

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2007

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. 2006AP2586

Cir. Ct. No. 1992FA194

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

PAUL KEITH HENDRICKSON,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

v.

DIANE BETH HENDRICKSON, N/K/A DIANE BAUMGARTNER,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Diane Hendrickson, now known as Diane Baumgartner, appeals a postdivorce order granting her a portion of her ex-husband Paul Hendrickson's disability pension in lieu of his retirement pension. Diane

contends the court erroneously reopened their divorce judgment under WIS. STAT. § 806.07(1)(h)¹ and further erred by replacing her fixed percentage of Paul's retirement pension with a fixed-dollar-amount from his disability pension. Paul cross-appeals, contending the court erred by dividing his disability pension. We agree with Paul and reverse the order.

BACKGROUND

¶2 Paul and Diane's divorce judgment was entered July 15, 1994. At the time, Paul was employed as a firefighter for the City of Minneapolis. Through his employment, he participated in the Minneapolis Firefighters Relief Association (the Plan), which included a retirement pension. The retirement pension consisted of a right to receive monthly benefits upon retiring, payable for the rest of Paul's life. It did not include an account balance that he could withdraw or borrow against. The divorce judgment divided Paul's retirement pension equally between Paul and Diane, to be effected by Qualified Domestic Relations Order (QDRO).

¶3 After the divorce, Paul suffered a work-related injury, and he has not worked since October 2000. In 2004, the Plan determined that Paul was permanently disabled. As a result, the Plan converted to a disability pension. In 2004, the Plan also rejected a 1994 QDRO that attempted to divide the retirement pension because it did not comply with Plan requirements.²

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

² From the record, it is unclear why the 1994 QDRO was not rejected until 2004.

¶4 In 2005, Paul moved for relief from the divorce judgment pursuant to WIS. STAT. § 806.07. The circuit court attempted to clarify the judgment in light of Paul’s unanticipated disability. The court found that the original intent was to divide Paul’s retirement pension equally, that any increase in benefits after the divorce would accrue to Paul only, and that the divorce judgment was premised upon a mistaken belief that Paul would be entitled to Social Security benefits. The court then ordered that Paul’s disability benefit be divided, with Diane being paid \$682.98 per month, which it concluded was the monthly amount she would have received from Paul’s retirement pension.

DISCUSSION

¶5 A final division of property in a divorce generally is not subject to revision or modification. *Winkler v. Winkler*, 2005 WI App 100, ¶15, 282 Wis. 2d 746, 699 N.W.2d 652; WIS. STAT. § 767.32(1)(a).³ However, a court may grant relief from a divorce judgment pursuant to WIS. STAT. § 806.07. *See Winkler*, 282 Wis. 2d 746, ¶16; *Conrad v. Conrad*, 92 Wis. 2d 407, 413, 284 N.W.2d 674 (1979). A court’s decision to grant relief is a discretionary act. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). We will affirm a circuit court’s discretionary act if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

³ WISCONSIN STAT. § 767.32(1)(b) states: “A court may not revise or modify a judgment or order that waives maintenance payments for either party or a judgment or order with respect to final division of property.”

¶6 The parties both argue the court’s order was erroneous, though for different reasons. Diane contends the circumstances did not support granting relief from the divorce judgment and the court erred by replacing her fixed percentage of Paul’s retirement pension with a fixed-dollar-amount from his disability pension. Paul argues his disability pension was not subject to division.

¶7 We conclude that one issue is clear and dispositive—Paul’s disability pension was not subject to division.⁴ Therefore, we do not address the other arguments. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

¶8 In Wisconsin, neither future disability benefits, nor the present value of those benefits, are divisible assets in a divorce. *Pfeil v. Pfeil*, 115 Wis. 2d 502, 504, 341 N.W.2d 699 (Ct. App. 1983). A service-connected disability benefit is compensation for impairment of the body, and it is not “in the nature of an asset acquired or accumulated through the marital relationship.” *Leighton v. Leighton*, 81 Wis. 2d 620, 636, 261 N.W.2d 457 (1978) (citation omitted). Exceptions to this rule apply in limited circumstances. *See, e.g., Loveland v. Loveland*, 147 Wis. 2d 605, 611, 433 N.W.2d 625 (Ct. App. 1988).

¶9 Diane does not refute Paul’s argument that disability benefits are indivisible in a divorce, nor does she argue that an exception applies. Therefore,

⁴ The parties’ arguments are generally confusing, and the parties themselves seem confused in multiple respects. For example, while they argue about whether the circumstances supported granting relief from the divorce judgment under WIS. STAT. § 806.07, it is unclear from the record whether the court granted relief from the judgment or merely clarified it under *Washington v. Washington*, 2000 WI 47, ¶19, 234 Wis. 2d 689, 611 N.W.2d 261. Further, the parties’ arguments reflect different assumptions about how the Plan operates. From the record, it is clear that neither party adequately investigated the Plan at the time of divorce or Paul’s motion for relief.

Diane concedes Paul's argument. *See Charolais Breeding Ranches, Ltd. v. PFC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).⁵

¶10 As a result, the court's order must be reversed.⁶ While our decision rests upon Paul's argument on cross-appeal, we reverse on both the appeal and cross-appeal since both challenged the court's division of Paul's disability pension.

By the Court.—Order reversed.

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

⁵ Instead, Diane argues that her interest in Paul's retirement pension was vested at the time of divorce, and therefore only Paul's half, not hers, converted to a disability pension. She seemingly assumes that, had a QDRO been accepted by the Plan prior to Paul's disability, she would still be entitled to retirement benefits after his disability, and Paul's disability pension would be reduced accordingly. Diane does not cite any facts in the record supporting this assumption.

⁶ We recognize that the court was attempting to craft an equitable solution to a poorly drafted property division. However, the available facts do not support dividing Paul's disability pension here.

