

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 18, 2004**

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. 03-0615  
STATE OF WISCONSIN**

**Cir. Ct. No. 01FA000285**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**SARA M. SANDBERG P/K/A SARA M. DONAHUE,**

**PETITIONER-RESPONDENT,**

**V.**

**JOHN P. DONAHUE,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County:  
STEVEN D. EBERT, Judge. *Affirmed in part; reversed in part and cause  
remanded with directions.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. John Donahue appeals an order amending a judgment divorcing him from Sara Sandberg. The issues are: (1) whether the

circuit court erred in computing the equalization payment; (2) whether the circuit court erred in dividing the Fidelity WROS account; (3) whether the circuit court should have given Donahue credit for his premarital accumulations in his Thrift Savings Plan (TSP) and Federal Employee Retirement System (FERS) accounts; (4) whether the circuit court properly considered Donahue's request to deviate from an equal property division based on the fact that he brought assets to the marriage and received gifts from his family during the marriage; (5) whether the circuit court erroneously exercised its discretion in refusing Donahue's request for a new appraisal of the marital residence just before trial; and (6) whether the circuit court misused its discretion in awarding family support. We affirm in part, reverse in part, and remand for further proceedings.

¶2 Donahue first argues the circuit court erred in calculating the equalization payment between the parties. Sandberg concedes the circuit court erred. The court awarded Donahue \$139,348 and Sandberg \$110,197. The court ordered Donahue to pay Sandberg \$29,151, the difference between the two figures, increased by 20%, apparently for tax consequences, for a total of \$34,981. The circuit court erred because it should have ordered Donahue to pay Sandberg *half* of \$29,151 to equalize their awards. The circuit court also failed to adequately explain why it ordered Donahue to pay an additional 20%, when it appears that the tax consequences of liquidating accounts was taken into consideration in determining the net value of each account. Therefore, we reverse the portion of the order addressing the equalization payment and remand for the

circuit court to correct its error and, if the court includes the 20% increase in its new award, to explain why that is warranted.<sup>1</sup>

¶3 Donahue next argues that the circuit court erred in dividing the Fidelity WROS account. The circuit court made a factual finding that this account, which contained a total of \$15,557, had \$7,500 that was not Donahue's money, but belonged to his brothers, who shared a farm business with him. After making that finding, however, the circuit court included the entire \$15,557 value of the account when dividing the property. Because the circuit court did not reduce the value of this account to reflect its factual finding that some of the money belonged to Donahue's brothers, we reverse this portion of the order and remand for the court to amend the property division, or explain why the entire value of the account should be included even though some of the money belonged to Donahue's brothers. *See Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982) (The circuit court properly exercises its discretion when it makes a "reasoned application of the appropriate legal standard to the relevant facts in the case.").

¶4 Donahue next argues that the circuit court failed to give him credit for interest on his premarital portion of the TSP account when it divided the property, despite the fact that the circuit court said earlier in its decision that it would do so. We agree. The circuit court said that it was giving Donahue credit, but there appears to be no adjustment to the property division reflecting that the circuit court did, in fact, give Donahue credit. *See Hartung v. Hartung*, 102 Wis.

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<sup>1</sup> We note that the circuit court will probably have to make new calculations about the portion of the marital estate to be awarded each party based on our conclusions below.

2d 58, 66, 306 N.W.2d 16 (1981) (“A 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.”). Therefore, we reverse and remand for the circuit court to adjust the property division to reflect the credit it said it intended to give. In the alternative, if the court gave credit in a manner that we have failed to recognize, the court should explain how it credited Donahue.<sup>2</sup>

¶5 Donahue next contends that he is entitled to credit for the premarital portion of his FERS account. Our review of the circuit court’s decision shows that it both failed to address Donahue’s argument that he should be given credit for his premarital contribution to this retirement account and failed to explain why it was appropriate to grant a credit for the premarital portion of the TSP, but not the FERS, both of which are retirement accounts. The circuit court’s failure to address this issue requires a remand. *See Corliss v. Corliss*, 107 Wis. 2d 338, 347, 320 N.W.2d 219 (Ct. App. 1982) (where the circuit court’s exercise of discretion relies on an incomplete analysis, we must remand for further consideration).

¶6 Donahue next argues that the circuit court should have considered his request to deviate from an equal property division. Donahue argued that the deviation was appropriate because he brought substantial assets to the marriage and received gifts from his family during the marriage. It appears the circuit court did not address this argument. Instead, it stated that the preexisting and gifted funds had lost their distinct character and had become commingled with the marital estate. The circuit court apparently misunderstood Donahue’s argument.

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<sup>2</sup> It is also unclear to us whether the circuit court intended to give Donahue credit for only the interest on his premarital portion, or whether it intended to award Donahue the premarital portion of the account *and* the interest that had accrued on that portion.

He did not argue that the funds remained his separate property. He argued that the circuit court should deviate from a presumptive equal property division because he brought greater assets to the marriage and received gifts from his family during the marriage. We remand for the circuit court to consider this argument.<sup>3</sup> See *Corliss*, 107 Wis. 2d at 347.

¶7 Donahue next argues that the circuit court misused its discretion in refusing to allow him access to the marital home for a new appraisal shortly before trial. The circuit court did not explain why it denied Donahue’s request, but the record provides a basis for the circuit court’s discretionary decision. See *Martindale v. Ripp*, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698 (“If the circuit court fails to provide reasoning for its evidentiary decision, [the appellate court] independently reviews the record to determine whether the circuit court properly exercised its discretion.”). Donahue, who was proceeding pro se at that time, had made numerous requests of the circuit court in the weeks leading up to trial in a series of letters. Due to this volume, the circuit court may not have had the leisure to explain its decisions in depth on each point. Donahue’s request for access to the marital home came just two weeks before trial, allowing little time for the appraisal to be arranged, especially given the acrimonious relationship between Donahue and Sandberg and Sandberg’s staunch refusal to permit Donahue into the house. Based on the short time frame and the parties repeated

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<sup>3</sup> Donahue also argues that the property division should be adjusted to reflect: (1) the fact that Sandberg received most of their personal property; (2) the fact that a portion of Sandberg’s attorney fees were paid from the marital estate; and (3) the fact that he paid Sandberg’s credit card debt shortly before the divorce. The circuit court did not address these arguments, which Donahue raised in his summation after the trial of the financial issues. He may renew them on remand. Donahue also argues that the circuit court did not adequately explain why he should carry life insurance with the children as beneficiaries. Again, he may raise this argument on remand.

disputes, we conclude the circuit court properly exercised its discretion in denying Donahue's request that an appraiser be allowed into the house on short notice.

¶8 Donahue also argues that the circuit court misused its discretion in relying on the testimony of the original appraiser, who testified that the home had appreciated around 5%, rather than on the testimony of the witness he presented, a realtor, who testified that the home had appreciated approximately 14%. The circuit court did not explain its decision in much detail, stating that it gave more weight to the opinion of the original appraiser based on his extensive experience and the fact that he had actually inspected the home and had found comparable homes. While we recognize that the circuit court relied in part on the fact that the first appraiser had actually inspected the inside of the home—after not affording Donahue's realtor access—we nevertheless conclude that the circuit court's discretionary decision should be sustained because it is supported by the record. The circuit court considered all of the facts before making its decision, including the extensive testimony of Donahue's realtor, who explained that her opinion of the home's worth was based on other homes in the area of similar size and amenities, as well as photos she had seen of the inside of the home. In reaching its decision, the circuit court accurately pointed out that the first appraiser *was* more familiar with the home. That familiarity gave the first appraiser's opinion more depth, an advantage the first appraiser would not have had absent Donahue's belated request for permission to enter. The circuit court's discretionary decision is also supported by the fact that the first appraiser was hired jointly by the parties, suggesting a more balanced viewpoint. Given the wide latitude accorded the circuit court in choosing between reasonable, but conflicting, opinions, we cannot conclude the circuit court acted outside the ambit of its discretion in giving more

weight to the first appraiser's testimony. *Schwartz v. Linders*, 145 Wis. 2d 258, 265, 426 N.W.2d 97 (Ct. App. 1988).

¶9 Finally, Donahue argues that the circuit court erroneously exercised its discretion in awarding family support. His argument can be broken into parts. First, he contends that the circuit court's factual findings underlying its decision were clearly erroneous. We disagree. He contends there was no support in the record for the finding that Sandberg would have to work up to seventy hours per week as a full-time funeral director. However, the testimony of Yvonne Slonaker, a Ryan Funeral Home manager, supported this finding. Donahue also contends there is no support for the circuit court's finding that full-time work was not available to Sandberg at Ryan, her current employer. It is true the testimony showed that full-time work was available, but it also showed that full-time work would entail an excessive number of hours. Thus the record supports a finding that full-time work was *not* available for only forty hours a week with a set schedule, which is what we believe the circuit court meant.

¶10 Turning to the second part of Donahue's argument, he contends that he should not have to pay limited-term maintenance to Sandberg while she retrain for a new job because neither the support nor the fairness objectives of maintenance warrant it. He contends Sandberg is capable of self-support working in the career for which she was trained and he should not be obligated to finance a new career for her. He also contends that maintenance is not warranted by fairness considerations because he will be working full time—which will require about fifty hours of work per week—while sharing the children's care equally, while Sandberg will not have to do so.

¶11 We review a circuit court’s decision to award family support for an erroneous exercise of discretion. *Corliss*, 107 Wis. 2d at 348. Although Donahue presents meritorious arguments, this decision was committed to the circuit court’s discretion and, based on the entire record, we cannot say the circuit court erroneously exercised its discretion in ordering limited-term maintenance due to the length of the marriage, the income disparity between the parties, their job prospects, including the schedules available to them, and other factors. Although we affirm the circuit court’s exercise of discretion in ordering maintenance, the circuit court is not precluded from revisiting the maintenance issue on remand if it deems it appropriate. *See Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 479, 377 N.W.2d 190 (Ct. App. 1985) (“While property division and family support are separate awards, they are interdependent and cannot be made in a vacuum.”). We do note, however, that it appears that the adjustments the circuit court will make will benefit Donahue, who is the payor, which should then enhance the reasonableness of the maintenance award, rather than detract from it.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).



