

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2007AP2914

Cir. Ct. No. 2007FA436

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ELEANOR L. STILKE-JOYCE,

PETITIONER-RESPONDENT,

V.

JOHN J. JOYCE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
MARY KAY WAGNER, Judge. *Reversed in part and cause remanded.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. John J. Joyce has appealed from a judgment of divorce from the respondent, Eleanor L. Stilke-Joyce. The sole issue on appeal is whether the trial court erroneously exercised its discretion in awarding

maintenance to Eleanor. We reverse the portion of the judgment awarding maintenance and remand the matter for further proceedings.¹

¶2 The parties had been married for fourteen years at the time of their divorce. At the time of the divorce, John was eighty-one years old and Eleanor was seventy-nine years old. Prior to their marriage, the parties had signed a premarital agreement (PMA), which stated that “both Parties are individually possessed of certain Individual Properties and both acknowledge that they played no role in the accumulation of the other’s Individual Property.” They agreed that each party would retain his or her individual property, which was defined in the PMA and delineated in an attachment to it. They also agreed that they would be bound by the PMA in the event of divorce.²

¶3 At trial, neither party challenged the validity of the PMA. The parties stipulated to the individual property to be awarded to each party under the PMA. Pursuant to the parties’ PMA and stipulation, the judgment of divorce entered by the trial court permitted each party to retain his or her individual property. *See* WIS. STAT. § 767.61(3)(L). In Eleanor’s case, this included bank

¹ Because neither party has challenged any other portion of the divorce judgment, our reversal applies only to the maintenance award.

² In the PMA, the parties stated that they understood that their agreement constituted a binding, written agreement under WIS. STAT. § 767.255. Section 767.255 (1991-92), the property division statute, has been renumbered as WIS. STAT. § 767.61 (2007-08). Section 767.255(11), dealing with premarital property agreements, is now numbered as § 767.61(3)(L). Unless otherwise noted, all future references will be to § 767.61(3)(L) and to the 2007-08 version of the Wisconsin Statutes.

and investment accounts valued at \$54,000.³ In John's case, this included his pension.⁴

¶4 By agreement of the parties, the remaining marital estate was divided equally between them. However, maintenance was not addressed in the PMA or stipulation, and John objected to Eleanor's request that she be awarded maintenance.

¶5 In its written decision awarding maintenance, the trial court addressed the statutory factors under WIS. STAT. § 767.56, and stated that "[t]he property division is equal." It found that Eleanor had a net monthly income of \$836 per month, consisting of her social security payments reduced by her monthly Medicare payment. It found that John had a monthly income of \$2856.83, consisting of a monthly pension payment of \$1,882.40 and social security of \$1,129.50, less his monthly Medicare payment. The trial court found that Eleanor did not have the ability to support herself absent maintenance, and that John, although "not flush with assets by any means," had a greater income. It therefore ordered John to pay maintenance of \$966 per month for an indefinite period of time to equalize the parties' income.

¶6 The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of the trial court's discretion. *Olski v. Olski*, 197 Wis. 2d 237, 243 n.2, 540 N.W.2d 412 (1995). A trial court erroneously exercises its

³ Trial testimony indicated that Eleanor obtained these assets upon the death of her first husband, or that they were derived from assets from her first husband.

⁴ John was already retired and receiving pension payments when the parties married.

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.*

¶7 An award of maintenance requires consideration of the needs of the recipient spouse and the corresponding ability to pay of the supporting spouse, along with supplementary factors. *Bahr v. Bahr*, 107 Wis. 2d 72, 84, 318 N.W.2d 391 (1982). The touchstone of analysis in determining a maintenance award is the statutory factors set forth in WIS. STAT. § 767.56, formerly numbered as WIS. STAT. § 767.26 (2003-04). See *Kennedy v. Kennedy*, 145 Wis. 2d 219, 222, 426 N.W.2d 85 (Ct. App. 1988). These factors reflect and are designed to further two distinct but related objectives: to support the recipient spouse in accordance with the needs and earning capacities of the parties, and to ensure a fair and equitable financial arrangement between the parties in each individual case. *Id.* The findings of fact made by the trial court in evaluating the maintenance objectives and the statutory factors will not be disturbed unless they are clearly erroneous. See *Sellers v. Sellers*, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996); WIS. STAT. § 805.17(2).

¶8 In challenging the maintenance award, John argues that the trial court erred when it considered his pension, contending that it constituted the impermissible double-counting of an asset that had already been awarded in the property division. He also contends that the trial court erroneously exercised its discretion by basing maintenance on an erroneous finding that the property division was equal. In addition, he contends that the maintenance award constituted an erroneous exercise of discretion because it leaves him unable to pay his own expenses, and because the trial court considered his pension while failing to consider the individual property retained by Eleanor.

¶9 Initially, we reject John’s argument that the trial court erroneously stated that the property division was equal. As recognized in the trial court’s maintenance decision, the parties stipulated to an equal division of the marital assets after the award to each party of the individual property retained in accordance with the PMA. We construe the trial court’s statement that the property division was equal as referring to the property not covered by the PMA.

¶10 We also reject John’s argument that the trial court’s consideration of his pension in awarding maintenance constituted the impermissible double-counting of an asset that had already been awarded in the property division. John relies on *Kronforst v. Kronforst*, 21 Wis. 2d 54, 64, 123 N.W.2d 528 (1963), in which the supreme court held that the husband’s interest in a profit-sharing trust could not “be included as a principal asset in making division of the estate and then also as an income item to be considered in awarding alimony.” John contends that since his monthly pension payments are not derived from earnings subsequent to the divorce as in *Olski*, 197 Wis. 2d at 247-48, his pension payments cannot be considered in determining maintenance.

¶11 John’s argument fails because the trial court did not double-count his pension. As previously noted, the trial court awarded John his pension based upon the parties’ agreement that the PMA was binding and their stipulation as to what property was to be retained by each of them under the PMA. It then divided their joint property equally, also in accordance with their stipulation.

¶12 When the present value of a pension is not included in the marital estate for property division purposes, then the pension payments may be counted as income for purposes of determining maintenance. *Wettstaedt v. Wettstaedt*, 2001 WI App 94, ¶20, 242 Wis. 2d 709, 625 N.W.2d 900. Here, although the

individual property and joint property of the parties were combined in the lists of assets awarded to each of them in the divorce judgment, the trial court did not value John's pension and include its value in determining what would constitute an equal division of the estate of the parties. *Cf. id.*, ¶10 (the value of the husband's pension was not included in the property division at divorce when "1/2 QDRO" was simply inserted in the "Husband" and "Wife" columns of the property division balance sheet). Eleanor was not awarded more assets in the property division based upon the award of the pension to John, and John did not give up other property in order to retain the pension. Thus, John's pension was "counted" for the first time when the trial court made its maintenance decision, *see id.*, ¶13, and the trial court did not erroneously exercise its discretion when it considered the pension payments.

¶13 Although the trial court was entitled to consider John's pension payments when addressing Eleanor's request for maintenance, we conclude that it erroneously exercised its discretion by failing to also consider the individual property retained by Eleanor. The individual property awarded to Eleanor could be considered by the trial court in awarding maintenance for the same reasons John's pension could be considered. This property was clearly relevant to an evaluation of Eleanor's financial need in relation to John's ability to pay. However, the trial court's maintenance decision indicates that it considered nothing but the parties' social security payments and John's pension payments, along with the equal division of their joint property, when evaluating their respective financial circumstances. Consequently, we reverse the portion of the judgment awarding maintenance. We remand the matter to the trial court to consider Eleanor's individual property when determining whether maintenance should be awarded and, if so, the amount of maintenance.

By the Court.—Judgment reversed in part and cause remanded.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

