**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 15, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 04-0900** **Cir. Ct. No. 87FA729227**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**IN RE THE MARRIAGE OF:**

**DONALD L. FREYBERG,**

**PETITIONER-APPELLANT,**

**V.**

**MAVIS A. FREYBERG,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed*.

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

¶1 FINE, J. Donald L. Freyberg appeals from an order decreasing Mavis A. Freyberg's maintenance. He claims that the circuit court erroneously

exercised its discretion because it did not reduce his maintenance obligation as much as he wanted. We affirm.

## I.

¶2 Donald L. and Mavis A. Freyberg were married in 1953 and divorced in 1989. Donald Freyberg was then a fifty-percent shareholder in the accounting firm of Freyberg & Hinkle, and had income from the firm of $140,000 per year. Mavis Freyberg was a homemaker who, as found by the circuit court in 1989, was capable of earning only a minimum wage. As material to this appeal, it awarded Donald Freyberg his pension, valued at $71,587, and his stock in Freyberg & Hinkle, which it determined had no market value beyond Donald Freyberg's income from which the circuit court was awarding maintenance:

> Mr. Freyberg's interest in his accounting firm, Freyberg & Hinkle, consists entirely of professional "good will," since the total of all other possible components of that interest has a negative value. Mr. Freyberg's interest in this business is not saleable. Further, Mrs. Freyberg will be sufficiently protected by a maintenance award, since that award is based on Mr. Freyberg's income from his business, and the expectation that this income will continue into the future. *Therefore, the Court finds that Mr. Freyberg's interest in his business has no value that would not duplicate the maintenance award.*

(Emphasis added.) *See* ***Kronforst v. Kronforst***, 21 Wis. 2d 54, 64, 123 N.W.2d 528, 534 (1963) (asset may not be counted "as a principal asset" and a source of income "to be considered in awarding alimony"). The circuit court ordered Donald Freyberg to pay $6,500 per month in permanent maintenance to split what had been the parties' family income, which at that point all came from Donald Freyberg.

¶3 Mavis Freyberg appealed, among other things, the circuit court's finding that Donald Freyberg's good will interest in his accounting firm had no marketable value beyond the income he earned from it. We affirmed in an unpublished opinion, *see* ***Freyberg v. Freyberg***, No. 90-0064, unpublished slip op. (Wis. Ct. App. July 26, 1990), and the supreme court denied Mavis Freyberg's petition for review. After that, Donald Freyberg has repeatedly sought to reduce his maintenance obligation.

*A. Donald Freyberg's First Motion to Terminate or Reduce His Maintenance Obligation.*

¶4 In February of 1998, Donald Freyberg filed a motion to terminate or reduce his maintenance payments because he planned to retire on June 30, 1998. Mavis Freyberg did not dispute that Donald Freyberg's retirement was the substantial change in circumstances necessary to trigger the potential modification of maintenance. *See* WIS. STAT. § 767.32(1)(a) (revision of maintenance order "may be made only upon a finding of a substantial change in circumstances"). On June 29, 1998, the assigned family court commissioner found that Donald Freyberg's post-retirement income would be:

- $3,677.90 per month in pension and social security benefits;
- a $1,000 per month "consulting fee" from the accounting firm;
- $500 per month from the accounting firm for medical insurance coverage;
- $1,000 per month from the accounting firm for five and one-half years under a "non-compete" agreement with the firm; and

- a one-time $850,000 payment for his Freyberg & Hinkle stock.[1]

The commissioner concluded that the stock proceeds could be considered to set maintenance even though Donald Freyberg received the money after entry of the divorce judgment. *See* ***Gerrits v. Gerrits***, 167 Wis. 2d 429, 435–437, 482 N.W.2d 134, 137 (Ct. App. 1992) (proceeds from lottery ticket purchased five months after divorce available to satisfy maintenance obligations). Donald Freyberg spent the stock proceeds as follows: he used $375,000 to pay capital-gains taxes and retire the mortgage on his house; he gave $230,000 to his current wife so she could buy property in Ireland; and spent $195,000 on living expenses.[2] The commissioner concluded from all of this that Donald Freyberg had an imputed $425,000 to invest as an asset to fund his maintenance obligation. Using a seven-and-one-half percent interest rate, the commissioner found that Donald Freyberg would earn an imputed $2,656.25 per month if he had invested the $425,000 and, based on Donald Freyberg's total income, ordered him to pay $3,665 per month in permanent maintenance.

¶5 Donald Freyberg sought circuit-court review of the commissioner's decision, which the circuit court treated as a review on the record. *See* WIS. STAT. § 757.69(1)(p), (8). The circuit court affirmed the commissioner. Donald Freyberg then sought reconsideration, which the circuit court denied. Donald

[1] Although Donald Freyberg testified in his deposition that he received $800,000 for his stock in the accounting firm, he does not argue that the family court commissioner's finding that he received $850,000 is wrong.

[2] These numbers add up to $800,000. None of the briefs explains what happened to the remainder of the $850,000 in stock proceeds that the circuit court found Donald Freyberg received, and neither party raises this as an issue.

Freyberg appealed. We dismissed the appeal in an unpublished opinion because we lacked jurisdiction. *See* ***Freyberg v. Freyberg***, No. 99-0114-FT, unpublished slip op. (Wis. Ct. App. Nov. 23, 1999).

*B. Donald Freyberg's Second Motion to Terminate or Reduce His Maintenance Obligation.*

¶6 In October of 1998, Donald Freyberg filed a second motion to terminate or reduce his maintenance obligation, asserting that there had been a substantial change in circumstances since the June 29, 1998 order. The family court commissioner disagreed, concluded that Donald Freyberg's motion was frivolous, and awarded Mavis Freyberg her attorney's fees and costs. The matters raised by Donald Freyberg's October 1998 motion are not material to the issues on this appeal.

*C. Donald Freyberg's Third Motion to Terminate or Reduce His Maintenance Obligation.*

¶7 Donald Freyberg filed a third motion to terminate or reduce his maintenance obligation in July of 2001. He claimed that there was a substantial change in circumstances because of a downturn in the economy and because the Ireland property investment had soured. On November 2, 2001, the family court commissioner again found that there was no substantial change in circumstances, concluded that the motion was frivolous, and again awarded Mavis Freyberg her attorney's fees.

*D. Donald Freyberg's Fourth Motion to Terminate or Reduce His Maintenance Obligation.*

¶8 In September of 2003, Donald Freyberg filed a fourth motion to terminate or reduce his maintenance obligation, arguing that as of December 31, 2003, he would no longer receive $2,500 per month in consulting fees, medical-insurance benefits, and non-compete payments from Freyberg Hinkle Ashland Powers & Stowell, S.C., the successor name of his former firm. On November 6, 2003, the family court commissioner reduced Donald Freyberg's maintenance payments to $2,763 per month to accommodate the $2,500 reduction in his income.

¶9 Donald Freyberg sought *de novo* review by the circuit court of the commissioner's decision, contending that the reduction was too little. *See* WIS. STAT. § 757.69(1)(p), (8). The circuit court held a hearing and agreed with the commissioner's June 29, 1998, determination that investing the $425,000 in stock proceeds would yield an imputed income of $2,656 per month. The circuit court opined orally: "I feel quite confident that, in fairness twenty-six fifty-six in investment income ought to continue [to] be attributable to you, Mr. Freyberg, based upon [the commissioner's] findings and the trial process that you went through back in 1998." Additionally, in a later written decision addressing Donald Freyberg's retirement assets, the circuit court noted that no one disputed that Donald Freyberg's pension could be used to determine maintenance. *See* ***Olski v. Olski***, 197 Wis. 2d 237, 247, 540 N.W.2d 412, 415–416 (1995) (future receipts of pension benefits available for maintenance obligations). It determined that the current value of that pension was $168,312, and that if it were invested at a five-percent interest rate for Donald Freyberg's sixteen-year life expectancy, the

investment would produce $1,275 per month in income. It further determined that:

> [i]f Donald withdraws the retirement assets at a rate faster than this, it would be to compensate for his poor business judgment regarding the proceeds of the sale of his company [by investing in the Ireland property], and would justify that this amount be imputed to him even after it is expended.

The circuit court determined that Mavis Freyberg should receive maintenance of $2,485.50 per month by making the following calculation: it took Donald Freyberg's social security income of $1,626 per month, added the imputed income of $2,656 per month from the accounting firm stock proceeds, and added his imputed pension income of $1,275 per month, and then subtracted Mavis Freyberg's minimal social security income, and divided the result in half.

## II.

¶10 A circuit court's determination of the amount and duration of maintenance is a discretionary decision that we will not disturb unless the circuit court erroneously exercised its discretion. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 27, 406 N.W.2d 736, 737 (1987). A circuit court erroneously exercises its discretion when it does not consider relevant factors, bases its award on factual errors, or grants an excessive or inadequate award. ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶18, 269 Wis. 2d 598, 613, 676 N.W.2d 452, 460. We will affirm, however, if under all the circumstances the circuit court's award is reasonable. ***Vier v. Vier***, 62 Wis. 2d 636, 639–640, 215 N.W.2d 432, 434 (1974).

¶11 Factors material to an award of maintenance are in WIS. STAT. § 767.26.[3] ***LaRocque***, 139 Wis. 2d at 31–32, 406 N.W.2d at 739–740. They are designed to further two distinct but related objectives: to support the recipient

[3] Under WIS. STAT. § 767.26, the factors a trial court may consider in setting a maintenance award are:

> **(1)** The length of the marriage.
>
> **(2)** The age and physical and emotional health of the parties.
>
> **(3)** The division of property made under s. 767.255.
>
> **(4)** The educational level of each party at the time of marriage and at the time the action is commenced.
>
> **(5)** The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> **(6)** The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> **(7)** The tax consequences to each party.
>
> **(8)** Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> **(9)** The contribution by one party to the education, training or increased earning power of the other.
>
> **(10)** Such other factors as the court may in each individual case determine to be relevant.

spouse in accordance with the needs and earning capacities of the parties (the support objective), and to ensure a fair and equitable financial arrangement between the parties in each case (the fairness objective). ***Id.***, 139 Wis. 2d at 32–33, 406 N.W.2d at 740; *see also* ***Kenyon v. Kenyon***, 2004 WI 147, ¶29, ___ Wis. 2d ___, 690 N.W.2d 251, 261 (support and fairness objectives apply also to modification hearings held after entry of the divorce judgment).

¶12 The starting point for the setting of maintenance following a long-term marriage is to give to the recipient spouse half of the total combined earnings of both parties. *See* ***Bahr v. Bahr***, 107 Wis. 2d 72, 84–85, 318 N.W.2d 391, 398 (1982). This may "be adjusted following reasoned consideration of the statutorily enumerated maintenance factors." ***Id.***, 107 Wis. 2d at 85, 318 N.W.2d at 398. The goal of maintenance is to provide support at the standard of living "comparable to the one enjoyed during the marriage." ***LaRocque***, 139 Wis. 2d at 35, 406 N.W.2d at 741.

¶13 Donald Freyberg's argument on appeal falls into three areas of alleged circuit-court error. First, he claims that the circuit court should not have used the $425,000 portion of the $850,000 as an asset from which to impute income to him. Second, he contends that the circuit court erroneously included as a basis for the maintenance award his current wife's investment in the Ireland property. Third, he attacks as speculative the circuit court's projection of a $1,275 monthly income from his pension fund. We look at these matters in turn.[4]

[4] Without challenging directly the circuit court's use of an imputed seven-and-one-half percent interest rate on the $425,000, and a five-percent interest rate on his pension fund, Donald Freyberg asks us "to take judicial notice of current treasury rates—which hover right around 1.7%." He does not further argue the point, however, other than a passing comment that the "disparity of interest rates" is unfair. We do not further address any interest-rate issue. *See* ***Bille***
(continued)

A.

¶14 Donald Freyberg argues that the circuit court erroneously exercised its discretion when it adopted the June 1998 finding by the family court commissioner that the remaining $425,000 in stock proceeds would yield $2,656 in income per month, without, according to Donald Freyberg, examining his "actual financial circumstances." *See* ***Plonka v. Plonka***, 177 Wis. 2d 196, 205, 501 N.W.2d 871, 875 (Ct. App. 1993) (circuit court should "freshly examine[]" financial circumstances when modifying maintenance). He points out that portions of the $425,000 were either used by him for living expenses or were given to his current wife to invest in the Ireland property, which he contends is losing money. Donald Freyberg thus claims that the circuit court did not adequately consider the support and fairness objectives because it "created an award that [he] cannot possibly meet out of his actual income." We disagree. In setting Donald Freyberg's maintenance obligation to Mavis Freyberg, the circuit court considered both the support and fairness objectives.

¶15 First, the circuit court assessed Mavis Freyberg's financial needs, finding that her sole source of income, aside from the maintenance payments, was $577 per month in social security. Relegating her to a monthly income of $577 per month by terminating Donald Freyberg's maintenance obligation was not, the circuit court concluded, "an option":

> It is not possible, based upon what I've heard … for there not to be an ongoing obligation to support the homemaker

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***v. Zuraff***, 198 Wis. 2d 867, 883 n.10, 543 N.W.2d 568, 574 n.10 (Ct. App. 1995) (we do not consider matters that are not briefed adequately).

> in that relationship, especially one whose sole source of income is $577 in Social Security.
>
> And that small sum of income is based upon precisely the sacrifices that were made. She didn't work outside the home, she doesn't have her own Social Security to draw from, and it's a 36-year marriage in a traditional relationship.

¶16 Second, the circuit court evaluated Donald Freyberg's ability to pay. As we have seen, it included imputed earnings from the stock proceeds and post-divorce pension in Donald Freyberg's income. It determined that it was fair to impute to Donald Freyberg income from the stock proceeds, despite his contention that the Ireland investment had soured because it agreed with the family court commissioner that the Ireland property was "a risky investment" for a person whom the circuit court characterized as "a sophisticated financial person." Indeed, as we have seen, the circuit court characterized the Ireland investment as "poor business judgment." The circuit court determined, based on the record before it, that "there are lots of reasons, other than the desire to maximize income," that prompted Donald Freyberg to give the money to his current wife to buy the Ireland property, pointing out that the property was near the woman's "ancestral home." The circuit court concluded that spending the $230,000 on the Ireland property had "the effect of undermining the financial security of [Donald Freyberg's] former wife to the betterment of [his] current wife, and I don't think it can be ignored. So I think, in fairness and in law, the twenty-six fifty-six is still income to" Donald Freyberg. The circuit court also found that Donald Freyberg "enjoys a high standard of living," including "living in a house valued at $457,300 which he co-owns with his current wife, [makes] approximately four trips per year to Ireland and [takes] annual gambling vacations to Las Vegas." The circuit court considered both the fairness and the support objectives, and its findings regarding

Mavis Freyberg's needs and Donald Freyberg's ability to pay are not clearly erroneous.

¶17 Donald Freyberg also argues that the circuit court should not have based the maintenance award on his earning capacity rather than his actual income because the circuit court made no finding that he was "shirking," namely, that his decision to use the $425,000 for personal expenses, and to give some of that money to his current wife to invest in the Ireland property, was unreasonable. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 587, 549 N.W.2d 481, 484 (Ct. App. 1996) (earning capacity used to determine maintenance when payer voluntarily and unreasonably reduces income). Again, we disagree.

¶18 An award of maintenance may be based on earning capacity, rather than actual earnings, when the obligated party voluntarily and unreasonably reduces or forgoes income. ***Chen v. Warner***, 2004 WI App 112, ¶11, 274 Wis. 2d 443, 448, 683 N.W.2d 468, 470, *review granted*, 2004 WI 138, ___ Wis. 2d ___, 689 N.W.2d 55 (WI Sept. 16, 2004) (No. 03-0288). "[N]o bad faith need be shown for an order to be based on that spouse's earning capacity, rather than his or her actual present earnings." ***Roberts v. Roberts***, 173 Wis. 2d 406, 411, 496 N.W.2d 210, 212 (Ct. App. 1992); *see also* ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 496, 496 N.W.2d 660, 665 (Ct. App. 1992) ("even where the obligated person's voluntary reduction in income is well intended … it is proper … to assess the reasonableness of that decision in light of the person's … maintenance obligations").

¶19 Donald Freyberg does not dispute that he voluntarily gave the $230,000 to his current wife, and also used part of the $425,000 for personal expenses. Thus, the focus is on whether doing that with the money was

"reasonable." Generally, the issue of reasonableness is a question of law, that we review *de novo*. ***Van Offeren***, 173 Wis. 2d at 492, 496 N.W.2d at 663. A circuit court's legal conclusion as to reasonableness, however, is closely intertwined with its factual findings. ***Id.***, 173 Wis. 2d at 492–493, 496 N.W.2d at 663–664. Thus, we give weight to the circuit court's conclusion. ***Ibid.***

¶20 Here, as we have seen, the circuit court found that Donald Freyberg's decision to give a portion of the stock proceeds to his current wife to invest in the Ireland property was unreasonable because it was "a risky investment" made by "a sophisticated financial person" for reasons other "than the desire to maximize income." Indeed, the circuit court found that Donald Freyberg's current wife's interest in Ireland as her "heritage" was heightened by the fact that the property she bought with the $230,000 was "near her ancestral home." As we have also seen, the circuit court opined that the purchase of the Ireland property had "the effect of undermining the financial security of [Donald Freyberg's] former wife to the betterment of [his] current wife." Given these findings, the circuit court properly used Donald Freyberg's earning capacity in determining maintenance. *Cf.* ***Murray v. Murray***, 231 Wis. 2d 71, 82, 604 N.W.2d 912, 918 (Ct. App. 1999) (one spouse should not be required to finance imprudent financial decisions made by other spouse).

¶21 Donald Freyberg also contends that the circuit court should not have, in effect, rejected the zero-valuation of his interest in his accounting firm made by the circuit court at the time of the 1989 divorce. *See* ***Rohde-Giovanni***, 2004 WI 27, ¶33, 269 Wis. 2d at 621, 676 N.W.2d at 463 ("[A] judge who reviews a request to modify a maintenance award should adhere to the findings of fact made by the circuit court that handled the parties' divorce proceedings."). Donald Freyberg misinterprets the 1989 circuit court's findings. As we have seen, the 1989 circuit

court set the value of Donald Freyberg's interest in the firm as not exceeding his income stream in order to avoid the double-counting problem identified by ***Kronforst***. Indeed, we pointed that out in our July 26, 1990, order denying Mavis Freyberg's appeal: "Goodwill must be established as a separate asset, rather than a measure of earning capacity of the professional, to avoid double counting of the goodwill as both an asset in the marital estate and as income for determining support or maintenance." ***Freyberg***, No. 90-0064, unpublished slip op. at 3. When that stream of income dried as a result of Donald Freyberg's retirement, Donald Freyberg received as its replacement the post-retirement payments plus $850,000 for his stock. The circuit court was thus entitled to consider that $850,000 in evaluating Donald Freyberg's proper maintenance obligation. *See* ***Poindexter v. Poindexter***, 142 Wis. 2d 517, 531–532, 419 N.W.2d 223, 229 (1988) (when modifying maintenance, circuit court should reconsider factors used to arrive at initial maintenance award under WIS. STAT. § 767.26). Indeed, the circuit court, consistent with the overarching intent of the law to ensure the fairness of support obligations, *see* ***LaRocque***, 139 Wis. 2d at 32–33, 406 N.W.2d at 740, must consider all of the attending circumstances that are legally material to its decision.

¶22 Moreover, as we have already seen, insofar as the $850,000 might have included value generated by Donald Freyberg's post-divorce work for his accounting firm, "assets acquired after the divorce (and thus not included in the property division at divorce) are available to satisfy post-divorce maintenance obligations." ***Olski***, 197 Wis. 2d at 247, 540 N.W.2d at 415–416 (future receipts of pension benefits available for maintenance obligations); ***Gerrits***, 167 Wis. 2d at 435–437, 482 N.W.2d at 137 (proceeds from lottery ticket purchased five months

after divorce available to satisfy maintenance obligations). The circuit court was well within its discretion when it awarded maintenance of $2,485.50

B.

¶23 Donald Freyberg also argues that the circuit court erroneously exercised its discretion because it "implicitly considered his current wife's assets" in awarding maintenance. He argues that under the Marital Property Act, *see* WIS. STAT. ch. 766, his current wife's one-half interest in the Ireland property and his pension cannot be imputed to him as income. Under the circumstances here, we disagree.

¶24 The circuit court explicitly indicated in its written decision that it was not considering Donald Freyberg's current wife's income or assets in determining maintenance: "Except to the extent it may be indirectly done by imputing $2,656 per month to Donald, his current wife's income and assets should not and have not been considered in this decision." The only asset that it "implicitly" considered was the Ireland property. But the funds from that perhaps ill-advised investment undisputedly would have been available to satisfy Donald Freyberg's maintenance obligations to his first wife if they had not been given to his second wife. The Marital Property Act does not change that.

¶25 WISCONSIN STAT. § 766.55(2) bars the use of the non-liable spouse's income to "satisfy" pre-marital obligations, including modifications of maintenance under WIS. STAT. ch. 767. *See* ***Burger v. Burger***, 144 Wis. 2d 514, 518, 424 N.W.2d 691, 693 (1988), *superseded by statute on other grounds as stated in* ***Woodmansee v. Woodmansee***, 151 Wis. 2d 242, 444 N.W.2d 393 (Ct. App. 1989); ***Abitz v. Abitz***, 155 Wis. 2d 161, 166, 455 N.W.2d 609, 611 (1990). But, and this is significant here, the prohibition against using a non-liable spouse's

income to "satisfy" a pre-act obligation, however, does not prohibit the consideration of the non-liable spouse's property in determining the liable spouse's ability to pay. *See* ***J.G.W. v. Outagamie County Dep't of Soc. Servs.***, 153 Wis. 2d 412, 425–426, 451 N.W.2d 416, 421 (1990) (impermissible for "non-liable spouse's income to 'satisfy' a pre-marital or pre-Act obligation" but § 766.55(2) "was not intended to prohibit consideration of the non-liable spouse's income in determining the liable spouse's ability to pay"). The circuit court did not err in considering the $230,000 Donald Freyberg gave to his current wife.

C.

¶26 Finally, Donald Freyberg alleges that the circuit court erroneously exercised its discretion when it imputed $1,275 in income per month for sixteen years based on his pension asset. He concedes that he is not "tak[ing] issue with the imputation of income itself." Rather, he claims that "to lock [him] into an imputation of $1,275 for 16 years, and to dictate that even if he uses his assets earned post-divorce at a faster rate … is unfair," and points out that, "[g]iven that this court cannot be aware of [his] future circumstances, such as illness or financial problems, to make a blanket statement that income will be imputed limits a future court's consideration of [his] ability to pay maintenance." We disagree.

¶27 "We have long recognized that a pension interest 'is very difficult to value.'" ***Olski***, 197 Wis. 2d at 248, 540 N.W.2d at 416 (quoted source omitted). "It is for this reason that circuit courts retain broad discretion in the complex task of valuing pension rights." ***Id.***, 197 Wis. 2d at 248–249, 540 N.W.2d at 416. And obsession with what might or might not happen tomorrow can paralyze an ability to make decisions that are needed today. As Churchill observed in the first volume of his history of the Second World War: "The veils of the future are lifted

one by one, and mortals must act from day to day." 1 WINSTON S. CHURCHILL, THE GATHERING STORM 570 (Houghton Mifflin Co. 1976) (1948). The circuit court made a reasonable assessment in determining the part that Donald Freyberg's pension asset should contribute to his maintenance obligation. If the circuit court's assessment proves to be unfairly burdensome because of what may happen in the future, Donald Freyberg will have his remedy. But, as recognized by Justice, then Judge, Benjamin Nathan Cardozo a long time ago: "Grotesque or fanciful situations, such as those supposed, will have to be dealt with when they arise." ***Gaines v. City of New York***, 109 N.E. 594, 596 (N.Y. 1915).

*By the Court.*—Order affirmed.

Publication in the official reports is not recommended.