

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 26, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal Nos. 2011AP163  
2011AP1603  
STATE OF WISCONSIN**

**Cir. Ct. No. 2009FA70**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE MARRIAGE OF:**

**CYNTHIA PARSONS EISENBERG,**

**PETITIONER-RESPONDENT,**

**V.**

**ALAN EISENBERG,**

**RESPONDENT-APPELLANT.**

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APPEALS from a judgment and an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. Alan Eisenberg appeals the judgment of divorce awarding Cynthia Parsons Eisenberg limited-term maintenance of \$4,000 per month. Alan separately appeals a subsequent order requiring him to meet his maintenance obligation by liquidating real estate he received as part of his property division.<sup>1</sup> Alan argues that the court erred in the maintenance award because Alan could not afford maintenance unless a spendthrift trust of which he is a beneficiary paid Alan distributions sufficient to cover maintenance, and the trust terms and testimony showed that the trust could not and would not pay such distributions. Alan further argues that the liquidation order resulted in double counting of property for purposes of both maintenance and property division. We agree with Alan that the court erred in its maintenance determination, and we conclude that that error requires reversal of the divorce judgment and remand for the court to reconsider both maintenance and property division. In addition, we reverse the liquidation order because it is premised on the validity of the court's erroneous maintenance award.

### **BACKGROUND**

¶2 The parties were married for fifteen years. At the time of divorce, Alan was approximately sixty-nine and Cynthia approximately sixty-one. The parties had no children together, but Alan had one adult son from a prior marriage.

¶3 The circuit court valued the parties' divisible assets at approximately \$783,000. Those assets included Alan's residence and additional real estate. The court concluded that the property should be divided equally. The major assets

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<sup>1</sup> This court on its own motion now orders these two appeals consolidated. Separately, for ease of reference given their shared last name, we refer to the parties by their first names only.

Alan received as part of the property division included his residence and the additional real estate, with Cynthia receiving a number of IRA and cash accounts, the full value of a small business that she ran during the marriage, and other assets.

¶4 Alan and his son were the beneficiaries of a trust valued at approximately \$2.85 million dollars (“the trust”). It is undisputed that the trust, created under Alan’s mother’s will, was not subject to property division.

¶5 The terms of the trust authorized the trustee to make discretionary distributions of income and/or principal for Alan’s support, as well as the support of his spouse and his issue. In addition, the trust contained a spendthrift clause. The terms of this clause are recited more fully in discussion below, but summarizing briefly, it provided that the trustee “shall” withhold distributions if the trustee believed that the trust funds would be diverted from the purpose of the trust. The spendthrift clause also provided that any beneficiary’s interest in the trust could not be assigned or seized by legal process.<sup>2</sup>

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<sup>2</sup> As Alan points out, spendthrift clauses are legislatively recognized by WIS. STAT. § 701.06 (2009-10). Section 701.06 provides, in part, as follows:

**Spendthrift provisions and rights of creditors of beneficiaries.** (1) INCOME BENEFICIARIES. A settlor may expressly provide in the creating instrument that the interest in income of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The income interest of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary until paid over to the beneficiary pursuant to the terms of the trust.

(2) PRINCIPAL BENEFICIARIES. A settlor may expressly provide in the creating instrument that the interest in principal of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The interest in principal of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary, but a judgment creditor, after any

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¶6 The circuit court found that, in the years leading up to the divorce, Alan and Cynthia had the benefit of approximately \$120,000 per year, or \$10,000 per month, in trust distributions made to Alan. Other income earned by either party, at least by the time of their divorce, was comparatively small. Alan was an unlicensed attorney at the time of the divorce. Their total non-trust income was approximately \$2,800 per month, not including \$2,500 per month of imputed income to Cynthia.

¶7 At trial, an attorney who assisted the trustee in administering the trust testified that he interpreted the spendthrift clause to prohibit the trustee from making distributions to Alan that would be used in whole or in significant part to pay maintenance to an ex-spouse. The trustee attorney further testified that the trustee would not make such distributions.

¶8 In addressing Cynthia's request for maintenance following trial, the circuit court concluded in the divorce judgment that Alan should pay Cynthia \$4,000 per month in maintenance for a limited term of four years and eight months. The court found, based on the historical \$10,000-per-month trust income figure, that equalizing the parties' incomes would require \$5,000 per month in maintenance. The court concluded, however, that \$4,000 per month was appropriate because Alan had "no control" over the trust. The court found that the trustee "might" refuse to make distributions sufficient for Alan to pay

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payments of principal have become due or payable to the beneficiary pursuant to the terms of the trust, may apply to the court for an order directing the trustee to satisfy the judgment out of any such payments and the court in its discretion may issue an order for payment of part or all of the judgment.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

maintenance. The court concluded that, if the trustee refused to make such distributions, then Alan “might be required to liquidate his real estate interests to pay maintenance.”

¶19 After the court entered the divorce judgment, Alan moved for reconsideration. He argued that, consistent with the trial testimony of the attorney for the trustee, the trust would not make distributions for Alan to use in paying maintenance to Cynthia. He further argued that the court’s decision resulted in double counting, in that he should not be forced to pay maintenance with money derived from the sale of real estate that he received in the property division. The court denied the motion. The court appeared to conclude that Alan’s arguments should be rejected because the court could have “solve[d] the problem [of the trust income] in the case” by ordering an unequal property division in favor of Cynthia instead of awarding her maintenance. The court seemed to reason that awarding maintenance instead of awarding Cynthia more than half of the property provided more flexibility and was fairer to Alan because maintenance could be modified based on changed circumstances while property division could not.<sup>3</sup>

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<sup>3</sup> The most pertinent portions of the circuit court’s oral reconsideration decision were as follows:

[Alan] contends [that case law] stands for [the proposition] that the Court would be precluded from ordering Alan to sell his property in order to pay maintenance. And I actually think now we’re really at the nub of the matter. [Alan] argues that such a result would be a greatly unequal division of the marital estate.

And I actually think that, if my ruling with regard to the trust [making maintenance payments] is wrong, that that is probably how the case should be resolved. In other words, if the Court of Appeals decides that this Court cannot consider [the trust] income in the setting of a maintenance award in this case, then I hope it will remand it to refigure the case.

(continued)

¶10 Approximately three months after the court entered the divorce judgment, Cynthia moved to have Alan held in contempt based on his failure to pay any maintenance. In response, Alan presented evidence that, after the divorce, the trustee reduced his distributions to only \$3,000 per month, an amount that the trustee determined was no more than Alan needed for his own support needs, based on evidence of Alan's support needs submitted at the divorce trial, leaving no money for maintenance.

¶11 The court declined to hold Alan in contempt based on the court's finding that Alan lacked the funds to pay maintenance as ordered. The court instead ordered Alan to liquidate real estate to meet his maintenance obligation, as the court's divorce judgment had anticipated might be necessary.

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And I think that, in light of the fact that [Alan] has this trust, it is richly endowed, I can solve the problem in the case by an unequal division of estate, and then [Alan] can either—can live in the style to which he was accustomed during the marriage or not, depending on the largess of the trustee.

....

But the bottom line for me is that I don't think that this Court can take a person of [Alan]'s situation ... in a multi-million dollar estate and simply ignore it. That is not fair. That does not reflect the lifestyle that the parties enjoyed during their marriage.

And I believe that the fairest way to do it is in the calculation of maintenance. I think it's fairest because it's flexible and modifiable based upon potential change of circumstances ....

If I did it by property division, now I would have to do a lump sum order, which this Court deems to be less flexible and more unfair to [Alan] than the order that the Court has made.

¶12 Alan appeals both the divorce judgment and the liquidation order, as indicated above.

## DISCUSSION

¶13 Alan's arguments in these appeals can be summarized as follows. In the first appeal, from the divorce judgment, Alan argues that the court erroneously exercised its discretion in awarding maintenance because the award depended on trust distributions that could be used for maintenance, even though the trust terms and trustee attorney's testimony show that the trust would not make these distributions. In the second appeal, from the liquidation order, Alan argues that the court's order was premised in part on unfair double counting in that it required Alan to liquidate part of his property division to meet his maintenance obligation.

¶14 For the reasons that follow, we agree with Alan that the circuit erred in determining maintenance, and we conclude that this error requires reversal of the divorce judgment and the liquidation order, and remand for the circuit court to reconsider both maintenance and property division.

### A. *Standard of Review and Relevant Legal Principles*

¶15 A circuit court's decisions on maintenance and property division are committed to the court's discretion. *Hokin v. Hokin*, 231 Wis. 2d 184, 190, 605 N.W.2d 219 (Ct. App. 1999). We affirm a discretionary decision if the court makes a rational, reasoned decision and applies the correct legal standard to the facts of record. *Id.* We will uphold the circuit court's findings of fact unless those findings are clearly erroneous. *Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993).

¶16 Although maintenance and property division are analytically distinct, they are related and must often be considered together to ensure a fair and equitable result. *Bahr v. Bahr*, 107 Wis. 2d 72, 78-80, 318 N.W.2d 391 (1982).

¶17 When the court sets maintenance, it must consider, among other factors, a payor's ability to pay. *Poindexter v. Poindexter*, 142 Wis. 2d 517, 530, 419 N.W.2d 223 (1988); *see also* WIS. STAT. § 767.56 (setting forth maintenance factors, many of which relate to ability to pay).<sup>4</sup> Failure to properly consider

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<sup>4</sup> WISCONSIN STAT. § 767.56 provides, in pertinent part, as follows:

**Maintenance.** Upon a judgment of ... divorce, ... the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (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. 767.61.
- (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

(continued)



ability to pay is therefore an erroneous exercise of discretion. See *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶18, 269 Wis. 2d 598, 676 N.W.2d 452.

¶18 There is a statutory presumption that the court will divide the parties' divisible property equally. See WIS. STAT. § 767.61(3). If the court departs from that presumption, the record must reflect that the court has considered the applicable statutory factors. *LeMere v. LeMere*, 2003 WI 67, ¶¶24-25, 262 Wis. 2d 426, 663 N.W.2d 789.<sup>5</sup>

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expectation of reciprocation or other compensation in the future, if the 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.

<sup>5</sup> WISCONSIN STAT. § 767.61(3) provides as follows:

PRESUMPTION OF EQUAL DIVISION. The court shall presume that all property not described in sub. (2)(a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

(a) The length of the marriage.

(b) The property brought to the marriage by each party.

(c) Whether one of the parties has substantial assets not subject to division by the court.

(d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(e) The age and physical and emotional health of the parties.

(continued)

¶19 Double counting may arise when a court has considered the same asset in both maintenance and property division in a way that results in unfairness: “[W]hen analyzing whether there has been double counting, the focus should be on fairness, not rigid double-counting rules.” *McReath v. McReath*, 2011 WI 66, ¶54, 335 Wis. 2d 643, 800 N.W.2d 399.

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(f) The contribution by one party to the education, training or increased earning power of the other.

(g) The earning capacity of each party, 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 become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The amount and duration of an order under s. 767.56 granting maintenance payments to either party, any order for periodic family support payments under s. 767.531 and whether the property division is in lieu of such payments.

(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(k) The tax consequences to each party.

(l) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(m) Such other factors as the court may in each individual case determine to be relevant.

***B. Analysis***

¶20 As should be apparent from the background set forth above, the circuit court set maintenance essentially based on the amount of trust income Alan received during the marriage, approximately \$10,000 per month on average. The court apparently concluded that Alan could afford to pay \$4,000 per month maintenance from such trust income or, failing that, by liquidating property that he was awarded in the property division. Thus, the central question presented in the first appeal, which ultimately is dispositive of the second appeal, is whether the circuit court erroneously exercised its discretion in setting maintenance based on the premise that trust distributions would be available for purposes of maintenance, and if they were not, finding that Alan could make the limited-term maintenance payments by liquidating some of the real estate he was awarded in the property division.

¶21 In arguing that the circuit court erred in its maintenance determination, Alan relies primarily on the terms of the trust’s spendthrift clause and on testimony by the trustee’s attorney. The spendthrift clause provides as follows:

The interest[s] of the beneficiaries are created for their personal enjoyment[,] [p]rotection and welfare[, and] shall not be susceptible of assignment, anticipation, hypothecation or seizure by legal process.<sup>[6]</sup> If my trustee believes that the interest of a beneficiary is threatened to be diverted from the purpose for which it was created, my

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<sup>6</sup> In the text we present an edited version of the first portion of the spendthrift clause to correct apparent grammatical or typographical errors. This portion of the clause actually reads as follows: “The interest of the beneficiaries are created for their personal enjoyment. Protection and welfare shall not be susceptible of assignment, anticipation, hypothecation or seizure by legal process.” The parties do not base any argument on these apparent errors, and we conclude that they do not affect our decision.

trustee shall withhold any income and principal which he is authorized to distribute to the beneficiary and shall apply it in such manner as he considers advisable for the care, comfort, maintenance, education or general welfare of the beneficiary or his spouse or his issue. Such distributions to the beneficiary may be resumed when my trustee considers the diversion is no longer effective or threatened.

¶22 Alan interprets the spendthrift clause as prohibiting the trustee from distributing funds for maintenance. The trustee's attorney testified that he interpreted the clause as Alan does and that the trustee would not make distributions to Alan to pay maintenance to an ex-spouse.<sup>7</sup> The circuit court's

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<sup>7</sup> The most pertinent portions of the testimony by the attorney were as follows:

Q. [S]o with [the spendthrift provision] in mind, if [the court] would order that [Alan] pay his wife \$5,000 a month in maintenance ..., and he doesn't have the money from his personal earnings, ... what would you do?

....

A. Any request that would be made by [Alan], we would look at a variety of factors. It's hard to answer a hypothetical without knowing exactly what is going on. But if it appeared that the distribution from the trust was being diverted directly for [Cynthia]'s benefit, as opposed to [Alan]'s benefit, I think we would have to deny the request. It's hard to answer in a hypothetical because, if it's simply a small amount that is just improving [Alan]'s lifestyle, it might be considered. But if the bulk of the distribution was going toward maintenance, I think the terms of the trust would require us to deny that request.

....

Q. And if the request [to the trust] was just for maintenance, that would also be denied?

A. If it was for the trust to pay maintenance directly, that would be denied.

Q. What about if it was a request from Alan because he doesn't have the money to pay maintenance? I know I kind of asked it in a different way, but this is important.

(continued)

decision, in contrast, shows that the court interpreted the spendthrift clause as giving the trustee discretion to determine whether distributions to Alan to pay maintenance would be appropriate. Cynthia fails to take a clear position on whether she agrees with the circuit court's interpretation of the trust terms, but we conclude that the only reasonable way to read her arguments is that she does.<sup>8</sup> Thus, while Cynthia disagrees with Alan that the trust terms *prohibit* the trustee from making distributions for maintenance, she does not dispute that the trustee at least *has the discretion not to* make such distributions under the trust terms.

¶23 Although, as indicated above, Alan argues that the terms of the trust prohibit the trustee from making distributions for maintenance, we conclude that it is not necessary to decide the issue in this case. It is undisputed that the trustee at least has the discretion to decline to make distributions for purposes of maintenance. Thus, the issue becomes whether the trustee *would* make

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A. As long as we believe that the monies that are being distributed to [Alan] are being used for his personal benefit, we're okay. As soon as we believe that the money is being diverted for a third party, that presents a problem under the terms of the trust.

Again, there [are] a lot of things that would have to be considered in any request, but I believe that, if it looked like a substantial amount of what was being requested was simply to be turned around and paid to a third party, that request would be denied, whether—whether it was [Cynthia] or whether it was anyone else .... When we make distributions, if we don't believe that it's going [to be] for his personal benefit, the request is going to be denied.

<sup>8</sup> Cynthia states in her brief, when describing the trust terms: “[T]he Trustee has *absolute discretion* to distribute income to Alan or [his son], and to invade principal if necessary. The Trustee *may* make payments directly for their benefit. Distributions *may* be made until the principal is fully exhausted.” (Emphasis added; record citations omitted.) This implies, but does not clearly assert, that Cynthia's position is that the trust has discretion *not* to make distributions for purposes of maintenance.

distributions for purposes of maintenance. On this point, there is no factual dispute. The trust's position was clear that it would limit or withhold distributions to Alan to the extent they were used for maintenance. As far as we can determine from the circuit court's decision, the parties' briefing, and our review of pertinent portions of the record, the trustee attorney's testimony was the only evidence on this topic, and that testimony showed that the trustee would not make distributions for Alan to pay maintenance. We are not presented with any facts of record that would support a finding to the contrary, nor did the circuit court find that the trust would make such payments, and Cynthia fails to address the trustee attorney's testimony in any detail or to develop any persuasive argument as to why the trustee attorney's testimony should not be controlling.

¶24 We recognize that there are two aspects of the trustee attorney's testimony that might superficially seem to support a finding that the trustee would continue to make distributions at levels the parties enjoyed during the marriage, such that Alan could afford to pay a significant amount of maintenance from trust income. However, we now explain why neither supports such a finding, at least not based on any legal authority cited by Cynthia.

¶25 First, the trustee's attorney acknowledged that the trustee made distributions to creditors during the marriage, including to one or more other attorneys who assisted Alan in attempting to reinstate his law license. However, the trustee's attorney reasonably distinguished such distributions as distributions that the trustee viewed to be in Alan's personal interests. This evidence does not, in context, support a finding that the trustee would have made distributions for Alan to pay maintenance to an ex-spouse.

¶26 Second, the attorney for the trustee indicated that “a small amount” of money distributed by the trust to improve Alan’s “lifestyle” might end up as part of a maintenance payment. However, we conclude that this testimony would undercut, not support, a finding that the trustee would make distributions sufficient to cover anything but a very minimal amount of maintenance.

¶27 There is a third aspect of the trustee attorney’s unrebutted testimony that makes it all the more clear that the trustee intended not to make trust distributions to Alan for maintenance. The attorney testified that distributing any significant amount of trust funds for Alan to pay maintenance raised concerns from the trustee’s standpoint regarding the trustee’s duty to the other beneficiary of the trust, Alan’s son. Alan’s son has equal, and in some ways greater, rights under the trust because Alan’s son is the sole remainder beneficiary. The circuit court appeared to discount such evidence because, in the court’s view, continued distributions to Alan of \$10,000 per month were “sustainable” indefinitely given the size of the trust. However, even to the extent this sustainability finding is correct, it does not in the context of all of the trustee attorney’s testimony support a further finding that the trustee would actually make such distributions.

¶28 Given this evidence, we conclude that the circuit court should not have calculated maintenance based on an assumption that Alan would continue to receive trust income in an amount similar to that enjoyed during the marriage. In doing so, the court based maintenance on the unfounded assumption that the trust was likely to cover maintenance payments under these circumstances. As a result, the court made an assessment of Alan’s ability to pay maintenance from the income available to him that rested on inaccurate facts or assumptions. This was an erroneous exercise of discretion. *See Rohde-Giovanni*, 269 Wis. 2d 598, ¶18, *Poindexter*, 142 Wis. 2d at 530; *see also Woodard v. Woodard*, 2005 WI App 65,

¶14, 281 Wis. 2d 217, 696 N.W.2d 221 (“[C]ourts frequently base maintenance decisions, in part, on predictions. However, a circuit court’s assessment must be based on facts of record, not on unfounded assumptions.”).

¶29 It is true that the circuit court seemed to anticipate an alternative course of action if or when the trustee refused to make distributions for maintenance. Specifically, the court anticipated that, in that event, Alan could liquidate real estate that he received in the property division to pay the maintenance. In addition, the court appeared to conclude in its reconsideration decision that this alternative course of action would not be unfair double counting because the court could have initially ordered an unequal division of property instead of maintenance. However, these aspects of the court’s decision do not persuade us that it properly exercised its discretion.

¶30 While the circuit court’s contingent approach has some appeal, we conclude that this approach does not clarify the court’s reasoning for the discretionary maintenance and property division decisions that the court actually made. The court based maintenance on assumed trust income and ordered an equal property division, after examining the applicable statutory factors. At the same time, and without explanation, the court anticipated a possible unequal property division, without addressing, based on the applicable statutory factors, why an unequal property division would be a fair and equitable result, and without determining what percentage of the property each party should receive. Even if we could reasonably read the circuit court’s decision as intending an unequal property division, which we cannot, we could not uphold it because the court did not explain on the record, with reference to the applicable statutory factors, why an unequal property division of any particular proportions was fair and equitable. *See LeMere*, 262 Wis. 2d 426, ¶25 (“the record must at least reflect the court’s



consideration of all applicable statutory factors before a reviewing court can conclude that the proper legal standard has been applied to overcome the presumptive equal property division”). For these same reasons, the court’s decision presents a potential double counting issue, to the extent that the court simultaneously intended an equal property division and intended that Alan pay maintenance from his portion of the property division.<sup>9</sup>

¶31 We recognize that Alan’s trust income presented the circuit court with a dilemma, which the court thoroughly and thoughtfully attempted to address. As the court recognized, it could not simply ignore Alan’s trust income, because the evidence showed that distributions from the trust appeared to be the primary, jointly used source of the parties’ support for much of their fifteen-year marriage and would continue to be a significant source of support for Alan after the divorce. These established facts made the trust income relevant to both the maintenance and property division decisions. *See* WIS. STAT. §§ 767.56 and 767.61(3); *Rohde-Giovanni*, 269 Wis. 2d 598, ¶29 (“maintenance is designed to support the recipient spouse in accordance with the needs and earning capacities of both the recipient spouse and the payor spouse” and “must ensure that there is a fair and equitable financial arrangement between the parties”).

¶32 Further, we recognize that the court in this case, or in any case with a similar trust, may have concerns regarding whether a trustee will take actions

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<sup>9</sup> In addition, we could not simply affirm on the assumption that the circuit court’s view was as follows: in the event that the trust would not cover maintenance payments, the property should be unequally divided to increase Cynthia’s share by the total value of the limited-term maintenance payments (\$4,000 x 56 months = \$224,000). We could not affirm on this basis because our doing so would amount to an exercise of the circuit court’s discretion in place of the circuit court, and would potentially fail to consider relevant factors such as tax consequences or the present values of a given set of monthly payments.

that, while legal and reasonable from the trustee's perspective, make the trust beneficiary's financial status a moving target or otherwise affect the overall fairness of the court's maintenance and property division decisions. Here, for example, it appears that, after the divorce was finalized, Alan continued to enjoy the benefit of living in his residence even though the trust purchased it from him for an undisclosed sum, at least part of which Alan was able to use to make an equalization payment he owed Cynthia for the property division.

¶33 However, when confronted with such concerns, the court has a variety of options, including but not limited to making an unequal property division at the outset, assuming a proper application of the statutory factors supports the particular division selected. Certainly, the court may consider, among other factors, the overwhelming evidence that Alan will continue to receive trust distributions indefinitely, albeit simply not distributions that can be used for maintenance.

¶34 Finally, we turn to Cynthia's argument that the circuit court should be affirmed because trust distributions to Alan are "reachable" for purposes of maintenance. It is unclear what Cynthia means by "reachable," but what she seems to mean is that the circuit court had authority to order the trustee to make distributions to Alan for purposes of maintenance, or to somehow attach trust funds even if those funds have not yet been distributed. Cynthia relies primarily on *Dillon v. Dillon*, 244 Wis. 122, 11 N.W.2d 628 (1943), a case involving the application of Pennsylvania law as of 1943 to a Pennsylvania trust. *See id.* at 124-28. She also relies on various non-Wisconsin authorities, which she asserts reflect the majority rule across jurisdictions, though she acknowledges courts are split on the issue.

¶35 If Cynthia means to argue that we should affirm the circuit court because the court *could* have used some procedural mechanism to require the trustee to make distributions for purposes of maintenance, even though the court did not do this, we are not persuaded. First, it is not apparent from Cynthia’s argument on what basis the court had the authority to issue an order directed at the non-party trustee or an order in some sense attaching or “reaching” undistributed trust income, at least not in a case, as here, where trust distributions are wholly within the trustee’s discretion. Second, Cynthia does not explain why it makes sense to affirm the circuit court based on a directive or order that it did not make.

¶36 For all of the reasons stated, we reverse the divorce judgment and remand for the court to reconsider both maintenance and property division. Nothing in our decision precludes the circuit court from considering, based on all relevant factors, one or more of the following: an unequal division of property, a smaller amount of maintenance, or a different limited term for maintenance in the event that maintenance is appropriate. In addition, we conclude we must reverse the liquidation order because that order is premised on the validity of the court’s erroneous maintenance award.

## CONCLUSION

¶37 In sum, we reverse the divorce judgment and liquidation order and remand for the court to reconsider both maintenance and property division.

*By the Court.*—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.



