

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 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. 2005AP1967

Cir. Ct. No. 2003FA894

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

JACKIE L. DUBOIS,

PETITIONER-RESPONDENT,

V.

DANIEL T. DUBOIS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
MARY KAY WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Daniel T. DuBois appeals from a judgment divorcing him from Jackie L. DuBois. On appeal, he challenges the circuit court's

unequal property division and the maintenance award. We affirm the circuit court's discretionary decision in each regard.

¶2 In its decision on property division and maintenance, the circuit court made the following findings. The parties had a fourteen-year marriage which produced two minor children. Daniel is in good health and has the rank of master chief petty officer. Daniel has been a member of the United States Navy for twenty-seven years with twenty-four years of actual service. The military considers Daniel to be an emergency medical technician or practical nurse. During the marriage, Daniel undertook additional education and worked a second job. Daniel's monthly earnings were \$6912. Daniel was reassigned to Hawaii during the divorce action.

¶3 Jackie's primary role was as caretaker for the children, and she home-schooled them for six years. Jackie occasionally held part-time jobs for short periods of time. Jackie was working part time on weekends at the time of the divorce, and the court imputed to her an annual income of \$12,480 (\$8 per hour at thirty hours per week). Jackie intends to seek training as a dental hygienist, which she predicts will take four years to complete on a part-time basis and will cost proximately \$8000. Jackie will have to work less than forty hours per week while training and bear primary child care responsibilities in light of Daniel's transfer to Hawaii.

¶4 The court unevenly divided the marital debt: approximately \$16,344 to be borne by Jackie and approximately \$34,138 to be borne by Daniel. As grounds for this allocation, the court found that Daniel had the ability to obtain a second job, as he had during the marriage, and his transfer to Hawaii would mean much less contact with the children, affording him time to take a second job. The

court found that Daniel has earning ability whereas Jackie must develop her earning ability during the four-year maintenance period. During the maintenance period, Jackie would not be able to do more than work, go to school and care for the children.

¶5 The court divided the parties' property as follows. The court awarded property valued at \$8000 to Jackie consisting of a van valued at \$12,415 with debt of \$7182 (equity of \$5233), a Roth IRA (\$284), and life insurance (\$2483 cash surrender value). The court awarded property valued at \$3025 to Daniel consisting of a pickup truck whose debt exceeded its value, a Roth IRA (\$1425) and life insurance (\$1600 cash surrender value). The court divided Daniel's military retired pay by awarding Jackie fifty percent of the component attributable to the months of marriage (the marital component), leaving Daniel with all of the premarital component and his fifty-percent share of the marital component. Each party kept the personal property and bank accounts in his or her possession; the parties stipulated that these assets were equally divided.

¶6 Daniel contends that the circuit court did not give sufficient reasons to deviate from an equal division of assets and debts, and that the property division does not comply with WIS. STAT. § 767.255(3) (2003-04).¹

¶7 The division of the marital estate is within the circuit court's discretion. *Cook v. Cook*, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997). The court is to presume that all property is to be divided equally between the parties, but the court may alter this distribution after considering the various factors set

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

forth in the property division statute. WIS. STAT. § 767.255(3). We will sustain the circuit court's discretionary decision if the court 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. *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). The court's findings of fact will not be set aside unless they are clearly erroneous. *Settipalli v. Settipalli*, 2005 WI App 8, ¶10, 278 Wis. 2d 339, 692 N.W.2d 279.

¶8 On its face, the property division appears unequal, as Daniel complains. Jackie received property valued at \$8000, and Daniel received property valued at \$3025. Daniel contends that of the total property, \$11,025, each party should have received \$5512, such that Jackie owes Daniel an equalization payment of \$2487. Daniel's analysis is flawed because it does not take into account that the court did not divide the premarital portion of his military retired pay, leaving the entire amount to him.² Military retired pay is property subject to division in divorce. *Cook*, 208 Wis. 2d at 175.

¶9 The record does not contain any information about the value of Daniel's military retired pay at the date of divorce. The premarital portion of the military retired pay factors into the overall property division, yet we have an evidentiary vacuum on the value of this asset. A party cannot complain that a circuit court erred when the party did not develop the record properly. *See Laribee v. Laribee*, 138 Wis. 2d 46, 52-53, 405 N.W.2d 679 (Ct. App. 1987).

² The parties were married for 177 months. At the time of the divorce, Daniel's military retired pay was based on twenty-four years (or 288 months) of active service. Therefore, roughly forty percent of Daniel's military retired pay was not included in the marital estate for purposes of property division.

¶10 All of Daniel's military retired pay was subject to division at divorce, *see Cook*, 208 Wis. 2d at 175, and in the absence of evidence to the contrary, we assume that the premarital portion awarded to Daniel equalizes the property division between the parties.

¶11 With regard to the unequal division of debt, we conclude that the circuit court properly exercised its discretion in the manner in which it allocated the debt between Daniel and Jackie. The court explained why Daniel was better able to bear a larger portion of the debt.

¶12 Daniel contends that the circuit court's order that each party bear his or her own attorney's fees is undermined by the court's allocation of marital debt. Jackie incurred debt to pay her attorney's fees, and that debt was then treated as marital debt. Therefore, Daniel reasons, he is being required to contribute to Jackie's attorney's fees. We see no error here. Daniel used marital funds to retain counsel; Jackie incurred debt, deemed marital, to retain counsel. Each party used marital funds or marital debt to retain counsel.

¶13 Daniel challenges the maintenance award to Jackie of \$1000 per month for four years. In its decision, the court considered the maintenance factors set out in WIS. STAT. § 767.26, including the length of the marriage, the ages and health of the parties, the property division, the parties' educational levels and earning capacities, the feasibility that Jackie can become self-supporting in the future, tax consequences, and the contributions of one party to the other. The court found that Daniel's military career required the family to relocate frequently, constraining Jackie's educational and employment opportunities and requiring her to shoulder many of the child-rearing duties. The court found that Jackie could become self-supporting if she completes dental hygienist training. The court

awarded Jackie \$1000 per month for four years, creating, in conjunction with child support, a 60/40 split of the parties' income in favor of Jackie, who will have the children primarily in her custody. In setting maintenance, the court excluded Daniel's earning capacity from a second job because he will have significant transportation expenses in order to have contact with the children. The court also noted that Daniel had significant debt assigned to him in the judgment of divorce.

¶14 The amount and duration of maintenance is within the circuit court's discretion 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 statutory maintenance factors set forth in WIS. STAT. § 767.26 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 the individual case. *Kennedy v. Kennedy*, 145 Wis. 2d 219, 222, 426 N.W.2d 85 (Ct. App. 1988).

¶15 Daniel challenges the circuit court's findings. He contends that his health is not good, and he believes that injuries suffered during his Navy career may result in disability and future shoulder surgery. We reject Daniel's challenge. Daniel is presently employed in his field of training, and he was consistently employed during the marriage.

¶16 Daniel complains that the court's findings about his education are erroneous and that the court overemphasized his additional education and training during the marriage and the frequency of his secondary employment. We are unpersuaded. The court's suggestion that Daniel may take a second job is sound. He has done so in the past, and he will have the time to do so because the children will live at a great distance from him upon his transfer to Hawaii. The court's

finding that Daniel has earning capacity while Jackie must develop hers while working part-time, going to school and caring for the children is not clearly erroneous based on the record.

¶17 Daniel contends that while the court considered that Jackie intended to pursue a career in dental hygiene, the court did not require Jackie to demonstrate that such a career could make her self-supporting or that it would take four years to complete the program on a part-time basis. We disagree. The court implicitly accepted Jackie's plan to become self-supporting when it awarded a limited period of maintenance.

¶18 Daniel complains that Jackie was not working regularly at the time of the divorce. Regardless of Jackie's actual work schedule, the circuit court imputed a thirty-hour work week to her. The court did not anticipate that Jackie would work full time while receiving maintenance, caring for the children and training for future employment.

¶19 We do not agree with Daniel that the court failed to consider the support and fairness objectives of maintenance. Consideration of these objectives is implicit in the court's maintenance rationale. The court considered these objectives when it evaluated Jackie's financial needs in terms of her earning capacity, ability to become self-supporting, need for training and role as primary caretaker of the children, Daniel's earning capacity and reduced child care role. The court divided the parties' income in recognition of Jackie's child care duties and need for training and did not factor in Daniel's secondary employment in setting maintenance.

¶20 Daniel contends that he cannot pay \$1000 per month in maintenance because he has only \$666 left from his net pay after meeting his budget, child

support and marital debt obligations. However, the court, in setting maintenance, did not consider any income Daniel might make from a second job, which the court found he could undertake. Therefore, Daniel will have extra funds at his disposal. We are not convinced that the court erred in setting maintenance at \$1000 per month.

By the Court.—Judgment affirmed.

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

