COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0106

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF

ROSEMARY E. HEINTZ,

PETITIONER-RESPONDENT,

V.

LEONARD HEINTZ,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 VERGERONT, J. Leonard Heintz appeals the judgment of divorce from Rosemary Heintz, contending the court erred in awarding an unequal

division of property in favor of Rosemary while at the same time holding open maintenance for her for ten years, and in failing to consider the tax consequences of this decision. Leonard also contends the trial court erred in denying his post-trial motion to permanently eliminate maintenance in light of changed circumstances. We hold the trial court was not precluded as a matter of law from awarding an unequal property division in Rosemary's favor in lieu of current maintenance and at the same time holding maintenance open for her for a period of ten years, and we conclude the court properly exercised its discretion in doing so in this case. However, we also conclude that the provision in the judgment holding maintenance open should specify the reason the court decided to hold it open. Finally, we affirm the court's order denying Leonard's post-trial motion. We therefore affirm in part, reverse in part, and remand for the purpose we explain in this decision.

BACKGROUND

¶2 Rosemary and Leonard were married in 1971 and, at the time of the divorce trial on December 29, 1997, Rosemary was forty-six and Leonard was fifty. The court made the following findings with respect to the parties' income and earning capacities. Both parties were in good health, had high school educations, and neither paid for or provided for the training and education of the other. Leonard had worked for Mayville Metal Products for twenty-seven years and was terminated in June 1997 because the company was downsizing. His income there had been $36,498 per year. He had been looking for a management position but had been unsuccessful and was currently working as a palletizer earning $24,190 annually. Rosemary had worked in a factory during the first seven years of the marriage for minimum wage, then stayed home with the parties' children until 1985, when Leonard was temporarily laid off. She went back to

work as an assembly worker, then worked at a grocery store deli, and has been working as a factory box worker since 1996, now earning $14,531 per year.

¶3 With respect to property, certain items were divided evenly by the parties pursuant to a stipulation. The court determined the value of the other assets, which totaled $281,158 and included the parties' residence. The parties agreed the residence should be awarded to Rosemary. With this asset, she had $170,982 of the assets valued by the court and Leonard had $110,176.

¶4 The parties addressed the issue of maintenance and property division in their post-trial briefs. In its memorandum decision entered March 16, 1998, the court determined that Rosemary was fully employed in a job commensurate with her abilities, and Leonard was not shirking in his search for employment similar to that which he had had at Mayville Metal. The court determined that, using the Mac Davis Taxcalc Program, with Leonard's current income, Leonard would need to pay Rosemary $4,230 per year to equalize their after-tax disposable monthly income, and that, if he were earning what he had been at Mayville Metal, that amount would be $9,736 a year. The court stated that it could not predict whether Leonard would be able to find a management position that paid what he had previously earned, although it described this at one point as "a distinct possibility." The court reasoned that, based on Leonard's current income, an unequal division of property in Rosemary's favor—that is, awarding her the assets that had been distributed to her without requiring the equalizing payment of $30,403—would fairly offset the maintenance Leonard would otherwise pay; but, if he did find another management position, that unequal property division would not be sufficient to offset the maintenance due her.

¶5 After laying out these factual findings and this reasoning, the court decided to direct that Rosemary pay only $800 to Leonard as a balancing payment, which the court then ordered Leonard to pay to Rosemary's counsel as a contribution to attorney fees; to order no current maintenance in light of the unequal property division; and to keep maintenance open for ten years. The court explained that if Leonard had not found a management position, or one that paid significantly more than he now receives by that time, he would be unlikely to do so thereafter.

¶6 For reasons not relevant to this appeal, the findings of fact, conclusions of law and judgment had not yet been entered when, on November 12, 1998, Leonard moved for an order eliminating maintenance. He asserted that, since the granting of the divorce on December 29, 1997,[1] Rosemary was living in her house with James Stiponovic in a "marriage-like arrangement"; Stiponovic was sharing expenses and paying money to her for various items; and this constituted a substantial change in circumstances.

¶7 At the hearing on this motion, the court heard evidence on Rosemary's living arrangements with Stiponovic. Leonard's attorney argued that these circumstances justified a modification of the court's decision to hold maintenance open, but he also argued the decision on property division and maintenance was in error.[2]

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[1] The court granted a divorce on the date of the trial, even though the issues of maintenance and property division were still to be briefed and decided.

[2] Leonard's arguments on the incorrectness of the court's March 16, 1998 decision were, in effect, asking for a reconsideration of that decision, although he did not denominate his motion in that way. We address these arguments in the first section below, and address his arguments for a modification based on substantial change of circumstances in the second.

¶8 The court found that Stiponovic's contribution to the household expenses consisted of paying $70 for groceries every other week. It concluded that was not a sufficient change in Rosemary's financial circumstances to affect its decision to keep maintenance open. The court repeated its rationale for that decision and emphasized that the "sole purpose" in keeping maintenance open was so that Rosemary had the opportunity to ask for maintenance if Leonard "goes back to the management position and gets into the forty- and fifty-thousand-dollar range," within the next ten years. The court stated that since Rosemary's living arrangements were unrelated to the sole purpose in holding maintenance open, they provided no basis for altering that decision.

DISCUSSION

Property Division and Maintenance

¶9 The division of the marital estate and the decision whether to award maintenance, and, if so, how much, are all committed to the trial court's discretion. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). We affirm a trial court's discretionary decision if the court makes a rational, reasoned decision and applies the correct legal standard to the facts of record. *See* ***id.*** We accept all findings of fact made by the trial court unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether the trial court applied the correct legal standard is a question of law, which this court reviews de novo. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 172, 560 N.W.2d 246 (1997). With respect to the division of the marital estate, the presumption is an equal division, although the court may alter the distribution after considering various factors. *See*

WIS. STAT. § 767.255(3).[3] In deciding whether to award maintenance, and, if so, for how long and in what amount, the court is to consider the factors in WIS. STAT.

[3] WISCONSIN STAT. § 767.255(3) provides:

> (3) 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.
>
> (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. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 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.

(continued)

§ 767.26,[4] which are designed to further two objectives: support and fairness. *See* ***Olson v. Olson***, 186 Wis. 2d 287, 293, 520 N.W.2d 284 (Ct. App. 1994). The

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> (L) Any written agreements made by the parties before or during the marriage concerning any arrangement for property distribution ….
>
> (m) Such other factors as the court may in each individual case determine to be relevant.

[4] Section 767.26, STATS., provides as follows:

> **Maintenance payments.** Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (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. 767.255.
>
> (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 ….
>
> (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.

former objective ensures the spouse is supported in accordance with the needs and earning capacities of the parties; the latter ensures a fair and equitable arrangement between the parties in each individual case. ***Id.***

¶10 Leonard first challenges the trial court's findings that Rosemary was employed in a job consistent with her abilities and earning capacity and that Leonard had the potential to earn more than he was earning at the time of the divorce. We conclude these findings are supported by the record. The evidence shows that, at the time of the divorce, Rosemary was working full time at an hourly rate higher than she had ever earned. The court took into account her physical capabilities, her experience and her education, and concluded that she was working at her earning capacity. Leonard, on the other hand, was earning substantially less than he had earned just six months earlier, when he was terminated from a management position through no fault of this own. The court did not find that Leonard *could* find a job commensurate with that one, or that he *should* be able to do so. Rather, the court found that Leonard had the potential to earn more, and decided to hold maintenance open for that reason. The factual underpinning for that decision—that it was possible that Leonard would succeed in his search for a management position and his income would return to the significantly higher amount it had recently been—is supported by the record.

¶11 Leonard next argues the trial court erred in awarding more than half of the marital estate to Rosemary, while at the same time keeping maintenance open for ten years. Leonard reasons that the unequal division of property was, according to the trial court "in lieu of maintenance," and the trial court therefore could not hold maintenance open, which, obviously, allows for the possibility of future maintenance payments. We are uncertain whether Leonard's argument is that as a matter of law a

court may do this under no circumstances, or that it is an erroneous exercise of discretion to do so in this case. We therefore address both propositions.

¶12 We hold that a trial court is not precluded as a matter of law from awarding an unequal division of property in lieu of current maintenance and also holding maintenance open. Leonard has provided us with no authority for his position, and we have been able to find none. It is true that the property division is an appropriate factor to consider in deciding whether to award maintenance, *see* WIS. STAT. § 767.26(3); and "[t]he amount and duration of an order under s. 767.26 granting maintenance to either party … and whether the property division is in lieu of such payments" is a factor a court may consider in deciding to alter the presumed equal distribution of property. WIS. STAT. § 767.255(3)(i). In other words, under these statutes, maintenance and property division are "interrelated and interdependent." ***Dixon v. Dixon***, 107 Wis. 2d 492, 509, 319 N.W.2d 846 (1982). However, nothing in these statutes indicates that if a court awards an unequal division of property in lieu of current maintenance, it must order that maintenance is waived and may not hold maintenance open for the benefit of the party receiving the greater share of property.

¶13 We are also persuaded that precluding a trial court from choosing this option, within the proper exercise of its discretion, is inconsistent with the case law discussing the trial court's role with respect to property division and maintenance. The supreme court has recognized that maintenance is a flexible tool available to the trial court to ensure a fair and equitable determination in each individual case. *See* ***Lundberg v. Lundberg***, 107 Wis. 2d. 1, 12, 318 N.W.2d 918 (1982). "A trial court should examine all the relevant circumstances of a particular case and may employ maintenance, property division or a combination of the two in order to fairly compensate a spouse." ***Id.*** at 15. We see no reason to limit a trial court's

flexibility by categorically removing the option of awarding an unequal property division in lieu of current maintenance and also holding maintenance open. The proper inquiry is whether the trial court properly exercised its discretion in doing so in this particular case, and we turn to that question now.

¶14 We conclude the trial court did properly exercise its discretion in deciding to make an unequal property division and also to hold maintenance for Rosemary open for ten years. The length of the marriage, the unequal income of the spouses (considering Leonard's income at the time of the divorce), and Rosemary's need all support an award of maintenance. However, the trial court also considered that Rosemary wished to keep the house, and that this was agreeable to Leonard and economically beneficial to Rosemary. Under these circumstances, the trial court decided it made more sense to order no current maintenance and an unequal division of property so that Rosemary could keep the house, than it did to order an equal division, a balancing payment from Rosemary to Leonard, and payments of maintenance from Leonard to Rosemary. When an equal division of property together with an award of current maintenance would result in a "circular flow of funds between the parties," the court need not "ignore such practical realities." ***Herdt v. Herdt***, 152 Wis. 2d 17, 22, 447 N.W.2d 66 (Ct. App. 1989). In such circumstances, the court may award an unequal division of property in lieu of maintenance if the court states its reasons for doing so and the reasons are supported by the record. *See* ***id***. The trial court here did explain its reasons, and they are supported by the record.

¶15 However, the unequal division of property in lieu of maintenance was based on Leonard's current earnings. The $29,603 benefit Rosemary derived from the unequal property division did not take into account the fact that Leonard had, until very recently, been earning significantly more in a management

position, was actively looking for another such position, and might find one. As we have said above, these factual findings are supported by the record. The court could reasonably decide that Rosemary should share in those earnings if Leonard succeeded in finding another such position—because of the long-term marriage, the fact that Leonard had been earning the higher figure during the marriage until shortly before the divorce, and because Rosemary's earnings are very modest. The court explained its reason for deciding upon a ten-year period, and that explanation is logical and supported by the record. When a trial court provides appropriate and legally sound reasons, based on the facts of record, for holding open a final maintenance decision until a future date, it may do so. ***Grace v. Grace***, 195 Wis. 2d 153, 158, 536 N.W.2d 109 (Ct. App. 1995). The trial court's decision to hold maintenance open for a period of ten years meets this standard.

¶16 Leonard argues the combination of an unequal property division in lieu of current maintenance and holding maintenance open is unfair to him because there is no guarantee that Rosemary will not bring a motion for maintenance even though he has not found a management position. He acknowledges that the trial court clearly stated the only purpose for holding maintenance open was to permit the court to consider ordering maintenance if Leonard succeeds within the next ten years of obtaining a higher paying management position, but, he points out, another judge could be assigned to hear such a motion and could award maintenance for other reasons.

¶17 Leonard's concern does not support a reversal of the trial court's decision to hold maintenance open, but it does support a modification of the paragraph of the judgment regarding maintenance. In ***Grace***, we upheld as a proper exercise of discretion a trial court's decision to hold maintenance open for one spouse because of her potential health problems. *See* ***id.*** at 158-60. However,

we observed that the provision of the judgment simply left maintenance open, without any limitation. ***Id.*** at 160. "As a result," we stated, "the judgment leaves the door open to an award of future maintenance to Kay for conditions or circumstances wholly unrelated to her health problems, such as a diminution in income or an increase in needs caused by factors not suggested in this record or in the court's decision." ***Id.*** We therefore reversed the judgment and remanded for the purpose of amending the maintenance provision "so as to limit its applicability to the specific health concerns discussed in the court's decision." ***Id.*** We recognize that the trial court here, in its memorandum decision and in its decision on the post-trial motion, very clearly stated its purpose for holding maintenance open, and, in its oral decision on the motion, it described this as the "sole purpose." However, paragraph 12a of the judgment, provides that "maintenance shall be held open for petitioner for a period of ten (10) years."[5] Following ***Grace***, we reverse this paragraph of the judgment and remand to the trial court to amend it to limit its applicability to the specific reason the court decided to hold maintenance open for a period of ten years.

¶18 Leonard also contends the trial court's decision is unfair because its effect is to subject his income to continuing scrutiny, but not Rosemary's income or her need. We do not agree with either the premise as Leonard states it or his conclusion. It is true that an increase in Rosemary's earnings, or a decrease in her need, will not form the basis for a modification of the unequal property division based on a substantial change in circumstances. *See* WIS. STAT. § 767.32(1). However, this is true any time a court awards an unequal property division in lieu

[5] We refer to paragraph 12a of the judgment as modified by order of July 2, 1999, to correct a mistake in the judgment originally entered.

of maintenance. If this fact, in itself, makes an unequal division of property in lieu of maintenance unfair and therefore impermissible, it would never be permissible. But the statute and case law expressly allow trial courts to make such awards, in the proper exercise of their discretion.[6]

¶19 With respect to the effect of Rosemary's financial circumstances on any future maintenance awarded, certainly her income and her need will be relevant factors in deciding how much maintenance to award if Leonard does find a higher paying management job similar to that which he held at Mayville Metal. As for whether an improvement in her financial circumstances might justify a change in the court's decision to hold maintenance open for ten years—for example, might justify the court deciding that maintenance should be permanently eliminated—we discuss that issue later in the context of Leonard's post-divorce motion.

¶20 Finally, Leonard argues that the court erroneously failed to take into account the tax consequences of its decision to award an unequal property division in lieu of current maintenance and hold maintenance open for the purpose the court identified. Leonard does not point to any specific evidence on tax consequences that he presented to the court that the court did not consider. *See* ***Fowler v. Fowler***, 158 Wis. 2d 508, 518-19, 463 N.W.2d 370 (Ct. App. 1990) (it is party's responsibility to present evidence or reliable data on tax consequences of trial court's decision; trial court's responsibility is to decide on basis of evidence).

[6] At oral argument, Leonard gave other examples of, in his view, the disadvantages of an unequal property division over an award of maintenance: maintenance terminates if the payee dies, or remarries, *see* WIS. STAT. § 767.32(3), whereas that is not true of a property division. These distinctions do not make an award of an unequal division of property in lieu of maintenance unfair as a matter of law, and merely pointing them out does not support an argument that such an award is unfair in this particular case.

The trial court did take tax consequences into account in computing the amount Leonard would need to pay annually in maintenance to equalize the parties' after tax incomes. It appears that Leonard's challenge is based on the fact that by awarding an unequal division of property in lieu of current maintenance, he was deprived of the ability to deduct maintenance payments for income tax purposes. However, this is always true when a court awards property in lieu of maintenance and does not, in itself, make the court's decision an erroneous exercise of discretion. Leonard has presented no developed argument, nor pointed to any specific evidence, that persuades us that the court erroneously exercised its discretion when it determined that the $29,603 more in property awarded to Rosemary fairly offset the maintenance to which she was entitled based on Leonard's current income.

Post-Trial Motion

¶21 Leonard contends he showed a substantial change in Rosemary's financial circumstances, which necessitated a modification of the trial court's decision to hold maintenance open for ten years.[7] In reviewing this decision, we accept the court's findings on the "before" and "after" circumstances and whether a change has occurred, unless they are clearly erroneous. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 33, 577 N.W.2d 32 (Ct. App. 1998). Whether the change is substantial is a question of law we review de novo. ***Id.*** However, because the legal determination of what is substantial requires a value judgment and is so heavily dependent on the interpretation and analysis of underlying facts, we give

[7] To the extent that Leonard's arguments at the hearing on the post-trial motion addressed what he believed were errors in the court's original decision on property division and holding maintenance open, we have already discussed those.

weight to the trial court's conclusion that a change is or is not substantial. *See* ***Harris v. Harris***, 141 Wis. 2d 569, 574-75, 415 N.W.2d 586 (Ct. App. 1987).

¶22 We affirm the trial court's determination that there was not a substantial change in circumstances. In its explanation for denying the motion, the court found that Stiponovic was living with Rosemary, was paying $70 every other week for groceries, and she paid all the other household expenses and her own personal expenses. Those findings are not clearly erroneous. The court then determined that this change in Rosemary's financial circumstances was not sufficient to constitute a substantial change. The court correctly relied on our decision in ***Rosplock***. In ***Rosplock***, we repeated the established law that the fact of cohabitation is relevant only to the extent that it changes the payee's economic status, and we concluded that receiving $200 per month from a live-in companion that paid for groceries and phone bills did not constitute a substantial change in circumstances.[8] ***Rosplock***, 217 Wis. 2d at 37.

¶23 The trial court also reasoned that, because the sole purpose in holding maintenance open for ten years was to provide Rosemary with an opportunity to receive maintenance if Leonard succeeded in regaining a higher paying management position, the change in circumstances that occurred did not justify altering that decision. We agree with this analysis. The decision whether to modify an order regarding maintenance should look to the trial court's reasons for that decision and view any change in circumstances in that context. *See* ***Rosplock***, 217 Wis. 2d at 35-36. In ***Rosplock***, we concluded that the fact that the

[8] In ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 37, 577 N.W.2d 32 (Ct. App. 1998), the recipient of maintenance also received $100 to $200 from her daughter on an inconsistent basis, which apparently also went for groceries and phone bills.

maintenance payee obtained employment during the limited term of maintenance and had rental income from assets awarded as part of the property division were not substantial changes in circumstances, because the former was in keeping with the goals of limited term maintenance and the latter was well within the expectation of the parties when they agreed to limited term maintenance. ***Id.*** Although in ***Rosplock*** the judgment term sought to be modified was entered pursuant to a stipulation, our analysis there is applicable in this case: the difference is that instead of looking to the expectation of the parties, we look to the reasons for the trial court's decision that one party is seeking to modify. The change in circumstances in Rosemary's living arrangements did not bear on the trial court's reasons for holding maintenance open.

¶24 In summary, we affirm the trial court's property division and its decision to hold maintenance open for ten years to provide Rosemary an opportunity to seek maintenance if Leonard obtains a higher paying management position. However, we reverse paragraph 12a of the judgment and remand for the trial court to modify it by identifying the purpose for which maintenance is being held open. We leave the precise wording up to the trial court. We also affirm the trial court's order denying Leonard's motion to permanently eliminate maintenance for Rosemary.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

¶25 DYKMAN, P.J. *(dissenting).* I agree with the majority's remand to require the trial court to modify the judgment by identifying the purpose for which maintenance is being held open. But I disagree that Leonard has not raised the issue of whether the trial court erroneously exercised its discretion when it determined that the $29,603 more in property awarded to Rosemary fairly offset the maintenance to which she was entitled based on Leonard's current income. His brief asserts:

> The petitioner will likely argue that the court's hold on the maintenance is intended not to cure the parties' present economic disparity, but rather, to provide for future inequity. However, the record contains insufficient credible evidence to support that assertion. In fact, the evidence presented in the record tends to establish the contrary: i.e., that the parties' incomes will more likely move toward equalization.

¶26 Leonard amplified his position at oral argument. Although Leonard would prefer that we rule in his favor because of the lack of evidence, the problem is that no-one, including the trial court and the majority, has addressed the real difficulty with awarding Rosemary both an unequal property division and the possibility of future maintenance.

¶27 While a trial court can make both an award of maintenance and an unequal division of property, a court cannot offset any property division against any maintenance award. Were that acceptable, a million dollar property division could be offset against a small maintenance award, or a $5,000 property division could be offset against a potential $1,000 per month lifetime maintenance award.

In my view, there must be some way to determine that there is some balance between the two awards sought to be offset. Here, the trial court offset $30,403 of property division against an unknown maintenance award. Even assuming that the trial court would have equalized the parties' income, had it made a maintenance award, the question would be whether $4,230 per year, or $353 per month for an unknown time, or for ten years, or whatever time the trial court might have chosen, was the equivalent of a sum, received over time, with a $30,403 present value after taxes.

¶28 There is too much to know or assume regarding the property division and maintenance award in this case. Though I agree that the trial court should modify the judgment by identifying the purpose for which maintenance is being held open, I cannot agree that we know enough about the facts to sustain the trial court's set off of property division against maintenance. I would remand to permit the trial court to exercise its discretion and give its reasons, based upon mathematics, why the trade-off of property division for maintenance was fair. Accordingly, I dissent from the part of the majority opinion which affirms this offset.