

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 6, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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. 02-2493  
STATE OF WISCONSIN**

**Cir. Ct. No. 00 FA 7146**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE MARRIAGE OF:**

**DANIEL A. DIETRICH,**

**PETITIONER-APPELLANT,**

**v.**

**JEANNE A. DIETRICH,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Daniel A. Dietrich appeals from a divorce judgment. He claims that the trial court erroneously exercised its discretion when it: (1) awarded \$1000 per month maintenance to Jeanne A. Dietrich for a period of twelve years; (2) failed to include the total amount of the mortgage of the

Milwaukee duplex in the property division equalization; (3) applied present value to Daniel's medical and \$21,000 lump-sum retirement benefits; and (4) awarded Jeanne 30% of Daniel's pension.<sup>1</sup> Because the trial court did not erroneously exercise its discretion, we affirm.

## I. BACKGROUND

¶2 Daniel and Jeanne were married in Las Vegas on October 1, 1989. Prior to exchanging vows, they entered into a pre-nuptial agreement, wherein they agreed to share equally the mortgage liability on a duplex located at 1379 North 58th Street in Milwaukee. Daniel owned this property prior to the marriage and it had a value of \$58,000 at the time of the marriage. The agreement also stated that Jeanne would be entitled to one-half of any appreciation in the property over \$58,000.

¶3 Six days after they were married, the Dietrichs purchased the Birch Hills Resort located in Townsend, Wisconsin. During the marriage, Jeanne managed the resort on a full-time basis during the summer season. Throughout the rest of the year, she worked temporary clerical and accounting jobs. At the time of the divorce, she was managing the resort year-round, making approximately \$660 per month. Daniel was employed at Briggs & Stratton and earned \$43,000 a year. He had worked at Briggs for thirty years, and had a pension plan and other benefits.

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<sup>1</sup> Daniel also objected to the trial court's allocation of Jeanne's \$7,500 debt. However, in his reply brief, Daniel concedes that he waived his right to challenge this issue. Therefore, we do not address it.

¶4 On December 15, 2000, Daniel filed for divorce. The case was contested and tried to the court. After hearing testimony, the trial court ordered Daniel to pay Jeanne \$1000 per month as maintenance until she turned sixty-five, which was in approximately twelve years. The court awarded Jeanne the Birch Hills Resort and Daniel the duplex. It also awarded Jeanne a 30% interest in Daniel's pension. Daniel appeals from the divorce judgment.

## II. DISCUSSION

¶5 Daniel challenges several of the trial court's discretionary decisions with respect to maintenance and property division.

### A. *Maintenance.*

¶6 The amount and duration of a maintenance award is left to the discretion of the trial court, and will not be disturbed by this court unless the trial court erroneously exercised its discretion. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). If the trial court considered the pertinent facts, applied the correct law and reached a reasonable determination, we will conclude that it properly exercised its discretion. *Id.*

¶7 Daniel claims the trial court erred when it awarded maintenance for twelve years—or until Jeanne was of retirement age. Daniel argues that the trial court never explained why twelve years was an appropriate length of time for maintenance payments. He also claims the trial court failed to consider the dual objectives of maintenance: fairness and support. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987). We are not persuaded.

¶8 In ruling on maintenance issues, a trial court considers the statutory factors set forth in WIS. STAT. § 767.26 (2001-02):<sup>2</sup> (1) length of marriage; (2) age and physical and emotional health of the parties; (3) division of property; (4) educational level of the parties at the time of the marriage and at the time of the divorce; (5) earning capacity of the parties; (6) whether the maintenance seeking party will be able to become self-supporting; (7) tax consequences; (8) any mutual agreements the parties made; (9) contributions by one party to education or increased earning power of the other; and (10) other relevant factors. The trial court should also consider the dual objectives of a maintenance award: (1) “to support the recipient spouse in accordance with the needs and earning capacities of the parties,” *LaRocque*, 139 Wis. 2d at 32-33; and (2) “to ensure a fair and equitable financial arrangement between the parties in each individual case.” *Id.*

¶9 The record reflects that the trial court did consider the appropriate statutory factors and the dual objectives of a maintenance award. The trial court addressed the issue of maintenance at both the temporary maintenance hearing on December 14, 2001, and during its final decision on May 16, 2002. During the temporary hearing, the trial court heard testimony from both parties and from Jeanne’s treating psychiatrist, who testified that Jeanne had severe depression and was incapable of working at a regular job. The trial court also was presented with information about the parties’ incomes, employment and financial situations. It then considered the pertinent maintenance factors and set temporary maintenance at \$1000 per month.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶10 During the hearing, the trial court noted that the marriage lasted twelve years, that Daniel was in good health and Jeanne was in poor health, that Jeanne “put things aside” so that Daniel could build a retirement fund, and that Jeanne had the capacity to earn approximately \$10,000 a year while Daniel would earn \$43,000 a year. Based on these factors, the trial court found it would set maintenance at \$1000 per month, which would “allow them both to have monies to live on.”

¶11 When the trial court addressed maintenance again for the final decision, it incorporated its discussion from the temporary hearing. The trial court then stated that maintenance of \$1000 per month would continue until Jeanne’s 65th birthday when she would become eligible for social security. During this time, the trial court indicated Jeanne would have an opportunity to build up a retirement account. The trial court noted that its decision was based on the statutory factors and equity concerns and fairness. The trial court reasoned that the psychiatrist’s testimony was uncontradicted and that Jeanne was disabled for most regular jobs. The court considered again the disparity in income and earning potential and pointed out that Jeanne had the opportunity to make more money running the resort and that Daniel would have additional income from the rental property. The trial court took these factors into consideration in setting the amount and duration of the maintenance award.

¶12 With respect to the duration of the maintenance, the trial court reasoned that terminating maintenance on Jeanne’s 65th birthday was reasonable and fair given all the facts and circumstances of this case. The trial court noted that the duration would provide Jeanne with sufficient income to live on until she was eligible for social security and would afford her an opportunity to continue the work at the resort. The trial court reasoned that because Jeanne was two years

older than Daniel, the duration of maintenance would give Daniel an opportunity to work beyond the maintenance term.

¶13 Having reviewed the trial court's decision and the record, we cannot conclude that the maintenance award constituted an erroneous exercise of discretion. The trial court considered the pertinent statutory factors as well as the dual objectives of support and fairness. The trial court tailored the maintenance award in a reasonable fashion given the particular facts and circumstances of this case. The record is undisputed that Jeanne's mental health made her incapable of working any regular job. This left her with a limited potential to become self-supporting within the next twelve years. Rather, the only job she was capable of performing involved her work at the resort, which provided an income substantially less than that of Daniel. In an attempt to be fair to both parties, the trial court awarded \$1000 per month for a limited term of twelve years. This was substantially less than the \$1500-plus, which the trial court could have awarded. Given the pertinent factors, we conclude that the trial court's maintenance award was reasonable and did not constitute an erroneous exercise of discretion. We also note that during closing argument, David's attorney agreed that \$1000 per month constituted a reasonable amount for maintenance.

*B. Division of Property.*

1. Mortgage Balance.

¶14 Daniel next claims the trial court erroneously exercised its discretion when it failed to include the entire mortgage balance on the 58th Street duplex when determining the property division equalization. We are not persuaded.

¶15 Like a maintenance award, decisions relative to property division are reviewed under the erroneous exercise of discretion standard. *Bahr v. Bahr*, 107 Wis. 2d 72, 77, 318 N.W.2d 391 (1982). Thus, we will not reverse the trial court's determination as to the property division unless it failed to consider the pertinent facts, apply the correct law, and reach a reasonable determination. *Id.* Moreover, we will not overturn a trial court's findings with respect to the value of marital assets unless the findings are clearly erroneous. *Holbrook v. Holbrook*, 103 Wis. 2d 327, 334, 309 N.W.2d 343 (Ct. App. 1981).

¶16 Here, Daniel complains because he feels the mortgage owed on the 58th Street duplex should have been equally divided between the parties. It is undisputed that the mortgage at the time of the divorce was \$45,747. The trial court also found the following facts. During the marriage, the parties refinanced the duplex and used approximately \$22,500 to pay off the loan owed on Daniel's truck. As a result, this increased the mortgage by \$22,500. The difference between these two amounts is \$23,247. As a result, the trial court found \$23,247 to be the actual amount of the mortgage on the duplex.

¶17 Daniel claims the trial court failed to provide an adequate explanation or reasoning for subtracting the loan value of the truck. Although we agree that the trial court could have been more explicit in its explanation, we cannot conclude that the trial court's division was erroneous. The \$22,500 actually represented the loan on Daniel's truck, and therefore was not a part of the house. If the trial court would have included this amount in the mortgage, Jeanne would, in effect, be paying for half of Daniel's truck. That would be unreasonable. Accordingly, we cannot conclude that the numbers used by the trial court were clearly erroneous or that it erroneously exercised its discretion in treating the mortgage in such a manner.

## 2. Medical and \$21,000 Lump Sum Retirement Benefits.

¶18 Daniel also claims the trial court erroneously exercised its discretion when it included the present value of his ten-year medical benefit and the \$21,000 lump sum retirement benefit in valuing the assets of the marital estate. We cannot conclude that the trial court's decision constituted an erroneous exercise of discretion.

¶19 Daniel suggests that the trial court erred by placing the present value on these items because these benefits will decline in value as time goes on. He further argues that because of the \$1000 per month twelve-year maintenance payment, he cannot retire for at least twelve years and that, at that time, his medical and retirement benefits will be less than the number used by the trial court. He concedes that, in general, marital assets are valued as of the date of divorce, but claims that specific circumstances exist here over which he has no control, which justifies a deviation from the general rule. *See Long v. Long*, 196 Wis. 2d 691, 696, 539 N.W.2d 462 (Ct. App. 1995).

¶20 The trial court addressed this issue and considered whether present value should be applied or whether the issue should be put off and revisited when Daniel actually does retire. Based on all the factors available, the trial court reasoned that the best option was to apply the present value to these two items because both items could fluctuate in the future. The \$21,000 lump sum retirement benefit could change based on union negotiations. It could be reduced or it could double. Thus, the best information available to place a value on the marital estate was to "take a snapshot" in time and use the figures available. The medical benefit at issue involved Daniel's employer's commitment to pay monthly health insurance premiums for ten years post-retirement. That amounted to



approximately \$31,000. Jeanne argued that as health insurance premiums rise, that benefit could substantially increase. The new number, however, is speculative. Given these circumstances, the trial court found that the fairest alternative was to follow the general rule to place the value on the asset at the time of the divorce. This was consistent with the values placed on other marital property, and there was no “exceptional” factor justifying departing from the general rule. See *Holbrook*, 103 Wis. 2d at 347.

¶21 Based on the foregoing, we cannot conclude that the trial court’s findings were clearly erroneous or that the trial court erroneously exercised its discretion. The trial court approached the subject in a reasonable fashion and applied the proper law to reach a reasonable determination. We are further not persuaded by Daniel’s claim that the maintenance award will force him to work for twelve more years and, in effect, “control” whether and at what time he could retire. Daniel is free to retire at a time of his choosing and petition the court for a modification of the maintenance award if he suffers from a substantial change in financial circumstances.

### 3. Pension Award.

¶22 Daniel’s final claim is that the trial court erroneously exercised its discretion when it awarded Jeanne a 30% interest in his pension. He claims the trial court failed to set forth any detailed reasons for the pension award. We reject his claim.

¶23 There are three methods available to trial courts faced with division of a pension: (1) calculate the amount the pensioned spouse contributed to the fund, plus interest, and award the other spouse an appropriate share; (2) apply the present value to the benefits when they vest under the plan; or (3) determine and

fix a presumptively equitable percentage of the pension payments “payable to [the non-pensioned spouse] as, if, and when paid to [the pensioned spouse].” *Bloomer v. Bloomer*, 84 Wis. 2d 124, 135-36, 267 N.W.2d 235 (1978). Here, the trial court chose the third method and determined, consistent with the case law, which percentage should be attributable to the recipient spouse. *Id.* The trial court found 30% to be an appropriate percentage.

¶24 Daniel complains because under the other two methods, Jeanne would have been awarded only 19% of his pension. He argues that the trial court’s only stated reason for choosing the 30% figure was “fairness.” Daniel suggests that this is an insufficient explanation and that the trial court should have explained in more detail the reasoning behind selecting the third option.

¶25 We conclude that the trial court’s decision to utilize the third acceptable method of pension division did not constitute an erroneous exercise of discretion. Before making this decision, the trial court was provided with the following facts. Daniel and Jeanne had agreed that Daniel would continue to work at his job at Briggs & Stratton, where he would build up his pension to provide for the couple during retirement. Jeanne, on the other hand, was responsible for handling the resort and, as a result, would not be able to maintain a job where she could build her own pension. Moreover, the couple agreed that in the event of divorce, Daniel would be entitled to the portion of his pension that he earned prior to the marriage. Using the third pension division method yielded a result that was consistent with the agreement and reasonable given the circumstances during the marriage. The marital portion of the pension was 60% of the value. Jeanne was awarded 30% of the value. Accordingly, the trial court’s reasoning that this method was fair to both parties was a reasonable determination and will not be overturned by this court.

*By the Court.*—Judgment affirmed.

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

