

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 2010

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. 2009AP1842

Cir. Ct. No. 2007FA1097

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

MICHAEL P. KELLY,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

v.

ADELE P. KELLY,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Rock County: KENNETH W. FORBECK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Michael Kelly and Adele Kelly cross-appeal various aspects of the property division in their divorce judgment. Michael appeals the trial court's inclusion of dissipated assets in the marital estate, while Adele cross-appeals the trial court's methodology for dealing with her \$20,000 non-divisible equity in the home. The parties also agree that the trial court made a computational error in its calculation of Michael's liabilities. For the reasons discussed below, we reduce the amount of dissipated assets and remove the \$20,000 house compensation payment from the calculation of the marital estate. Accordingly, we affirm in part, reverse in part and remand with directions that the divorce judgment be amended in accordance with this opinion.

BACKGROUND

¶2 Michael filed for divorce in October of 2007. At that time, he was employed full time at General Motors (GM), while Adele had a nursing license but was unemployed. A court commissioner entered a temporary order generally prohibiting either party from disposing of marital assets during the pendency of the divorce without the written consent of the other party or an order of the court or court commissioner, and specifically directing that any tax refunds were to be deposited in a trust account. The temporary order also made Michael solely responsible for paying over \$3,200 in monthly debts, including the mortgage on the family residence, a home equity loan, house insurance, payments on two vehicles; health insurance for both parties; three GM Personal Savings Plan (PSP) loans; and maintenance.

¶3 Michael retired from GM in June of 2008. He was supposed to receive a monthly pension of \$2,989 and a buy-out of \$45,000 at or about the same time as his retirement, but his receipt of those funds was delayed by about

six months due to Kelly's refusal to sign the necessary retirement paperwork. During the six-month period after Michael retired but before he began receiving his pension, he continued to make all of the payments required of him under the temporary order.

¶4 Meanwhile, in March and April of 2008, Michael received a federal tax refund of \$6,633, a state tax refund of \$1,718, and a stimulus check of \$1,200, but did not deposit any of those funds in the trust account as required by the temporary order. He also took out \$2,500 from his GM PSP account in March, closed out the rest of that account in the amount of \$11,509 in August, and received a \$15,175 converted pension payment in December.

¶5 At the final hearing, Michael claimed it was necessary for him to use the tax refunds, monies from his GM PSP account and pension payment to make his required payments under the temporary order, and he testified that he did not use any of that money to pay any obligations other than joint marital obligations. The trial court found that Michael's use of those funds without obtaining prior permission violated the temporary order and stated that it was "not impressed that he decided to take the law into his own hands." The court further noted that it did not have any proof or evidence, aside from Michael's own testimony, that he had spent the money on marital obligations that showed "specifically what he did with those monies." The court therefore attributed \$38,735 in dissipated assets to Michael's side of the property division.

¶6 The parties' home was valued at \$530,000. However, the court determined that only \$465,000 of that value should be included in the marital estate, while \$45,000 of the value should be treated as Michael's nonmarital asset and \$20,000 of the value should be treated as Adele's nonmarital asset. The court

attempted to accomplish this division by awarding the house to Michael as an asset worth \$465,000, and then listing a \$20,000 debt on Michael's column of the property division to reflect that he needed to pay her the value of her equity in the house.

STANDARD OF REVIEW

¶7 The valuation and division of the marital estate are both within the sound discretion of the circuit court. *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995); *Rumpff v. Rumpff*, 2004 WI App 197, ¶27, 276 Wis. 2d 606, 688 N.W.2d 699. Therefore, we will affirm property division awards when they represent a rational decision based on the application of the correct legal standards to the facts of record. *Id.* We may, however, correct a computational error. *Vander Perren v. Vander Perren*, 105 Wis. 2d 219, 227, 313 N.W.2d 813 (1982).

DISCUSSION

¶8 The marital estate includes all of the property and obligations of either party which have been acquired before or during the marriage, other than by gift or inheritance. *McLaren v. McLaren*, 2003 WI App 125, ¶8, 265 Wis. 2d 529, 655 N.W.2d 405; WIS. STAT. § 767.61(2) (2007-08).¹ As a general rule, marital assets are to be valued as they exist on the date of the divorce. *See Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Special circumstances may warrant deviation from this rule, however. *Id.*

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

One such exception applies to marital assets which have been divested during the pendency of the divorce without proper consideration. *See Zabel v. Zabel*, 210 Wis. 2d 336, 339-40, 565 N.W.2d 240 (Ct. App. 1997).

¶9 Michael argues that the circuit court erred by including in the marital estate \$9,551 in tax refund, \$14,009 in the savings plan, and \$15,175 in pension payout funds, for a total of \$38,735, that no longer existed as of the date of the final hearing, because he had testified that those funds were used to pay marital debts during the six-month period between June and December of 2008. However, Michael fails to address the trial court's determination that he had failed to provide adequate proof as to how those funds were actually expended. The court was not required to simply accept Michael's general assertion that all the funds went to marital obligations.

¶10 Nonetheless, other portions of the record do support Michael's testimony that he continued to pay all of his obligations under the temporary order during the six-month period when he was without any other discernible source of income. At a minimum, the temporary order itself establishes that these monthly payments included \$1,816 on the mortgage; \$368 on the home equity loan; \$575 on car loans; \$115 on GM PSP loans; and \$400 in maintenance, totaling at least \$3,274 in monthly obligations. Multiplying these established obligations by six months, the only reasonable conclusion to draw is that Michael must have spent at least \$19,644 of the disputed assets on legitimate marital obligations. Therefore, we direct the circuit court upon remand to reduce the amount of dissipated assets credited to Michael's side of the property division from \$38,735 to \$19,091.

¶11 We next consider the trial court's treatment of the house. The parties do not dispute the court's determination that only \$465,000 of the house's

value should be included in the marital estate. However, by excluding the nonmarital value of the house awarded to Michael from the marital estate, but then placing a \$20,000 debt on Michael's column of the property division to reflect that he needed to reimburse Adele for her portion of the value of the equity in the house that had been awarded to Michael, the court essentially converted Michael's sole debt into a marital debt, reducing Michael's obligation by half. What the trial court should have done to implement its stated intention was exclude the \$20,000 debt from the list of marital assets and obligations, and instead impose it as an additional obligation *after* calculating the amount needed to equalize the division of the marital estate.

¶12 After reducing Michael's assets by \$19,644 to account for the dissipated assets which must have been spent on legitimate marital obligations, Michael's side of the marital estate asset ledger is \$531,599. After reducing Michael's marital liabilities by \$20,000, and correcting a computation error acknowledged by both parties, Michael's side of the marital estate liability ledger is \$370,662, giving him \$160,937 in net marital assets. Since Adele was awarded \$67,587 in net assets, this requires a payment of \$46,675 from Michael to Adele to equalize the marital estate. In addition to equalizing the marital estate, Michael needs to pay Adele \$20,000 to compensate for her portion of the \$65,000 value of the house that was awarded solely to Michael outside of the marital estate.

¶13 We therefore reverse the divorce judgment in part and remand with directions that the trial court amend it in accordance with this opinion, directing Michael to pay Adele \$66,675.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

