

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2011

A. John Voelker
Acting 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. 2010AP1003

Cir. Ct. No. 2008FA2450

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

RICHARD EDWARD BLACK,

PETITIONER-RESPONDENT,

v.

SUNG JA BLACK,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
AMY SMITH, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Sung Ja Black appeals from the property division component of her divorce judgment. She claims that the circuit court should have: (1) subjected the inherited property of her husband Richard Black to division in

order to avoid hardship for Sung Ja; (2) included in the marital estate funds that Sung Ja alleged Richard had hidden or dissipated; and (3) deviated from the presumption of an equal property division to avoid hardship for Sung Ja. For the reasons discussed below, we reject each of Sung Ja's claims and affirm the divorce judgment in its entirety.

BACKGROUND

¶2 Richard and Sung Ja were married in 1959. At the time of the divorce hearing, Richard was 70 and Sung Ja was 75 years old, and their two children were both grown.

¶3 The circuit court determined that Richard had gross monthly income of \$5,652 and a reasonable monthly budget of \$3,596, while Sung Ja had gross monthly income of \$1,479 and a reasonable monthly budget of \$2,173. Although Sung Ja had submitted a significantly higher budget, the court noted that the balances of the bank accounts in Sung Ja's possession had increased by nearly \$20,000 during the pendency of the divorce while Richard's bank accounts had decreased in value by about \$13,000, suggesting that Sung Ja's income including the temporary maintenance amount of \$2,322 was more than sufficient to cover her actual needs. Taking into account the tax consequences, the court ordered Richard to pay Sung Ja \$2,042 per month in maintenance to equalize the parties' incomes.

¶4 The circuit court further determined that the net value of the marital estate was \$762,984, and ordered Richard to pay Sung Ja \$25,485 to equalize the marital assets in the possession of each party. The circuit court refused to include in the marital estate about \$260,000 worth of stock that Richard had inherited, finding that it had not been comingled with marital assets and that there was no

evidence that Sung Ja would suffer hardship without access to the additional assets. The circuit court also rejected Sung Ja's claims that she had medical problems that warranted a deviation from the presumptive equal distribution of the marital estate, noting that both parties had health problems and that the evidence did not show that Sung Ja's were any worse than Richard's.

STANDARD OF REVIEW

¶5 Whether property is subject to division as part of the marital estate presents a mixed question of fact and law. *Derr v. Derr*, 2005 WI App 63, ¶¶9, 45, 280 Wis. 2d 681, 696 N.W.2d 170. We will review the circuit court's resolution of any disputed historical facts regarding an asset under the clearly erroneous standard. *Id.*, ¶¶25, 45, 51. We then treat the application of any legal presumption regarding the characterization of an asset as either divisible or non-divisible as a question of law subject to de novo review. *Id.* However, the valuation and ultimate division of assets determined to be divisible are within the sound discretion of the circuit court. *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). Therefore, we will affirm a decision on how to divide the marital estate so long as it represents a rational decision based on the application of the correct legal standards to the facts of record. *Id.*

DISCUSSION

Richard's Inherited Stock

¶6 Marital assets (collectively, the marital estate) include all of the property of either party acquired before or during the marriage, unless specifically

exempted by statute. *McLaren v. McLaren*, 2003 WI App 125, ¶8, 265 Wis. 2d 529, 655 N.W.2d 405. WISCONSIN STAT. § 767.61(2) (2009-10)¹ excludes property acquired by one of the spouses by gift or due to the death of another, unless the court finds that the refusal to include such assets would create a hardship for the other party or the children of the marriage.

¶7 Sung Ja argues that the circuit court should have included the value of Richard's inherited stock in the marital estate because she will suffer hardship otherwise. Specifically, she contends that her monthly income of \$3,801 including maintenance falls short of her monthly budget of \$4,390 and does not adequately take into account her medical needs. However, the circuit court explicitly rejected Sung Ja's claimed budget, explaining that it included exaggerated claims for unreimbursed medical costs and unreasonable items—such as \$700 a month for travel—that were far beyond Sung Ja's standard of living during the marriage. The court's finding that Sung Ja's actual budget was \$2,173 was based in large part upon credibility determinations and is not clearly erroneous. Furthermore, although the court included this point in its discussion of maintenance, the fact that Sung Ja's bank accounts increased by nearly \$20,000 during the pendency of the divorce also supports the court's determination that Sung Ja was not unable to meet her needs based on a reasonable budget. Therefore, we are satisfied that the circuit court properly refused to subject Richard's exempt individual property to division in the divorce.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Allegedly Misappropriated Funds

¶8 Although marital assets and debts are generally to be valued as they exist at the date of the divorce, *see Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990), it is appropriate to include in the marital estate assets that have been divested during the pendency of the divorce without proper consideration. *See* WIS. STAT. § 767.63; *Zabel v. Zabel*, 210 Wis. 2d 336, 339-40, 565 N.W.2d 240 (Ct. App. 1997).

¶9 Sung Ja argues that the value of the marital estate should be increased to include \$220,000 that Richard withdrew from a credit union account during the marriage and “cannot account for.” However, this argument is based on an incorrect factual premise. The circuit court accepted Richard’s testimony that he had transferred \$200,000 in 2004 to other accounts to ensure that all of the deposits were fully FDIC insured, and that the other \$20,000 was left in a desk at home to which both parties had access. Again, the circuit court’s findings were based upon credibility determinations and are not clearly erroneous. Therefore, the money withdrawn from the credit union was not unaccounted for or squandered during the pendency of the divorce, and was not subject to a dissipated asset analysis.

Division of Marital Property

¶10 WISCONSIN STAT. § 767.61(3) sets forth a presumption that all marital property is to be divided equally between the parties, but allows the circuit court to deviate from that presumption after considering the length of the marriage, the property brought to the marriage by each party, whether one party has substantial assets not subject to division, the economic and non-economic contributions of the parties to the marriage, the age and physical and emotional

health of the parties, the contribution of either party to the education or increased earning power of the other party, the earning capacity of each party in relation to the standard of living enjoyed during the marriage, the desirability of awarding the family home to the parent having primary physical placement of any minor children of the marriage, the amount and duration of any maintenance payments, other economic circumstances including pension plans, the tax consequences, any agreement between the parties, and other factors which the court may determine to be relevant. *LeMere v. LeMere*, 2003 WI 67, ¶¶16-17, 262 Wis. 2d 426, 663 N.W.2d 789. Although the statute directs the circuit court to consider all of the factors, a failure to explicitly discuss a factually inapplicable or marginally relevant factor will not provide grounds for reversal. *Id.*, ¶26.

¶11 “Part of the rationale in creating the presumption of equal property division is that the homemaking partner has contributed services which have enabled the financially supporting partner to achieve his or her station in life, and in so doing the homemaking partner has lost ground in the job market.” *Id.*, ¶18 (citation omitted). “The spouse who raises the children and cares for the family home contributes, albeit indirectly, to the development and expansion of a family business, by carrying the child-rearing and homemaking responsibilities of the marriage partnership, enabling the other spouse to focus more intensively on the business.” *Id.*, ¶28.

¶12 Sung Ja argues that she is entitled to more than half of the marital property due to her contributions to the marriage, her poor health, her financial support of the family while Richard earned his degree, and Richard’s misuse of marital funds. As we have already noted above, the circuit court rejected, based upon credibility determinations, Sung Ja’s claims that Richard had squandered marital assets and that Sung Ja’s medical needs exceeded Richard’s medical needs.

Moreover, the court noted that Richard largely financed his degree through the G.I. bill, and the court's discussion shows that it took into account Sung Ja's contributions to the marriage when equalizing the parties' incomes and the marital property. The circuit court was well within its discretion to conclude that the presumption that the marital property should be divided equally had not been rebutted.

By the Court.—Judgment affirmed.

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

