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DISTRICT II

November 30, 2016

To:

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You are hereby notified that the Court has entered the following opinion and order:

2016AP687

In re the marriage of: Roberta A. Ulloa v. Andrew Ulloa
(L.C. #2014FA656)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Andrew Ulloa appeals his judgment of divorce, claiming that the circuit court erred when it considered Roberta Ulloa's pension as income instead of an asset subject to property division. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ As we find that the circuit court's decision violates our supreme court's holding in *Steinke v. Steinke*, 126 Wis. 2d 372, 376 N.W.2d 839 (1985), *modified per curiam*, 127 Wis. 2d 444, 379 N.W.2d 853

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(1986), we reverse the judgment and remand for consideration of Roberta's pension in the property division and reconsideration of the maintenance award.

Andrew and Roberta were married in 2002 but began a committed relationship in 1989. Roberta commenced divorce proceedings against Andrew on July 28, 2014. At the time of trial, Roberta was fifty-four years old, and Andrew was forty-five years old. Two issues predominated at trial: (1) the division of Roberta's pension² from the State of Illinois and (2) the amount of income that should be imputed to Roberta in determining maintenance. Roberta's pension was in pay status at the time of the divorce, and the circuit court found that Roberta's pension would be considered income for purposes of a maintenance determination instead of considering the pension for property division purposes. After hearing testimony regarding Roberta's health issues and her physical ability to return to work, the court imputed minimum wage income to Roberta at the rate of thirty-five hours per week and awarded her \$2000 in maintenance per month for approximately seven years. Andrew appeals.

A decision regarding property division upon divorce is within the sound discretion of the circuit court, and we will not disturb that finding unless the circuit court erroneously exercised its discretion. *See Steinke*, 126 Wis. 2d at 383. Likewise, maintenance award determinations are also matters of circuit court discretion. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). While we provide considerable deference to discretionary decisions by the circuit court, we require that decisions be based on correct interpretation of applicable law. *Id.* “A

² Andrew also had a pension from the Waukegan Police Department, which the circuit court ordered equally divided by qualified domestic relations order.

discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.” *Id.*

Andrew first claims that the circuit court erred by failing to value and divide Roberta’s pension as part of the property division. Andrew cites our supreme court’s decision in *Steinke* as support. In *Steinke*, the court held that “as a matter of law, the value of a spouse’s interest in a pension fund must be included by the [circuit] court in the division of the property between the spouses.” *Steinke*, 126 Wis. 2d at 380. Roberta counters that the court’s treatment of her pension as an “income stream” for purposes of the maintenance award was part of “a very comprehensive analysis of both maintenance and property division to reach an equitable result to serve the needs of both parties, consistent with the directives of *Steinke*.” The court in *Steinke*, however, took care to explain that prior case law “did not create a rule that pension rights may be excluded from the property division if they are included in the maintenance award.” *Id.* at 382. Upon review of the record, we agree that the circuit court did exclude Roberta’s pension from its calculation of the marital estate in violation of the court’s pronouncement in *Steinke*.

Wisconsin law creates a presumption that all marital property should be divided equally between the parties. WIS. STAT. § 767.61(3). The court, however, “may alter this distribution ... after considering all of” the enumerated factors under § 767.61(3)(a)-(m), of which an order “granting maintenance payments to either party ... and whether the property division is in lieu of such payments” is but one factor. The circuit court’s decision concerning Roberta’s pension is lacking any analysis of the § 767.61(3) statutory factors. The circuit court merely states, “The Wife’s pension is currently in pay status and she receives approximately \$25,000 annually. This amount is considered as income in the maintenance determination. Therefore, the Court will not split it or assign it a value as an asset of the marriage.”

This discussion by the circuit court is not sufficient to overcome the presumption of equal division of property and fails to satisfy *Steinke*'s pronouncement that "a pension fund must be included ... in the division of the property between the spouses." See *Steinke*, 126 Wis. 2d at 380. As a result, we must reverse the judgment and remand for the court to re-examine the division of property.

Andrew next argues that the circuit court's analysis of Roberta's maintenance award was incorrect. On that issue we also reverse as a component of reversal on the property division: "Failure to include the value of the pension plan in the marital estate is a substantial error in the property division and warrants reconsideration of the maintenance award." *Steinke*, 126 Wis. 2d at 389.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily reversed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the cause is remanded with directions to reconsider the maintenance award upon a proper analysis of the property division.

Diane M. Fremgen
Clerk of Court of Appeals