

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 12, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP513**

**Cir. Ct. No. 2008FA967**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**JUAN J. GUERRERO,**

**PETITIONER-APPELLANT,**

**V.**

**PAULA D. GUERRERO,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dane County:  
JOHN C. ALBERT, Judge. *Affirmed in part; reversed in part and cause  
remanded with directions.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Juan Guerrero appeals the property division and maintenance portions of a judgment dissolving his marriage to Paula Guerrero. Juan argues that the trial court erred by refusing to apply the “special circumstances” rule when dividing the couple’s property. Juan also claims that the trial court erred by awarding Paula maintenance and, alternatively, contends that the record does not support the maintenance amount awarded.

¶2 We reject Juan’s arguments with respect to the division of property and, therefore, affirm that part of the judgment. Although we conclude that the trial court properly exercised its discretion in awarding Paula temporary maintenance, the record does not support the amount awarded. We therefore reverse that part of the judgment and remand the matter to the trial court with directions.

### **BACKGROUND**

¶3 Juan and Paula were married in April 1995, and Juan filed for divorce in May 2008. After a trial, the court rejected Juan’s claim that special circumstances warranted valuing the marital assets as of the date of the parties’ alleged separation rather than on the date of their divorce, April 29, 2009. Ultimately, the court distributed 55% of the estate to Juan and 45% of the estate to Paula. The court also awarded Paula \$300 per month in maintenance for a period of five years.

¶4 The parties filed competing motions for reconsideration. With respect to maintenance, Juan argued that the award was based on a mistake of fact regarding his budget. Although the court conceded the error and retracted its finding, it increased the maintenance award to \$500 per month. This appeal follows.

## DISCUSSION

### A. Property Division

¶5 The division of property in divorce actions is entrusted to the trial court's discretion, and will not be disturbed on appeal unless the court has erroneously exercised its discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. This court will sustain discretionary decisions if “the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2) (2009-10).<sup>1</sup>

¶6 As a general rule, marital assets are to be valued as they exist on the date of the divorce. See *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Special circumstances, however, may warrant deviation from this rule. *Id.* Juan moved the circuit court to conclude that special circumstances warranted valuing the marital assets as of the parties' alleged separation in August 2001. Specifically, Juan claimed that, although he and Paula were married for fourteen years, they had been living separate lives for more than half of that time. The court denied Juan's request, noting that his proposal ignored “almost seven years of activities that typify a marriage.” The court continued:

During those seven years the parties took numerous trips together, acting as husband and wife in that they shared the same bed. They filed taxes as married in 2005 and 2006.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

They refinanced the property brought to the marriage by the respondent in 2002 and again in 2003. Certainly the inference of [Paula] cosigning those two mortgages is that the approval for the refinance might not have been granted by the financial institution but for her agreeing to be a co-obligor on the new money....

... [I]n 2006 and 2007, [Juan] contributed toward the expenses of the marital residence and received some of the proceeds when it was sold in June of 2007.

¶7 The court acknowledged that in some cases, valuation dates other than the date of the divorce are appropriate, but in the cases cited by Juan, the parties' actions were evaluated after the divorce petition was filed rather than pre-filing, as Juan urged. The court noted that Juan "had the ability to file the divorce whenever he didn't want to be married any more, but he didn't file until May of 2008." The court further noted: "The fact that he led a double life, both married and unmarried during that period of time doesn't change the fact that he was married and it was totally within his control as to when he filed for divorce."

¶8 Citing *Schmitt v. Schmitt*, 2001 WI App 78, 242 Wis. 2d 565, 626 N.W.2d 14, Juan contends that the trial court erred when it noted that only post-filing conduct was relevant when determining whether the special circumstances rule applied. In *Schmitt*, which involved a dispute over maintenance, the trial court considered that the parties had lived separate lives for fifteen of their thirty-eight years of marriage. *Id.*, ¶16. On appeal, the husband challenged the court's consideration of this evidence on the ground that it is not a statutory factor to be considered under the maintenance statute, WIS. STAT. § 767.26. *Schmitt*, 242 Wis. 2d 565, ¶18. This court rejected that argument, holding that the court, in its discretion, could properly consider the "separate lives" evidence under the broad catch-all provision of the statute. *Id.*

¶9 Juan argues that because the identical catchall provision is found in the property division statute, WIS. STAT. § 767.61(3)(m), the *Schmitt* court’s reasoning has equal application to property division cases. It is undisputed, however, that Juan did not cite the *Schmitt* case to the circuit court. In any event, as noted above, the court ultimately considered and commented on the parties’ pre-filing *and* post-filing actions before concluding there were no special circumstances to justify using a valuation date other than the date of the divorce. We discern no error.

#### B. Maintenance

¶10 The determination of maintenance is a matter entrusted to the trial court’s sound discretion. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). 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” those factors listed under WIS. STAT. § 767.56.<sup>2</sup> On review, the

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<sup>2</sup> WISCONSIN STAT. § 767.56 provides:

Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(1)(g) or (j), 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.

(continued)

question is whether the trial court's application of the factors achieves both the support and fairness objectives of maintenance. *Forester v. Forester*, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993). The first objective is to support the recipient spouse in accordance with the needs and earning capacities of the parties. "The goal of the support objective of maintenance is to provide the recipient spouse with support at pre-divorce standards." *Fowler v. Fowler*, 158 Wis. 2d 508, 520, 463 N.W.2d 370 (Ct. App. 1990). The fairness objective is "to ensure a fair and equitable financial arrangement between the parties in each individual case." *King v. King*, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999) (citation omitted).

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(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, 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.

¶11 Here, Juan argues the trial court erred as a matter of law when it awarded maintenance. First, Juan contends the court erred by considering this to be a fourteen-year marriage when, under his view of the facts, the parties separated in 2001. As noted above, however, the court found that the parties lived in a marital-type relationship during the entire fourteen years. Juan has failed to show that this finding is clearly erroneous, and to the extent there was conflicting trial testimony, the trial court is the ultimate arbiter of witness credibility. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶12 Juan also claims the court erred by beginning its maintenance analysis with the proposition that there should be an equalization of disposable income. Juan argues that such an analysis is reserved for long-term marriages and a fourteen-year marriage, especially one where the parties led separate lives for over half of the marriage, is not long term. Juan's argument is again founded on his belief that the couple had only a six-year marriage. The circuit court found otherwise.

¶13 Moreover, in reviewing maintenance awarded after a seven-year marriage, our supreme court acknowledged that in addressing the fairness objective of maintenance, “[i]t would seem reasonable for the trial court to begin the maintenance evaluation with the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties.” *King*, 224 Wis. 2d 235, ¶24 n.10 (quoting *Bahr v. Bahr*, 107 Wis. 2d 72, 84-85, 318 N.W.2d 391 (1982)). The *King* court continued:

The practice in the circuit courts of Wisconsin has been to use the suggested starting point and then to make adjustments to the 50 percent approach based on the statutory factors including the length of the marriage at

issue. See the State Bar of Wisconsin CLE Books' publication on family law, which, in summarizing maintenance law in Wisconsin, states, "In determining maintenance, the court may reasonably begin by calculating one-half of the total income of both parties. However, this is merely the starting point of the maintenance evaluation; equity of result is the determinative factor controlling the ultimate award." Leonard L. Loeb, et al., *System Book for Family Law* at 1–12 (4th ed. 1993 & Supp.1998).

*Id.* We therefore reject Juan's challenge to the maintenance award based on these alleged "errors of law."

¶14 Here, the court considered the statutory factors, as well as the support and fairness objectives, and concluded that temporary maintenance would allow Paula to achieve stable employment and self-sufficiency. However, although we conclude the trial court properly exercised its discretion in awarding Paula temporary maintenance, the record does not support the amount awarded. The court looked to the parties' budgets and concluded Juan had a surplus of \$327 per month based on its belief that Juan paid for only half of the mortgage on a vacation home. Noting that Paula "does have a need" and "there is an ability to pay temporary maintenance," the court awarded Paula \$300 in monthly maintenance for five years.

¶15 Juan moved for reconsideration arguing that he was responsible for the entire vacation home mortgage, which would leave him with a budget surplus of only \$82.<sup>3</sup> A trial court erroneously exercises its discretion when it makes a mistake with respect to the facts upon which its decision is based. *Perrenoud v. Perrenoud*, 82 Wis. 2d 36, 46, 260 N.W.2d 658 (1978). Although the trial court

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<sup>3</sup> This amount is calculated by subtracting the additional half of the mortgage payment, \$245, from the \$327 surplus initially found by the trial court.



conceded the error and retracted its finding, it ultimately increased the maintenance award to \$500 per month. Because it is unclear from the record why the court increased maintenance from \$300 to \$500, we will reverse that part of the judgment and remand the matter to the trial court to either set forth the reasoning behind its decision to increase maintenance or recalculate maintenance based on Juan's corrected budget.

*By the Court.*—Judgment 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.

