

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2009AP852

Cir. Ct. No. 2007FA574

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

CRYSTAL K. KELLY,

PETITIONER-APPELLANT,

V.

GARY M. KELLY,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County:
KENNETH W. FORBECK, Judge. *Reversed and cause remanded with
instructions.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Crystal Kelly appeals the judgment of divorce from Gary Kelly, challenging the property division, maintenance, and child support. We agree with Crystal that the circuit court applied an incorrect standard in its treatment of Gary's monthly pension payment. *Steinke v. Steinke*, 126 Wis. 2d 372, 380-81, 376 N.W.2d 839 (1985), requires the circuit court to include these payments in the property division, subject to the statutory presumption of an equal division. To the extent *Dutchin v. Dutchin*, 2004 WI App 94, ¶20, 273 Wis. 2d 495, 681 N.W.2d 295, is inconsistent with *Steinke* on this point, *Steinke* controls. We also agree with Crystal that at least one of the court's rationales for the unequal division of the rest of the parties' assets is an erroneous exercise of discretion. For these reasons, we reverse and remand the court's order regarding the property division.

¶2 Our reversal of the property division necessitates a reversal and remand of the orders on maintenance and child support. However, we address Crystal's challenge to the child support order because it may arise on remand. We conclude the circuit court erred in not determining Gary's child support obligation before it determined Gary's maintenance obligation, as required by WIS. ADMIN. CODE § DCF 150.03(6) (Nov. 2009).¹ We also conclude the resulting lower child support cannot be justified under WIS. STAT. § 767.511(1m) (2007-08),² which allows a deviation from the percentage standards, because the court did not undertake the analysis and make the findings required by that statute.

¹ All references to the Wisconsin Administrative Code are to the November 2009 version unless otherwise noted.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶3 At the time of the divorce trial in November and December 2008, Gary and Crystal had been married approximately 25 years and had three children, two adults and a sixteen-year-old son who lived with Crystal. Crystal was 53 years old and Gary was 55. Crystal had worked for nineteen years as a waitress, hostess, and, most recently, dining room manager of a country club, but her job was eliminated in the summer of 2007. By the time of trial she still had not found work and was collecting unemployment compensation. Gary had worked for thirty-one years at the General Motors (GM) plant in Janesville, took an early retirement at the end of 2006, and began receiving pension payments of \$3056 per month. He, too, was unemployed at the time of trial.

¶4 The parties resolved the issues of custody and placement of their minor child, and the issues of property division, maintenance and child support were tried. The circuit court found that Crystal worked both in the home and in her occupation, and that she and Gary were equal partners in the marriage with “an equal right to the income that was produced as a result of this partnership.” The court also found that Crystal was capable of earning \$18,000 per year and Gary was capable of earning \$16,640 per year.

¶5 The parties’ primary assets were their home and Gary’s GM pension. The parties agreed the pension had a present value of \$292,702, but neither party asked the court to divide this asset based on the present value. Instead, their dispute regarding the pension was over whether the monthly pension payments should be divided. Gary’s position was that he should receive the entire monthly payment and pay maintenance and child support based on that income. Crystal’s position was that the monthly payment should be divided equally between them,

which would eliminate the need for Gary to pay maintenance and result in a lower child support obligation.

¶6 Excluding Gary's pension, the parties' assets totaled \$224,894 and their debts totaled \$93,161. The court awarded \$222,094 of these assets to Gary, which included all the equity in the parties' home, which Gary wanted to keep, and \$84,862 of the debts, which included the mortgage. The court awarded Crystal her car, valued at \$2800, and \$8299 of the debts. The court also ordered Gary to pay Crystal \$30,000 within 90 days. This division resulted in Gary receiving \$107,232 in net assets and Crystal receiving \$24,500.

¶7 The court awarded Gary his entire monthly pension payments out of which he was ordered to pay Crystal \$1000 in maintenance for the next three years. The court also ordered Gary to maintain the survivorship benefit in Crystal's name.

¶8 With respect to child support, the circuit court ordered Gary to pay \$350 per month, which is 17% of his monthly pension payments minus the \$1000 maintenance payment. This was contrary to Crystal's position that WIS. ADMIN. CODE § DCF 150.03(6) requires courts to set a child support amount before determining a maintenance obligation. The circuit court further ordered that the \$350 child support payment would become maintenance after the couple's child graduated from high school in June 2010, with the result that from that date until December 31, 2012, Crystal would receive \$1350 per month in maintenance.

DISCUSSION

¶9 On appeal Crystal challenges the property division, the maintenance award, and the child support award. She contends the court erroneously exercised

its discretion in dividing the marital estate because it did not include Gary's monthly pension payments as an asset to be divided subject to the rebuttable presumption of a 50/50 division established in WIS. STAT. § 767.61(3). She also contends that the court's unequal division of the other assets is an erroneous exercise of discretion. The maintenance award, she asserts, is insufficient both in amount and duration, especially given the court's unequal division of the marital estate. As for child support, she renews her argument that setting child support after the maintenance determination is contrary to WIS. ADMIN. CODE § DCF 150.03(6).

¶10 A circuit court's decisions on property division, maintenance, and child support are committed to the court's discretion. *Hokin v. Hokin*, 231 Wis. 2d 184, 190, 605 N.W.2d 219 (Ct. App. 1999). This court will affirm a circuit court's discretionary decision if the circuit court examined the relevant facts, applied the correct standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Johnson v. Johnson*, 157 Wis. 2d 490, 497, 460 N.W.2d 166 (Ct. App. 1990).

¶11 A circuit court erroneously exercises its discretion if it makes an error of law. *King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999). Whether the circuit court applied the correct legal standard is a question of law, which this court reviews de novo. *Hokin*, 231 Wis. 2d at 191. When the circuit court's exercise of discretion involves fact-finding, we accept the court's findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). The proper exercise of discretion contemplates that the circuit court explains its reasoning on the record. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. However, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision. *Id.*

I. Property Division

A. Gary's Pension

¶12 The parties' dispute over the court's treatment of Gary's pension centers on their reading of the case law. According to Crystal, *Steinke*, 126 Wis. 2d 372, permits the court to divide Gary's pension by dividing the monthly pension payments, but the court must nonetheless treat those payments as part of the marital estate, subject to the presumptive 50/50 division established under WIS. STAT. § 767.61(3).³ Gary responds that, while *Steinke* sets forth the general

³ WISCONSIN STAT. § 767.61(3), provides:

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.
- (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.

(continued)

rule, *Herdt v. Herdt*, 152 Wis. 2d 17, 447 N.W.2d 66 (Ct. App. 1989), and *Dutchin*, 273 Wis. 2d 495, allow a circuit court the discretion to treat the pension as an income stream to the pensioned spouse, who then pays a portion of the monthly pension payments as maintenance. The circuit court here relied on this reading of *Dutchin* in awarding all the monthly pension payments to Gary and then considering this as income in determining maintenance for Crystal.

¶13 We agree with Crystal that *Steinke* is controlling and requires that the pension be included in the property division and also requires that, if the court decides to divide the pension by dividing the monthly payments, the 50/50 presumption applies. We conclude that *Herdt* is consistent with *Steinke*, and to the extent *Dutchin* is inconsistent with *Steinke*, we must follow *Steinke*.

(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.

¶14 In *Steinke* one spouse, like Gary, was receiving monthly pension payments at the time of the divorce. *Steinke*, 126 Wis. 2d at 375. The circuit court decided that the pension should be excluded from the division of the marital estate and the monthly payments should be treated as income considered in determining maintenance. *Id.* at 376. The supreme court reversed. The supreme court concluded, based on prior case law, that a spouse’s “interest in a pension plan is a part of the wealth brought to, or accumulated during, the marriage ... [and therefore] the value ... must be included in the property division.” *Id.* at 381.

¶15 The supreme court explained this conclusion with reference to the presumption of equal division of property required by WIS. STAT. § 767.255, now renumbered § 767.61(3). This statute establishes a rebuttable presumption that the marital estate is to be divided equally, although the court may alter the distribution after considering the enumerated statutory factors. This presumption of equality in the division of the marital estate is based upon the status of marriage as a partnership. *Steinke*, 126 Wis. 2d at 377. More specifically, part of the rationale for the presumption of equal property division is to recognize the contribution made by a spouse who provides homemaking services but does not earn as much as the other spouse. *See id.* at 381. Thus the spouse without a pension is entitled to share (presumptively one half of) the other spouse’s interest in a pension. *Id.*

¶16 The *Steinke* court recognized the difficulty in valuing a pension and listed three methods of valuation that courts may use: (1) calculating the pensioned spouse’s contributions to the fund plus interest and awarding the other spouse an appropriate share; (2) calculating the present value of the retirement payments when they vest under the plan; and (3) “determine and fix a presumptively equitable percentage of the pension payments ‘payable to [the nonpensioned spouse] as, if, and when paid to [the pensioned spouse].’” *Steinke* at 384-85.

¶17 When a pension is in pay status, the *Steinke* court emphasized, “the fact that the asset is paid out very similarly to how employment income is paid out—on a monthly or semi-monthly basis—[does not] diminish its property character.” *Id.* at 382 (emphasis added). Because in *Steinke* the retired spouse was already receiving pension payments, the court noted that the least speculative method of dividing the asset would be to fix a percentage, presumptively 50%, that the other spouse would receive of those monthly payments. *Id.* at 385. However, the court did not order that method of division but left it to the circuit court’s discretion. *Id.*

¶18 Thus, *Steinke* establishes that, while the division of a pension may be accomplished by dividing the monthly payments when received, this method of division does not alter the fact that the pension is property subject to the rebuttable presumption of equal division under WIS. STAT. § 767.61(3). Of course, this presumption may be rebutted after a consideration of the statutory factors. *See Steinke*, 126 Wis. 2d at 383. In addition, an unequal division of the monthly payments may be proper when it offsets an unequal division of other property, so as to arrive at an overall equal property division between the spouses. *See id.* at 379-80 (general treatment of a pension plan in this jurisdiction is to consider it as property and either divide it or divide other marital assets to effect a de facto pension division).

¶19 In the more recent case *Cook v. Cook*, 208 Wis. 2d 166, 174, 560 N.W.2d 246 (1997), the court reaffirmed the rule that a retirement plan earned through a spouse’s employment must be included in the property division at divorce. In *Cook* the court applied this rule to military retirement pay received on a monthly basis. *Id.*

¶20 *Herdt* is consistent with *Steinke* and does not deviate from the principle that, even if a pension is divided by dividing monthly payments, it remains property that is subject to the rebuttable presumption of equal division. In *Herdt* the retired spouse was receiving monthly pension payments, and that monthly amount plus his other income was significantly less than the income of the other spouse, who was still working. *Herdt*, 152 Wis. 2d at 20. The circuit court divided the other assets equally and ordered no maintenance. *Id.* The working spouse appealed, contending that the circuit court had not included the pension in the property division. *Id.* We disagreed. We concluded that the circuit court had made an unequal division of the property by not ordering the retired spouse to pay any portion of the monthly pension payments to the other spouse and that this was a proper exercise of discretion. *Id.* at 21. One of the factors under WIS. STAT. § 767.255, now § 767.61(3), is “[t]he amount and duration of an order under s. 767.56 granting maintenance payments to either party ... and whether the property division is in lieu of such payments.” WIS. STAT. § 767.61(3)(i). Because of the retired spouse’s lower income, the circuit court concluded that he would be entitled to maintenance. *Herdt*, 152 Wis. 2d at 22. If he paid half of his monthly pension payments to his spouse, then she would have to pay him maintenance, creating a “circular flow of funds.” *Id.* at 22. Instead, the circuit court allowed the retired spouse to keep all his monthly pension payments, resulting in an overall unequal division of property in his favor, in lieu of maintenance.

¶21 The facts in *Dutchin* are somewhat similar to those in *Herdt*, but language in *Dutchin* clouds the distinction between treating a pension as property to be divided pursuant to WIS. STAT. § 767.61(3) and the manner of division. In *Dutchin*, the spouse receiving monthly pension payments was unable to work and

had a somewhat higher income than the working spouse. *Dutchin*, 273 Wis. 2d 495, ¶¶3-4. The circuit court did not divide the monthly pension payments equally because to do so would result in the working spouse having a higher monthly income than the retired spouse. Instead the court ordered the retired spouse to pay the working spouse \$425 in maintenance until she was 65, in order to equalize their incomes. *Id.*, ¶5.

¶22 In our discussion in *Dutchin*, we accepted the distinction made by the parties and the circuit court between treating the pension as an “asset” subject to division and treating it as an “income stream.” *Id.*, ¶¶5, 18, 21, 22. Apparently, the circuit court was of the view that it could not divide the pension as an “asset” except by a qualified domestic relations order⁴ and this might not be possible because the pension was already in pay status. *Id.*, ¶¶20-21. The circuit court decided to treat the pension payments as an “income stream” because it was simpler and avoided a “circular flow of income,” and we concluded this was a proper exercise of discretion. *Id.*, ¶22.

¶23 The distinction we apparently accepted in *Dutchin* between treating a pension as an asset subject to division and treating the monthly pension payments as an income stream is inconsistent with *Steinke* and *Cook* insofar as it suggests that the circuit court has the discretion not to include the pension in the property division. As already noted, *Steinke* makes clear that the circuit court does not have the discretion to do that, although the court may choose to divide the

⁴ A qualified domestic relations order (QDRO) is a judgment, decree, or order made pursuant to a state domestic relations law that authorizes payment of retirement benefits to a former spouse in order to satisfy child support, maintenance, or marital property obligations. *Taylor v. Taylor*, 2002 WI App 253, ¶2 n.1, 258 Wis. 2d 290, 653 N.W.2d 524.

pension by dividing the monthly payments in a manner that takes into account the rebuttable presumption of an equal property division in WIS. STAT. § 767. 61(3). *Steinke*, 126 Wis. 2d at 383-385.⁵

¶24 The difference between treating monthly pension payments as an income stream that is considered when deciding on maintenance and treating them as property of the marital estate is more than semantics. As the *Steinke* court noted, in contrast to the statutory presumption of equal property division, there is no statutory presumption of an equal division of marital income upon divorce. *Id.* at 379.

This distinction reflects a legislative recognition that property held by the parties at the termination of the marriage is presumed to have been acquired by their joint efforts. After the marriage is terminated, the parties are no longer considered partners, and the contribution toward the maintenance of a former spouse is to be treated under a basic concept of need by the dependent party and the corresponding ability to pay by the supporting party, with consideration of other supplementary factors.

Bahr v. Bahr, 107 Wis. 2d 72, 84, 318 N.W.2d 391 (1982).⁶

¶25 Because we conclude that *Dutchin* is inconsistent with *Steinke* and *Cook* insofar as it suggests that the circuit court has the discretion not to include

⁵ We recognize that the circuit court in *Dutchin v. Dutchin*, 2004 WI App 94, 273 Wis. 2d 495, 681 N.W.2d 295, was apparently attempting to achieve an equal division of property and income. It may be that, despite the labels used, the order that the retired spouse pay \$425 to the other spouse until she was 65, when considered with the division of other assets, did achieve a roughly equal division of the property, including the pension, as occurred in *Herd v. Herd*, 152 Wis. 2d 17, 447 N.W.2d 66 (Ct. App. 1989). However, our opinion did not use this analysis in affirming the circuit court's decision.

⁶ Subsequently the supreme court in *LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987), clarified that an award of maintenance serves two distinct objectives: support and fairness.

the pension in the property division, we must follow *Steinke* and *Cook*. *Cook*, 208 Wis. 2d at 189 (only the supreme court has the power to overrule, modify, or withdraw language from a previous supreme court case); *Cuene v. Hilliard*, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509 (if an opinion of this court is inconsistent with a supreme court opinion, we must follow the supreme court opinion).

¶26 Turning to the case before us, we conclude the circuit court applied an incorrect legal standard with respect to Gary's pension. As already noted, neither party contended that the pension should be divided by any method other than dividing the monthly payments. The circuit court properly recognized the presumption of an equal division of property and its statements indicate that it believed an equal division was fair in this case. However, it erred in deciding that *Dutchin* provided the authority for it to treat Gary's monthly pension payments not as an asset of the marital estate to be divided pursuant to WIS. STAT. § 767.61(3) but as his income, which the court then considered for purposes of maintenance and child support.

¶27 This is not a *Herd* situation in which the spouse receiving the pension payments has the lower income and is entitled to maintenance, triggering the "property in lieu of maintenance" factor, *see* WIS. STAT. § 767.61(3)(i), to justify an unequal property division. Nor do we see an explanation in the record for dividing the monthly pension payments unequally because of an unequal division of other assets. Indeed, the other assets were divided unequally in Gary's favor, which should result in an unequal division of the monthly payments in Crystal's favor, in the absence of any factors that overcome the presumption of an equal division. We cannot conclude, based on the court's explanation and our own review of the record, that the court, in effect if not in words, either divided

Gary's pension equally, when considered with the rest of the property division, or divided it unequally after considering the factors in WIS. STAT. § 767.61(3).⁷

¶28 Because we conclude the circuit court erred in not dividing Gary's pension by dividing the monthly pension payments as property subject to the 50/50 presumption, we must reverse and remand the property division. On remand the circuit court shall apply the presumption of equal division to the monthly pension payments as well as to the parties' other assets and may deviate from an overall equal division only as provided in WIS. STAT. § 767.61(3).

B. Division of Other Assets

¶29 Although we are remanding the property division because of the pension, we address aspects of Crystal's second challenge to the property division because it will likely remain an issue on remand.

⁷ As we understand the court's reason for electing to award Gary his monthly pension payments and then order maintenance to Crystal based on those, the court viewed this approach as a more favorable option for Crystal in the event that Gary filed for bankruptcy. We surmise the court was referring to the fact that, in a bankruptcy under Chapter 11 of the United States Code, claims for property division are dischargeable and claims for maintenance support are nondischargeable, with federal law governing which way a liability is characterized. *Lyman v. Lyman*, 184 Wis. 2d 124, 130, 516 N.W.2d 767 (Ct. App. 1994). We see nothing in the record indicating that there was a concern that Gary might file for bankruptcy, and neither party mentions this rationale on appeal. More to the point, neither party argues that a concern about bankruptcy justifies a deviation from the rule of *Steinke* that the pension must be treated as property. Accordingly, we do not consider this rationale further. We note, however, that it is not apparent why the bankruptcy rationale justifies awarding Crystal only \$1000, then \$1325, per month and limiting this to three years.

We recognize that the court ordered that the survivorship benefit of Gary's pension remain in Crystal's name. We cannot discern from the record, the court's comments, or the parties' briefs how this affected the court's decision on how to divide Gary's monthly pension payments or how it affected the division of the other assets.

¶30 Crystal contends that the circuit court erroneously exercised its discretion by ordering an unequal division of the assets besides the pension. With the \$30,000 payment from Gary, Crystal has 19% of these other assets. Crystal asserts this significant deviation from the presumed 50/50 property division under WIS. STAT. § 767.61(3) is not justified by the statutory factors.

¶31 The circuit court found that Crystal and Gary were equal partners in the marriage and recognized the presumption of an equal division of property. It also recognized that the \$30,000 it ordered did not balance the unequal division of assets. However, it explained that it did not believe Gary was going to be able to meet his other obligations if he had to pay more than \$30,000 to Crystal, especially given the \$1000 a month maintenance payment.

¶32 The circuit court's rationale accepts Gary's decision to keep the house and the resulting expenses. It is true that WIS. STAT. § 767.61(3)(h) requires a court to consider "[t]he 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." However, Crystal had primary placement of the minor child and she was not asking to keep the house. The court appears not to have given consideration to selling the house and splitting the proceeds. It is unreasonable to deviate from the 50/50 presumption in Gary's favor simply because he wants to keep the house.

¶33 Insofar as the circuit court's rationale for an unequal division of the other assets was based on the maintenance it ordered, we question why the court's finding that Crystal was entitled to maintenance under WIS. STAT. § 767.56 results in her receiving less than half these assets. However, because, as we explain below, the issue of maintenance will be significantly affected by our decision on

dividing Gary's monthly pension payments, we do not undertake a further analysis on this point.

II. Maintenance

¶34 Our ruling that the circuit court erred in not dividing Gary's monthly pension payments as part of the property division requires that we reverse and remand the court's order of maintenance. As noted above, Crystal argued in the circuit court that, if the court divided these payments evenly (assuming an equal division of the other assets), she would not need maintenance. We are not directing the court to divide these payments equally; we leave that to the court's discretion after applying the correct law. However, it is evident that our ruling will at least affect the amount of maintenance, if not the need for it entirely.

III. Child Support

¶35 Similarly, the order of child support must be reversed and remanded to determine Gary's income in light of our ruling on dividing Gary's monthly pension payments. In the event that on remand the circuit court orders maintenance, Crystal's challenge to the manner in which the court calculated child support will remain an issue.

¶36 WISCONSIN ADMIN. CODE § DCF 150.03(6) provides:

Determine child support before maintenance. If a payer will have obligations for both child support and maintenance to the same payee, the court shall determine the payer's child support obligation under this chapter before determining the payer's maintenance obligation under s. 767.56, Stats.

¶37 The circuit court deducted the \$1000 maintenance from Gary's monthly pension payments before computing 17% of his income for purposes of

child support. The regulation plainly does not permit this and Gary does not argue otherwise.

¶38 However, Gary characterizes the circuit court's decision to award \$350 rather than \$520 (17% of his monthly pension payments) as a reasonable deviation from the percentage standard permitted by WIS. STAT. § 767.511(1m). Section 767.511(1j) requires that a circuit court determine child support payments by using the percentage standard established by regulation, and that standard for one child is 17% of gross monthly income. WIS. ADMIN. CODE § DCF 150.03(1)(a). The court may deviate from this standard "[u]pon request by a party ... if, after considering the [enumerated] factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties." WIS. STAT. § 767.511(1m).

¶39 Neither Gary nor Crystal requested that the court deviate from the 17% standard. Indeed, Gary agreed that his child support obligation should be calculated as 17% of \$3056, or \$520. However, the circuit court, expressing concern for how Gary was going to be able to meet his obligations, calculated the 17% based on \$2056. The court did not explain its decision with reference to the statutory factors in WIS. STAT. § 767.511(1m).

¶40 On remand, consistent with WIS. ADMIN. CODE § DCF 150.03(6), Gary's child support obligation shall be determined before any maintenance is determined, if the court decides that maintenance is warranted. The percentage standard in § DCF 150.03(1)(a) shall apply unless a party makes a request and the court undertakes the analysis and makes the finding required by WIS. STAT. § 767.511(1m).

CONCLUSION

¶41 We reverse the court's decision on the property division, maintenance, and child support and remand for further proceedings. On remand the court shall consider Gary's pension payments as property to be divided under WIS. STAT. § 767.61(3), along with the parties' other assets, and shall apply the presumption of an equal division of the property. If the court decides, after considering the factors in § 767.61(3), that an overall unequal division of the property is warranted, it shall explain its reasoning. Whatever the court's decision on the appropriate overall division of the property, it shall explain how its division of the monthly pension payments fits within the overall division.

¶42 Along with its reconsideration of the property division, the court shall reconsider the issue of maintenance and the amount of child support. The child support determination shall be consistent with paragraph 40 above.

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

Recommended for publication in the official reports.

