

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2905-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE MARRIAGE OF:

MARY JUDITH JOHNSON, A/K/A JUDY JOHNSON,

PETITIONER-RESPONDENT,

V.

ROBERT R. JOHNSON,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County:
NORMAN L. YACKEL, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

MYSE, P.J. Robert R. Johnson appeals portions of a divorce judgment relating to certain of the trial court's property division valuations and the

trial court's maintenance award.¹ Robert contends the court erroneously exercised its discretion in valuing the marital estate by failing to: (1) consider certain adjustments to the value of two Florida condominiums awarded to Robert; (2) include a \$7,500 account receivable as an asset to Mary Judith Johnson (Judith); (3) include an \$8,000 savings account as an asset to Judith; and (4) value Judith's survivor's interest in his pension fund in dividing the fund equally between them. Robert contends the trial court also erroneously exercised its discretion in awarding maintenance to Judith by failing to consider Judith's earning capacity. Because we conclude that we must remand for further consideration of the issues pertaining to the value of the Florida condominiums awarded to Robert, we reverse that portion of the divorce judgment. We also conclude that Robert's assertions in all other regards are meritless and, accordingly, affirm the balance of the divorce judgment.

Robert and Judith were married more than thirty-six years. They have no minor children. As a commercial pilot for Northwest Airlines, Robert was frequently away for weeks at a time during their marriage. Consequently, Judith remained at home, for the most part foregoing outside employment. Robert retired early from Northwest on a medical disability. He receives social security disability benefits of approximately \$15,348 per year. Judith will not be eligible for social security benefits for several years.

Robert also receives a pension from Northwest Airlines. He has two retirement plans from Northwest Airlines. The primary plan is a fully funded defined benefit pension plan from which Robert receives \$10,000 per month for

¹ This is an expedited appeal under RULE 809.17, STATS.

life. The second is an unfunded plan dependent on Northwest Airlines' financial health. This second plan pays \$409.50 per month. At the time of Robert's retirement, he and Judith made a decision to waive a joint survivor annuity in favor of a single annuity during Robert's life. This option provided a higher income during Robert's life rather than a lesser amount for Robert and Judith's joint life. Northwest Airlines granted the Johnsons an additional benefit because Robert was totally disabled at the time of his retirement. Northwest agreed to pay Judith a disabled employee's dependent survivor benefit of 50% of Robert's regular benefit after his death. This was provided without reducing Robert's lifetime benefits.

When Judith and Robert separated, Judith remained in their Sawyer County lakefront home. Robert retained one of their Florida condominiums, Magnolia House, as his residence. During the pendency of the divorce, the parties further agreed that Robert would retain control of the other Florida condominium, the Islander House, and their Plymouth, Minnesota, townhouse. Robert also maintained control over all pension payments and his 401(k) plan. Judith was not paid maintenance, and she paid no debts directly from her own accounts. The trial court awarded property to each party with a net value of \$428,849 plus a Qualified Domestic Relations Order (QDRO) granting each party a 50% interest in the Northwest Airlines pension, which pays \$10,409.50 per month. It also awarded Judith maintenance at \$500 per month until she reaches age sixty-two, her death or her remarriage, whichever occurs first.

Robert now challenges certain of the trial court's property division valuations and its award of maintenance to Judith. Details of the property division, maintenance award and other facts will be discussed in this opinion.

PROPERTY VALUATIONS

Robert contends that the trial court erroneously valued certain of the parties' property subject to division. The valuation of the marital estate lies within the sound discretion of the trial court. *Long v. Long*, 196 Wis.2d 691, 695, 539 N.W.2d 462, 464 (Ct. App. 1995). The trial court's valuation of an asset of the marital estate is a finding of fact. *Preuss v. Preuss*, 195 Wis.2d 95, 107, 536 N.W.2d 101, 105 (Ct. App. 1995). We do not upset a trial court's valuations of assets unless they are clearly erroneous. Section 805.17(2), STATS. An erroneous exercise of discretion occurs when the trial court fails to articulate its reasons for reaching a particular result. *Thorpe v. Thorpe*, 108 Wis.2d 189, 198, 321 N.W.2d 237, 242 (1982). We address each particular property item separately.

Magnolia House Condo

The trial court awarded Robert the Magnolia House condo at a value of \$200,000 less the mortgage debt of \$96,000. These values were stipulated at trial. Robert contends that the trial court erred by failing to deduct a \$5,000 liability, which represents a net assessment the condo association made as a result of that portion of damage sustained during a hurricane that insurance did not cover. Robert testified as to the existence of the assessment, the amount of the assessment, the approximate amount of credit against the assessment from the insurance settlement, the approximate net assessment after application of the settlement, and that the insurance settlement had been made within the month of trial. Judith challenged the assessment by noting Robert submitted no documents verifying the loss and suggested that because the net assessment after application of the insurance settlement had not been made as of the divorce hearing, the court should not reduce the property's fair market value based on this consideration.

The trial court apparently felt that either the fact of assessment or the amount of assessment was too speculative to consider because it concluded that “gross amounts less verifiable mortgages ... represent a more accurate fair market value for the property.”

In the absence of contrary evidence, Robert’s testimony is sufficient to reflect a real debt incurred to fund repairs sustained by hurricane damage. A trial court is required to deduct outstanding liabilities against property in determining the value of the marital estate. *Lacey v. Lacey*, 61 Wis.2d 604, 609-610, 213 N.W.2d 80, 83 (1973). Therefore, the trial court must find either that no assessment is due and explain why it reaches that determination, or it must give credit for the assessment in determining the property’s fair market value. The trial court failed to explain its exclusion of the outstanding assessment against the Magnolia House condo in determining the property’s fair market value. We therefore remand this issue for the trial court’s reconsideration.

Islander House Condo

The trial court awarded the Islander House condo, a real estate investment, to Robert and calculated its value at the stipulated appraisal of \$150,000 less the \$76,000 mortgage. By agreement between Robert and Judith, this property was placed on the market for sale before the divorce hearing. Robert claims the trial court erred by failing to credit the property’s fair market value for the following expenses: (1) an outstanding SBA loan for a special assessment; (2) a contractual obligation with the rental management company for \$3,400 to update furnishings; (3) a 6% real estate sales commission on the sale of the property; and (4) the capital gains tax consequences flowing as a result of the sale. The trial court made no specific findings of the amount or value of these expenses, despite

Robert's undisputed testimony in the record. The trial court relied, instead, on gross amounts less verifiable mortgages as a more accurate valuation of the property.

Robert testified that the SBA loan was incurred in early 1996 and that he pays \$498 per month on the loan. His net worth statement indicates a balance of \$6,735 remaining on the loan; however, Robert testified that he had made another monthly payment. It is undisputed that this debt existed at the time of trial. Robert also testified that the management company responsible for renting the condo required an update of furnishings to continue to qualify the property for rental. Robert's net worth statement reflected an amount of \$1,200, but he testified that the company assessed additional upgrades the month of trial that were not reflected in the statement. He did not have documentation for those upgrades but estimated the total assessment amounted to \$3,400. It is undisputed that the obligation in the rental contract to upgrade the furniture was an existing contractual obligation.

Absent contrary evidence, the SBA loan represents a lien against the Islander House condo. Because a trial court is required to deduct outstanding liabilities in determining value of the marital estate, the trial court should have considered this expense and either accorded a credit to the value of the property or explained why in its discretion no credit would be given. *See Lacey*, 61 Wis.2d at 609-10, 213 N.W.2d at 83. The same reasoning applies to the contractual obligation to update furnishings. The trial court should have considered this expense and either accorded a credit or explained why in its discretion no credit would be given. *See id.* Accordingly, we remand this issue for the trial court's reconsideration.

Robert also claims a credit for two expenses related to the sale of this condominium: a 6% real estate sales commission, and the capital gains tax that would be incurred upon future sale of the property. The trial court made no findings on these issues having valued the property based on the appraised value less the mortgage. Generally, we have held that property appraised for property division purposes should not include the cost of selling the appraised property *unless a sale is anticipated*. **Ondrasek v. Ondrasek**, 126 Wis.2d 469, 480-81, 377 N.W.2d 190,194-95 (Ct. App. 1985). Here, however, it is undisputed that Robert and Judith signed a listing contract for the sale of the Islander House condo before the divorce reflecting their intent to sell the property and identifying the percentage of sales commission resulting from the sale. Because the trial court could properly infer that sale of this property was anticipated, it should properly consider the costs of sale in its valuation. As a legitimate expense, the trial court should either deduct the real estate commission from the valuation or explain why in its discretion no such credit would be given. Thus, we remand this issue to the trial court for its reconsideration. *See Lacey*, 61 Wis.2d at 609-10, 213 N.W.2d at 83.

Robert also claims a credit for the amount of capital gains he will be required to pay as a result of this condo's sale. Robert argues that the amount of capital gain can be calculated under the provisions of the tax code once the gain has been determined by a purchase agreement. In dividing marital property upon divorce, the trial court is directed to consider the tax consequences to each party of its rulings and any proposed division, but is not obligated to consider tax consequences of a hypothetical or theoretical disposition of marital property. Section 767.255(3)(k), STATS.; *see also Ondrasek*, 126 Wis.2d at 480, 377 N.W.2d at 194.

In *Liddle v. Liddle*, 140 Wis.2d 132, 410 N.W.2d 196 (Ct. App. 1987), our supreme court concluded that the trial court could reasonably consider and adopt an expert's opinion that the value of limited partnerships owned by a couple ought to be reduced by future capital gains taxes, notwithstanding the wife's contention that the taxes were speculative, because a sale would occur within five to seven years. Likewise, the court also concluded it was reasonable to deduct capital gains paid on the eventual sale of a stock portfolio from the stocks' market value because evidence supported a finding that the stocks would probably be sold. In the instant case, as in *Liddle*, the record suggests that sale of the Islander House condo was imminent. Therefore, the trial court could properly consider discounting the value of the condo by the amount of estimated capital gains tax due. Accordingly, we remand this issue for the trial court's reconsideration. If the court determines that Robert has failed to adequately demonstrate the amount of gain that will be incurred, or if the court finds another reason not to deduct the gain, it may either decline to give credit stating the reasons for such a determination or it may craft a judgment reflecting the amount of gain at such time the tax consequences from the sale can be calculated.

Wisconsin law recognizes that the factors Robert raises on appeal be considered in determining the value of the marital estate. See *Lacey*, 61 Wis.2d at 609-10, 213 N.W.2d at 83. It is not apparent that the trial court considered these factors, and it failed to explain why it was rejecting adjusting the marital estate for these costs. An erroneous exercise of discretion occurs when the trial court fails to articulate its reasons for reaching a particular result. *Thorpe*, 108 Wis.2d at 198, 321 N.W.2d at 242. An exercise of discretion, such as the valuation of the marital estate, requires a reasoning process dependent on facts or inferences from the record, conclusions based on a proper legal standard, and the basis set forth in the

record. *Weiss v. Weiss*, 122 Wis.2d 688, 702, 365 N.W.2d 608, 615 (Ct. App. 1985). We conclude the record contains evidence of legitimate expenses or liabilities that should properly be considered in determining the marital estate's value. Because the trial court did not articulate its reasons for excluding these liabilities from its valuation determination, we remand and direct the trial court to reconsider these liabilities, either deducting them from the value of the properties or explaining why they should not be considered.

Account Receivable and Credit Union Account

Robert also contends that the trial court erred by failing to credit a \$7,000 loan Judith made to a friend and an \$8,000 credit union account in Judith's name alone. The trial court determined that the source of these funds were gifts from Judith's parents. Accordingly, the court could properly award these items to Judith without dividing them with Robert. Section 767.255(2), STATS. The court is entitled to create an unequal property division recognizing the source of marital assets, including those received by one spouse as gifts from parents. Section 767.255(2), STATS., permits a court to exclude from the property subject to division property a spouse acquired by gift or accumulated before marriage. It is not an erroneous exercise of discretion to award property in such a fashion based upon the source of the property given as a gift to one spouse.

Pension Benefits

The trial court also refused to alter an equal division of Robert's pension benefits from Northwest Airlines. Robert contends that because Northwest gave Judith a 50% survivor's interest without cost assessed against the pension benefits, Judith's interest in the pension should be recalculated to reflect this additional benefit. We conclude the existence of a survivor's benefit, acquired

without cost to Robert and Judith, does not require the trial court to divide the pension benefits other than equally. The survivor benefit cost the couple nothing and was awarded by Northwest as part of the pension benefit. While it is an item of value, it does not require the court to alter the 50/50 division of the pension benefits. We do not mean to indicate, however, that had Robert and Judith selected reduced benefits so as to assure Judith continuing pension benefits in the event of Robert's death, that this would not be a proper factor for the court to consider in ordering the distribution of the pension benefits. We merely note that in this case, because the benefit was obtained without cost to the parties, the court could, in the exercise of its discretion, decline to change the equal distribution of pension benefits to the parties.

MAINTENANCE

The major item of income, Robert's pension, was not considered as part of maintenance; rather, it was part of the property division. The trial court further found that Robert was receiving approximately \$1,250 per month as social security disability income and, considering that additional income, set maintenance for Judith at \$500 per month until she reaches age sixty-two, or upon her death or remarriage. Robert contends that Judith, who is age sixty, has earning capacity that should have been assessed in determining whether to award maintenance.

The determination of a maintenance award is addressed to the trial court's discretion. *Anderson v. Anderson*, 72 Wis.2d 631, 642, 242 N.W.2d 165, 171 (1976). The court is required to consider relevant factors under § 767.26, STATS. The feasibility of a dependent party's taking employment is a factor that may be weighed along with other statutory factors. *Bahr v. Bahr*, 107 Wis.2d 72,

83-84, 318 N.W.2d 391, 398 (1982). “The dual objectives of maintenance are support and fairness.” *Brabec v. Brabec*, 181 Wis.2d 270, 277, 510 N.W.2d 762, 764 (Ct. App. 1993).

We located nothing in the record that would compel the trial court to now charge a sixty-year-old woman with her earning capacity after an extended marriage and an essentially equal property division. The trial court found that Robert receives approximately \$1,250 per month from social security. Judith would not be eligible for social security for another two and one-half years. The trial court did not err by awarding Judith limited term maintenance to equalize income after considering such appropriate factors as Judith’s age, the amount of property distributed, the enhancement of the marital estate to Robert’s benefit from comingled gifts from Judith’s family, the length of marriage and the parties’ work histories. *See* § 767.26, STATS. Because the record reflects an appropriate exercise of discretion, we affirm the trial court’s maintenance determination.

We conclude that we must remand for further consideration of the trial court’s valuation of the Florida condominiums awarded to Robert because the law recognizes the costs Robert raises as factors to consider in determining the value of the marital estate. Because the trial court did not consider those costs and failed to explain why it rejected adjusting the marital estate for those costs, we reverse that portion of the divorce judgment. On remand, we direct the trial court to consider the outstanding liabilities relating to the two condominiums and either apply the costs to the valuation or explain why credit should not be given for those liabilities. Because we conclude that Robert’s assertions in all other regards are meritless, we affirm the balance of the divorce judgment.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs awarded to either party on appeal.

Not recommended for publication in the official reports.

