

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2013AP2479

Cir. Ct. No. 2012FA20

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

ADELINE FRANCES VASSALLO,

PETITIONER-RESPONDENT,

V.

VICTOR PETER VASSALLO,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Reversed and cause remanded with directions.*

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

¶1 LUNDSTEN, J. Victor Vassallo appeals the circuit court's judgment divorcing Victor and Adeline Vassallo after a trial contesting

maintenance and property division issues. Victor's primary challenge is to the circuit court's maintenance decision. Victor complains that the court's determination that he pay Adeline \$2,500 per month in indefinite maintenance unreasonably requires him to liquidate assets to meet his maintenance and personal ongoing financial obligations. Victor also challenges property division. Although the division of divisible property was roughly equal, Victor challenges the circuit court's decision to also award to Adeline a non-divisible asset valued at \$28,333.

¶2 So far as we can tell from the record before us, the court's maintenance decision unfairly required Victor to liquidate significant assets while allowing Adeline to retain all assets awarded to her. If there is a reasonable explanation for this result, the circuit court's decision does not reveal what it is. Also, the circuit court does not explain, and we are unable to detect, a basis for the "hardship" determination necessary to support invading Victor's non-divisible property. Accordingly, we reverse and remand for the circuit court to reconsider maintenance and property division in a manner consistent with our decision.¹

Background

¶3 Victor and Adeline had been married about 42 years at the time of the divorce. Victor was 69 and Adeline was 64, and both were retired. They had no minor children.

¹ Adeline has not filed a responsive brief. We conclude that this appeal can be decided based solely upon Victor's brief and the record.

¶4 The parties' divisible assets had a total net value of \$527,000, and the circuit court divided these assets approximately equally. The court awarded assets with a net value of about \$267,000 to Victor and assets with a net value of about \$260,000 to Adeline.² The bulk of the parties' divisible assets consisted of real estate, including the two separate residences each party occupied at the time of the divorce, and a 53-foot boat valued at \$187,000. The property division included the division of substantial debt, largely consisting of mortgage debt. The court assigned to Victor approximately \$419,000 in debt, including a \$284,000 mortgage on the residence awarded to him. The court assigned to Adeline a \$104,729 mortgage on the residence she received.

¶5 Victor owned three significant non-divisible assets: vacant lots valued at \$247,000; a \$117,000 bank account; and a one-third interest in a rental property.³ Victor's non-divisible one-third interest in the rental property was the non-divisible asset awarded to Adeline, and it requires further explanation.

¶6 During the marriage, Victor and Adeline owned two-thirds of the rental property. Victor's sister owned the remaining one-third. Subsequently, Victor's sister gifted her one-third to Victor. The circuit court classified the two-thirds portion as divisible property and the one-third portion, gifted to Victor, as

² These aggregate numbers do not appear in the record. We calculated them based on the circuit court's fact finding and on pages 7 and 8 of the judgment in which the circuit court sets forth its property division. As we explain later in the Background section, the summary in the paragraph above does not include Victor's non-divisible asset that was awarded to Adeline.

³ The circuit court's oral decision took Victor's \$117,000 non-divisible bank account into consideration for purposes of property division and maintenance, but we see no reference to the account in the subsequent written judgment of divorce. The reason for this discrepancy is not apparent to us. Regardless, Victor seems to concede in his appellate brief that the circuit court was correct to consider the \$117,000 account as part of its analysis and that we should consider the \$117,000 account on appeal.

Victor's non-divisible property. The circuit court awarded the entire rental property, valued in total at \$85,000, to Adeline after determining that this was necessary to avoid a "hardship." The net result of awarding Adeline the rental property was to award her the divisible two-thirds portion (\$56,666) and the non-divisible one-third portion (\$28,333).

¶7 Thus, out of Victor's non-divisible assets valued at about \$392,333, Victor received about \$364,000 in assets, and Adeline received \$28,333. This means that the parties' total net awards of property, both divisible and non-divisible, were about \$631,000 to Victor and \$288,000 to Adeline. As we have said, Victor challenges awarding Adeline the \$28,333 non-divisible portion of the rental property.

¶8 With respect to maintenance, the circuit court found that Victor had social security income of \$1,959 per month, and Adeline had social security income of \$771 per month. In addition, the court apparently found that Victor had received and would continue to receive the \$650 per month from the rental property discussed above.⁴ The court ordered Victor to pay Adeline \$2,500 per month in indefinite maintenance.

¶9 We reference additional facts as needed in our Discussion section below.

⁴ The record is ambiguous as to the precise amount of the monthly rental income. In the transcript of the circuit court's oral decision, the amount is shown as \$506. Victor tells us that he believes the circuit court transposed numbers because the trial testimony shows that the amount was \$650. To Victor's observation, we add that it is possible that the \$506 figure may reflect a transcription error, for we note that the transcript contains other obvious transcription errors. Regardless, it does not matter for purposes of our decision whether the rental income is \$506 or \$650.

Discussion

¶10 Victor challenges the circuit court’s maintenance determination. He also challenges the circuit court’s property division, namely, the transfer of \$28,333 of Victor’s non-divisible property to Adeline to avoid a hardship. Because we are unable to find support for the circuit court’s exercise of discretion with respect to the maintenance determination, we agree with Victor that the standard of review requires that we reverse and remand for further consideration of maintenance. In addition, for reasons we explain, the circuit court should revisit, but need not necessarily change, the overall property division.

A. Maintenance

¶11 “We will not disturb the circuit court’s decision regarding maintenance unless the award represents an erroneous exercise of discretion.” *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶17, 269 Wis. 2d 598, 676 N.W.2d 452. “A circuit court engages in an erroneous exercise of discretion when it fails to consider relevant factors, bases its award on factual errors, makes an error of law, or grants an excessive or inadequate award.” *Id.*, ¶18. “Moreover, ‘(a) discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.’” *Id.* (quoted source omitted).

¶12 WISCONSIN STAT. § 767.56 sets out the factors that the circuit court considers when addressing maintenance.⁵ The factors are designed to further two

⁵ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. WISCONSIN STAT. § 767.56 provides:

(continued)

distinct objectives, support and fairness. “First, maintenance is designed to support the recipient spouse in accordance with the needs and earning capacities of

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.
- (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.

both the recipient spouse and the payor spouse.” *Rohde-Giovanni*, 269 Wis. 2d 598, ¶29. “Second, a maintenance award must ensure that there is a fair and equitable financial arrangement between the parties.” *Id.* “The factors listed in [the statute] must be considered in light of these objectives when the circuit court is setting the amount of the maintenance award.” *Id.*

¶13 In addition, in a long-term marriage like the one here, the “starting point” is an equalization of the parties’ incomes. *Schmitt v. Schmitt*, 2001 WI App 78, ¶13, 242 Wis. 2d 565, 626 N.W.2d 14. The circuit court may adjust this amount based on application of the statutory factors. *Id.*

¶14 Here, as Victor points out, the circuit court’s maintenance award resulted in a significant disparity in the parties’ respective incomes. By our calculations based on the circuit court’s oral ruling, the award resulted in a monthly income of \$109 for Victor (\$1,959 social security + 650 rental income - \$2,500 maintenance paid) and \$3,271 for Adeline (\$771 social security + \$2,500 maintenance received).⁶ Moreover, as Victor also points out, the disparity is magnified by the fact that the circuit court assigned the bulk of the parties’ debts to Victor, including the \$284,000 mortgage on Victor’s residence with monthly payments of approximately \$1,900. In contrast, the only debt the circuit court

⁶ The circuit court apparently assumed or ordered that Victor would continue to receive the rental income from the rental property after that property became solely owned by Adeline pursuant to the divorce judgment. Unless there are considerations we are missing, it would seem to make more sense for Adeline to receive the rental income from the property directly and to adjust any maintenance payment accordingly. Regardless, the details of cash flow regarding the rental payment do not affect our conclusion that we must reverse and remand for the circuit court to reconsider the maintenance decision.

assigned to Adeline was the \$104,729 mortgage on her residence with monthly payments of approximately \$850.⁷

¶15 Although the circuit court addressed the statutory maintenance factors and the support and fairness objectives, and made a number of pertinent fact findings, we are unable to see a reasonable basis for the maintenance award based on this record. That is, we find no explanation as to why the court so substantially deviated from the “starting point” of an equalization of incomes.

¶16 The circuit court appeared to rely on its conclusion that it was fair and reasonable to require Victor, but not Adeline, to liquidate significant assets to support both parties after the divorce because Victor had substantial non-divisible assets. But we find no explanation for this conclusion.

¶17 We recognize that Adeline presented a \$2,367 monthly budget shortfall without any maintenance and that this amount is close to the circuit court’s \$2,500 maintenance figure. However, assuming that shortfall is accurate, it does not change our analysis because the maintenance award fails to adequately address Victor’s even more significant shortfall in meeting a reasonable budget. The circuit court’s findings show that Victor’s reasonable expenses, including the \$1,900 mortgage payment the circuit court assigned to him, far exceeded his available income of \$109 per month after maintenance.

⁷ Victor points to evidence that Adeline may also receive rental income from a Florida condominium that she received in the property division. We disregard this evidence of income. The circuit court made no finding as to its amount other than to say that there was evidence of “some” income from this \$100,000 condominium. The circuit court is free to consider this evidence of income on remand.

¶18 We also recognize that, before the circuit court, Adeline predicted that, after the divorce, Victor would resume his construction business and earn income at a level comparable to what he had earned during the marriage. However, the circuit court's findings and reasoning do not indicate that the court accepted this assertion. On the contrary, the circuit court expressly found that Victor's primary business customer "has no more work" for Victor and that "there is no evidence that [Victor's] income will substantially increase in the future."

¶19 As to reasoning the circuit court did employ, the problem we see with the court's approach is that it effectively treated Victor's non-divisible assets as if they were divisible assets, without a supporting rationale. It seemingly attempted to solve the parties' jointly created asset-rich/cash-poor problem by requiring Victor to liquidate significant assets, while Adeline retained all of her assets and met all of her expenses. The net result of the circuit's court's maintenance award was to allow Adeline to invade a significant portion of Victor's non-divisible property without an adequate reason.

¶20 For all of the reasons above, we conclude that the circuit court erroneously exercised its discretion in making the \$2,500-per-month maintenance award, and we remand for the court to reconsider the amount of that award.

B. Property Division

¶21 We turn to Victor's challenge to the property division. As already indicated, Victor challenges the circuit court's conclusion that Victor's \$28,333 non-divisible one-third portion of the rental property must be transferred to Adeline to avoid a hardship. By statute, one spouse's non-divisible property is

subject to division only if “refusal to divide the property will create a hardship on” the other spouse. WIS. STAT. § 767.61(2).⁸ Hardship is defined by case law as “a condition of financial privation or difficulty.” *Doerr v. Doerr*, 189 Wis. 2d 112, 119, 525 N.W.2d 745 (Ct. App. 1994) (quoted source omitted). It requires “something more than an inability to continue living at the predivorce standard.” *Id.* at 124.

¶22 We explained in *Doerr* that our review of a hardship determination involves a three-step analysis and three standards of review. Here, it suffices to state that the circuit court’s ultimate determination of whether to invade the non-divisible property is discretionary and will be affirmed if it has any reasonable

⁸ WISCONSIN STAT. § 767.61(2) provides, in full:

(2) PROPERTY SUBJECT TO DIVISION. (a) Except as provided in par. (b), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:

1. As a gift from a person other than the other party.
2. By reason of the death of another, including, but not limited to, life insurance proceeds; payments made under a deferred employment benefit plan, as defined in s. 766.01(4)(a), or an individual retirement account; and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer on death arrangement under ch. 705.
3. With funds acquired in a manner provided in subd. 1. or 2.

(b) Paragraph (a) does not apply if the court finds that refusal to divide the property will create a hardship on the other party or on the children of the marriage. If the court makes such a finding, the court may divest the party of the property in a fair and equitable manner.

basis. *See id.* at 121-22; *Popp v. Popp*, 146 Wis. 2d 778, 791, 432 N.W.2d 600 (Ct. App. 1988).

¶23 We begin with the observation that the circuit court was faced with a unique asset in that the asset was real estate that was two-thirds divisible and one-third non-divisible. Additionally, the asset carried with it rental income. It made sense to award the property entirely to either Victor or Adeline. But awarding the rental property entirely to Adeline entails awarding Adeline a non-divisible asset, which, by law, requires some basis to conclude that Adeline will suffer a “hardship” if she is not awarded that non-divisible asset.

¶24 The problem is that we are uncertain of the basis for the circuit court’s hardship determination. That is, although the circuit court stated that a transfer of non-divisible property was necessary to avoid a hardship, it is not clear from either the circuit court’s decision or our review of the record how this determination was reasonable. We note that the parties have significant divisible assets aside from their residences, and that the effect of the court’s hardship determination is to modestly increase Adeline’s overall net estate relative to Victor’s overall net estate without providing Adeline an asset that can be readily liquidated.

¶25 We also observe, however, that, under all the facts of this case, it may have been a fair and reasonable result for the circuit court to exercise its discretion to divide the parties’ *divisible* property differently after addressing the pertinent factors. *See* WIS. STAT. § 767.61(3) (providing list of factors for circuit court to consider before departing from presumption that divisible property is to be divided equally). And, as a practical matter, we acknowledge that it is hard to say that the circuit court’s hardship determination achieved a different bottom line

than would be achieved from a plainly permissible modestly unequal division of *divisible* property.

¶26 Still, because we are unable to see the basis for the circuit court's hardship determination, and because the circuit court needs to reconsider the maintenance award, we conclude that on remand the court should revisit the property division. Although it might be tempting for a reviewing court in our position to affirm the property division on the alternative basis that an unequal division of divisible property here likely would have been reasonable, and could have achieved essentially the same net result, we think the better course is to remand for the circuit court to reconsider its decision. We are not confident, based on the record before us, what the circuit court would have done in the absence of its hardship determination, and we cannot exercise the circuit court's discretion in the circuit court's stead.

¶27 Finally, we note that, if the circuit court determines that an unequal division of divisible property is reasonable after considering the applicable factors, we see nothing that would prevent the parties from stipulating that the easiest or most practical way to effect that unequal division is for Adeline to simply retain Victor's non-divisible interest in the rental property in lieu of redistributing other, non-divisible assets.

Conclusion

¶28 In sum, we conclude that the circuit court erred in its maintenance determination and that the court should revisit property division. We reverse and

remand for the circuit court to reconsider both maintenance and property division in a manner consistent with our decision.⁹

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

⁹ Victor requests a new trial on remand, but he does not explain why a new trial is necessary. We see no apparent necessity for a new trial and deny this request. Our denial of his request does not prevent the circuit court from holding additional proceedings if the court deems them necessary.

