COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP531 **Cir. Ct. No. 2012FA217**

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

IN RE THE MARRIAGE OF:

AMY JOY BROWN,

JOINT-PETITIONER-APPELLANT,

V.

SCOTT ALAN BROWN,

JOINT-PETITIONER-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Reversed and cause remanded with directions*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Amy Brown challenges the maintenance award in the judgment divorcing her from Scott Brown. We agree with Amy that the circuit court misused its discretion in two respects: (1) the court did not consider Scott's employment bonuses as part of his income for purposes of setting maintenance and (2) in setting maintenance, the court accepted Scott's budget which included tuition and other expenses for the parties' adult, college-age child and post-high school education expenses for the younger child without making the necessary findings to support that decision. Accordingly, we reverse the judgment of divorce and remand to the circuit court for a determination of maintenance under the prevailing law.

¶2 The parties were married for twenty-four years. At the time of the divorce, the parties had a seventeen-year-old daughter and an adult, college-age son.

¶3 At an evidentiary hearing, Scott testified that his bonus depends upon his performance and the company's financial condition. Scott earned sizable bonuses in 2010 and 2011,[1] but, at the time of the November 2012 trial, he did not know if he would receive a bonus in 2012. Scott received smaller bonuses of $2000 to $4000 in prior years, and he did not earn a bonus every year. The bonuses were applied to marital expenses.

¶4 Citing ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 406 N.W.2d 736 (1987), the circuit court acknowledged that in determining maintenance, the court had to consider the parties' standard of living during the marriage. The court

[1] Scott's 2011 bonus was $48,750.

made findings regarding the parties' income, but the court did not include Scott's bonuses in his income, stating:

> I did not put a lot of weight on the bonuses. And I didn't do it because I got the impression from Scott's testimony that the large bonuses are fairly new, meaning they weren't a big part of the marriage. There were some bonuses, but I felt that they were smaller—at least that's the impression I had—during the course of the marriage. So I'm not factoring those in for the maintenance issue.

¶5 The court found that Amy earned $6149 per month and Scott earned $11,375 per month (without including the bonuses). The court awarded Amy $2000 per month in maintenance.[2]

¶6 Maintenance is within the circuit court's discretion. ***Hefty v. Hefty***, 172 Wis. 2d 124, 133, 493 N.W.2d 33 (1992). If a court misapplies the law, the court misuses its discretion, ***Mathias v. Mathias***, 188 Wis. 2d 280, 286, 525 N.W.2d 81 (Ct. App. 1994), and commits reversible error.

¶7 "[A] reasonable maintenance award is measured not by the average annual earnings over the duration of a long marriage but by the lifestyle that the parties enjoyed in the years immediately before the divorce and could anticipate enjoying if they were to stay married." ***Hefty***, 172 Wis. 2d at 134 (quoting ***LaRocque***, 139 Wis. 2d at 36) (emphasis omitted). Bonuses, including bonuses received in the last years of the marriage, are appropriately considered in determining maintenance. ***Id.*** at 132-34. When the circuit court declined to consider all sources of Scott's taxable income for maintenance purposes as

[2] The circuit court anticipated that maintenance would be revisited once the younger child graduated from high school approximately eighteen months after the divorce trial. This scenario, no matter how likely, did not relieve the circuit court of its responsibility to properly exercise its discretion based upon the record and the law at the time of the divorce.

required by ***Wright v. Wright***, 2008 WI App 21, ¶¶37-38, 307 Wis. 2d 156, 747 N.W.2d 690 (2007), the court failed to comply with ***Hefty*** and ***LaRocque*** and misused its discretion. On remand, the circuit court shall properly exercise its discretion in setting maintenance.[3]

¶8 We turn to the other issue that prompts our reversal. In discussing the parties' financial support of their adult son, the circuit court stated: "I know there were questions about providing support for the kids, including your [adult] son. And that's great if you can do it, but that's really not a concern of myself as judge." Notwithstanding this remark, the court accepted Scott's budget which included financial support for the son: $400 per month in tuition plus transportation and food expenses. Scott's budget also included $200 per month for the minor daughter's post-high school education fund. Amy's budget did not include post-high school education expenses for either child, although she hoped to be able to contribute to the children's post-high school education.

¶9 Unless the record demonstrates the parties' agreement to support their children past the age of majority, ***Miller v. Miller***, 67 Wis. 2d 435, 442, 227 N.W.2d 626 (1975), "there is no legal obligation to support a child beyond the age of eighteen years," ***Weiss v. Weiss***, 122 Wis. 2d 688, 699-700, 365 N.W.2d 608 (Ct. App. 1985); *see also* ***Bliwas v. Bliwas***, 47 Wis. 2d 635, 637-41, 178 N.W.2d 35 (1970). Our supreme court declined "to open a Pandora's box where payors could seek to reduce the amount of maintenance paid to recipients simply because the payors are making sizable contributions to their adult children's education

[3] Scott argues that the circuit court's various financial arrangements rendered the parties' postdivorce monthly incomes roughly equal. This argument is not dispositive. The circuit court did not consider all of the parties' income in reaching the postdivorce financial arrangements.

expenses." ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶38, 269 Wis. 2d 598, 676 N.W.2d 452. In what the supreme court predicted would be rare circumstances, a court may consider, in its discretion, a parent's contribution to the education expenses of an adult child in the context of setting maintenance. ***Id.***

¶10 Amy testified that Scott is in charge of the tuition bills, and he tells her what she owes. When asked if she was comfortable with that arrangement, Amy replied, "I didn't think I had a choice not to pay that." In the past, Amy contributed to the son's tuition, but she could not afford to do so currently.

¶11 Scott testified that the $400 per month tuition figure represented one-third of the son's tuition and that he and Amy had been paying one-third of the tuition. Amy stopped contributing to the tuition fund in August 2012, and Scott continued to provide tuition support. Scott hoped Amy would contribute to the tuition and he expects Amy to pay for one-half of their son's automobile expenses. Scott acknowledged that even though he and Amy did not have a legal obligation to provide financial support to their son, Scott expected that Amy would do so after the divorce.

¶12 The circuit court did not find that the parties agreed to provide financial support to their adult children. Rather, the evidence was that Scott was planning to offer such support and Amy hoped to be able to do so. However, neither Amy nor Scott testified that they had agreed to continue making their son's college tuition payments, to provide other financial support to their son, or to fund their daughter's post-high school education. The circuit court misused its discretion. On remand, the circuit court shall address this issue under the applicable law.

¶13 Finally, Amy argues that the circuit court did not address her objection to Scott's $283 monthly budget item for gifts and donations. Amy proposed $50 per month for such items in her own budget. The court did not mention Scott's budget item in its decision. We do not address this issue because Amy did not draw the circuit court's attention to its failure to address Scott's budget item. This is the type of issue to which the circuit court's attention should have been drawn before lodging an appellate challenge. ***Schinner v. Schinner***, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988).[4]

¶14 We reverse and remand to the circuit court with directions to address maintenance under the applicable law.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[4] Because the circuit court will address maintenance on remand, nothing precludes the court from looking at the parties' budgets anew.