a conditional payment and not guaranteed. We agree with Rebecca's contention that the underlying finding is not supported by the record. Nothing in the record indicates the terms or conditions under which Jason will receive the remaining \$15,000 bonus. For this same reason, we cannot accept Rebecca's bald assertion that Jason's absolute entitlement to the bonus was established at the time of Jason's enlistment. Nothing in the record supports either assertion.

¶6 We conclude that the circuit court implicitly found Jason's bonus to be part of his compensation package with the military. As such, it is income to him, whether already paid or payable in the future. An income stream is not divisible marital property. *See Hubert*, 159 Wis. 2d at 812 (anticipated income cannot also be treated as an asset). Income is relevant only to maintenance; this is not a maintenance case. Thus, we sustain the circuit court's refusal to divide the bonus as a marital property asset.

¶7 Rebecca contends that her student loans should have been designated as marital debt because Jason benefited from the income generated by her college degree. She explains that the marital estate was increased because she had a college degree.

¶8 The record establishes that the student loans were incurred before the marriage. However, the marital estate is defined as all of the property and obligations of either party which were acquired before or during the marriage. *McLaren v. McLaren*, 2003 WI App 125, ¶8, 665 N.W.2d 405. Whether or not we consider the characterization as nonmarital debt appropriate, the circuit court exercised its discretion in making Rebecca solely responsible for the student loan as part of the property division, even if it results in an unequal division. We

sustain a discretionary determination if the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a reasonable conclusion. *Id.* We look for reasons to sustain discretionary decisions. *Prosser v. Cook*, 185 Wis. 2d 745, 753, 519 N.W.2d 649 (Ct. App. 1994).

¶9 Here the short-term nature of the marriage was a driving factor in the property division. The circuit court was trying to put the parties back in the same position as before the marriage. In doing so, the circuit court noted that Rebecca solely enjoys the future benefits of her degree and yet benefited from having student loans reduced during the marriage with marital funds. This was a proper exercise of discretion with respect to Rebecca's sole responsibility for her student loans.

¶10 The final issue is the circuit court's refusal to enforce the oral agreement that Jason would share his income with Rebecca while the divorce was pending. The circuit court declared that any agreement, if made, was not enforceable because it was not in writing or on the record. We assume without deciding that the circuit court was obligated to consider the agreement as potentially enforceable even though it was only orally made. This is appropriate here because both parties testified that the agreement was made and there was correspondence between counsel suggesting the agreement was made in lieu of a temporary order.

¶11 WISCONSIN STAT. § 767.10(1) (2001-02) governs the enforceability of the agreement. The agreement made after the parties' separation is merely a joint recommendation to the court suggesting the outcome on a particular issue. *Van Boxtel v. Van Boxtel*, 2001 WI 40, ¶13, 242 Wis. 2d 474, 625 N.W.2d 284.

The circuit court is vested with discretion to either accept or reject such a stipulation. *See id.*, ¶25. “The parties cannot by stipulation proscribe, modify, or oust the court of its power to determine the disposition of property, alimony, support, custody or other matters involved in a divorce proceeding.” *Evenson v. Evenson*, 228 Wis. 2d 676, 683, 598 N.W.2d 232 (Ct. App. 1999) (citation omitted). This rationale applies equally to temporary support agreements because that is a matter originally within the court’s discretion. *See Van Boxtel*, 242 Wis. 2d 474, ¶21 (once the parties invoke the jurisdiction of the court, the court is given authority to determine disposition); WIS. STAT. § 767.23 (temporary orders for support).

¶12 The circuit court determined that the parties had roughly equal income streams. It noted that Rebecca benefited from living in the house during the action when Jason did not. While it recognized that the mortgage payment was probably more than what Rebecca could pay alone long term, it found that Jason had turned over money from his paycheck for several months. Rebecca was not completely left alone to bear the responsibility of maintaining the marital home. The circuit court’s refusal to enforce the agreement to its exact terms comports with its objective to return the parties to their premarital status. This was a proper exercise of discretion in light of the short-term nature of the marriage and the nominal amount of property subject to division.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

