

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 14, 2006**

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. 2005AP157**

**Cir. Ct. No. 2003FA1074**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**ALAN L. GILLETTE,**

**PETITIONER-RESPONDENT,**

**V.**

**NICOLE M. GILLETTE,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County:

J. MAC DAVIS, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Nicole M. Gillette has appealed from a judgment of divorce from the respondent, Alan L. Gillette. She challenges the trial court's maintenance award and property division. We affirm the judgment.

¶2 The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of discretion. *Wolski v. Wolski*, 210 Wis. 2d 183, 188, 565 N.W.2d 196 (Ct. App. 1997). The touchstone of analysis in determining or reviewing a maintenance award is the statutory factors set forth in WIS. STAT. § 767.26 (2003-04).<sup>1</sup> *Kennedy v. Kennedy*, 145 Wis. 2d 219, 222, 426 N.W.2d 85 (Ct. App. 1988). These factors reflect and are designed to further two distinct but related objectives: to support the recipient spouse in accordance with the needs and earning capacities of the parties and to ensure a fair and equitable financial arrangement between the parties in each individual case. *Id.*

¶3 The division of the marital estate also lies within the sound discretion of the trial court. *Cook v. Cook*, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997). Absent a finding of hardship, property is exempt from the marital estate if it was acquired by gift from someone other than the other party, by reason of the death of another, or with funds acquired as a result of a gift or the death of another. WIS. STAT. § 767.255(2)(a) and (b). A trial court is to presume that all other property is to be divided equally between the parties, but may alter this distribution after considering the various factors set forth in the property division statute. Sec. § 767.255(3).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version.

¶4 A trial court's maintenance and property division awards will be upheld absent an erroneous exercise of discretion. *Settipalli v. Settipalli*, 2005 WI App 8, ¶10, 278 Wis. 2d 339, 692 N.W.2d 279. A trial court's discretionary decision will be sustained by this court when it has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. See *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). The trial court's findings of fact will not be set aside unless they are clearly erroneous. *Settipalli*, 278 Wis. 2d 339, ¶10.

¶5 Nicole's first argument is that the trial court erroneously exercised its discretion by failing to consider future gifts to Alan in determining maintenance and the property division. She relies on evidence that Alan's parents gave the parties substantial gifts over the course of their marriage, and contends that this level of gift-giving is likely to continue for Alan. She also relies on evidence that Alan's parents have purchased a \$200,000 lot and intend to build a house in which Alan expects to reside, even though his parents will retain title to the property. She contends that Alan therefore has "future interests" that should have been taken into consideration by the trial court when it evaluated his economic circumstances under WIS. STAT. § 767.255(3)(j). She contends that the trial court should have taken into account that, as a result of gifts and parental assistance, after the divorce Alan will be able to continue living at or above the marital standard of living, while her standard of living will be markedly reduced.

¶6 A review of the record reveals that the trial court considered Nicole's contentions and the evidence supporting them. However, while acknowledging the past generosity of Alan's parents and the evidence that Alan expects to live in the home being built by them, the trial court also considered that

Alan's parents have no obligation to assist him, and that their treatment of him may change. It noted that Alan has no ownership interest in the home being built by his parents, and that he might or might not ultimately live there rent-free or for reduced rent. It also noted that the financial circumstances of Alan's parents or their business might change, as might Alan's relationship with his parents. Based upon its conclusion that future gifts and benefits are unknown and speculative, the trial court declined to consider them in dividing the parties' property and making the maintenance award.

¶7 Because the trial court reasonably concluded that future gifts and assistance from Alan's parents are speculative, no basis exists to disturb its refusal to consider future gifts as a factor in dividing the marital estate and awarding maintenance to Nicole. Although a trial court is required to consider a party's "future interests" when evaluating his or her economic circumstances under WIS. STAT. § 767.255(3)(j), the interests contemplated by this language are definable future interests of a reasonably determinable value, like pension benefits. "Future interests" does not compel consideration of speculative future gifts.<sup>2</sup>

¶8 Nicole's remaining arguments are equally unavailing. She contends that a ski boat was a gift to the parties from Alan's parents and should have been included in the marital estate. However, the trial court found that the boat belonged to Alan's parents, not to Alan and Nicole. The trial court's finding is not clearly erroneous. It is supported by evidence that the boat was purchased by

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<sup>2</sup> Although we affirm the trial court's refusal to consider speculative future gifts, we note that if Alan ultimately receives gifts and assistance that create a substantial change in the parties' financial circumstances, Nicole will be able to move for modification of child support or maintenance.

Alan's father in 1993, prior to the parties' marriage. It is also supported by Alan's testimony that, even though he and Nicole could use the boat without restriction and even though it was sometimes stored on their property, it was always titled in his father's name. In addition, it is supported by Alan's testimony that when the boat was sold to a friend, his parents joined in the decision and ultimately provided the \$16,000 to repurchase the boat.

¶9 The weight and credibility to be given to the testimony of the witnesses is uniquely within the province of the trial court. *See Siker v. Siker*, 225 Wis. 2d 522, 528, 593 N.W.2d 830 (Ct. App. 1999). A trial court may reject even uncontroverted testimony of a witness, or may choose to believe some assertions and disbelieve others. *State v. Kimbrough*, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. Based upon Alan's testimony, the trial court was entitled to find that the boat always belonged to Alan's parents, and was never gifted by them to Alan and Nicole. The trial court therefore properly concluded that it was not part of the marital estate.

¶10 Nicole also challenges the trial court's decision to include an ATV in Alan's share of the marital estate at no value. The record indicates that Alan and Nicole purchased the ATV while they were married, the ATV was titled in Alan's name, and it was purchased under a credit plan which provided for no payments and interest for twelve months. The evidence also indicates that after this divorce action was commenced, Alan's parents made full payment for the ATV.

¶11 Based upon this evidence, the trial court concluded that the ATV was the property of Alan and Nicole. However, it further found that when Alan's parents paid for the ATV, they intended to make a gift to Alan alone. Because it

concluded that the payment was a gift to Alan, it attached no value to the ATV in the marital estate.

¶12 The trial court's finding that Alan's parents gifted the cost of the ATV to him is not clearly erroneous. In conjunction with this finding, the trial court's refusal to assign value to the ATV in the marital estate was tantamount to finding that its value constituted a gift. Because gifted property is properly excluded from the marital estate under WIS. STAT. § 767.255(2)(a)1, no basis exists to disturb the trial court's decision.

¶13 Nicole's final argument is that the trial court erred when it determined that \$15,000 paid by Alan's parents for a Land Rover driven by Nicole was a loan rather than a gift. Again, we repeat that the weight and credibility of the evidence is for the trial court. Alan testified that the \$15,000 was a loan. Nicole's own testimony indicated that she and Alan made a \$500 payment on the vehicle to his parents, and that when Alan's parents provided the money for the purchase, they stated: "Well, you know, maybe you should try to pay us back for this one." In addition, in her first financial disclosure statement, Nicole listed the amount as a debt due on demand. Based upon the record, the trial court's finding that the \$15,000 for the Land Rover was a loan, and that \$14,500 remained as a debt, is not clearly erroneous.

*By the Court.*—Judgment affirmed.

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

