

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP2046

Cir. Ct. No. 2009FA92

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

SHARON LYNN LARSEN,

PETITIONER-APPELLANT,

V.

RICHARD JOHN LARSEN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Crawford County:
JAME P. CZAJKOWSKI, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Sharon Larsen appeals a divorce judgment. Sharon argues that the circuit court improperly exercised its discretion in:

(1) calculating the income of her ex-husband, Richard Larsen, for the purpose of setting child support; (2) failing to award her maintenance; and (3) denying her request for a contribution from Richard toward her attorney fees. Because we conclude that the circuit court properly exercised its discretion in each instance, we affirm.

¶2 Sharon and Richard were married in 1990 and separated in 2009. After Sharon filed for divorce, Richard filed for chapter 11 bankruptcy. A reorganization plan for the repayment of Richard's debts was confirmed during the pendency of the divorce.

¶3 Richard was a farmer prior to his marriage to Sharon and he continued to farm throughout their marriage. In addition to farming, Richard owns and receives income from rental properties. During the marriage, Sharon was primarily a homemaker. After Sharon and Richard separated, Sharon began work as a janitor.

¶4 In the judgment of divorce, the circuit court awarded Sharon and Richard joint custody of their two minor children, with Sharon receiving primary placement. The circuit court found Richard's annual income to be \$91,820, Sharon's to be \$46,183, and used these amounts to set Richard's child support obligation at \$1,132.54 per month. As to maintenance, the circuit court determined that neither party would receive maintenance. The circuit court also denied Sharon's request for a contribution from Richard for her attorney fees.

¶5 The parties agree that the issues raised on appeal rest within the sound discretion of the circuit court and will not be overturned unless the circuit court improperly exercised its discretion. See *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789; see also *Kastelic v. Kastelic*, 119 Wis. 2d

280, 289-90, 350 N.W.2d 714 (Ct. App. 1984). A circuit court properly exercises its discretion when it reaches a rational decision based on application of the proper legal standards to the facts in the record. *Weiler v. Boerner*, 2005 WI App 64, ¶11, 280 Wis. 2d 519, 695 N.W.2d 833. A circuit court's findings of fact will be upheld unless clearly erroneous. WIS. STAT. § 805.17(2) (2011-12).¹

¶6 Sharon first argues that the circuit court failed to properly exercise its discretion in determining Richard's income for child support purposes. Sharon does not take issue with the circuit court's methodology for determining child support, nor does she challenge its general approach to calculating Richard's income for this purpose. Instead, she challenges only one aspect of the court's determination of Richard's income, namely, its decision to rely on a look back period of eight years, which she submits was too long.

¶7 The \$91,820 figure arrived at by the court includes \$66,981 in farm income. The court calculated the farm income by averaging Richard's gross farm income, less his business expenses, as expressed on the previous eight years of his tax returns (2005-12), plus a 50% "add back" to make up for tax deductions taken on the depreciation of farm equipment.² The court's general approach was a proper method of calculating Richard's income. *See* WIS. ADMIN. CODE § DCF 150.03(1) and (2).

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The parties agreed below on the 50% add back for depreciation and neither party disputes this amount on appeal. In addition to farm income, Richard's annual income of \$91,820 includes an "add back" of \$17,062 in yearly interest paid to Sharon on her portion of the marital estate, and \$7,776 for rental income averaged over 2010-12. Neither of these sums is at issue on appeal.

¶8 Turning to Sharon’s argument, it focuses on the court’s use of an average of the previous eight years of income, which she argues should have been the previous three years. Sharon’s primary argument on this issue is that using an eight-year look back artificially reflects a lowered farm income because it includes Richard’s “unprofitable beef cattle operation,” which was terminated in 2010.³

¶9 This argument fails, first, because as Richard points out in his appellate brief, the record illustrates that part of Richard’s financial success in 2010 and 2011 was attributable to the fact that Richard sold off his remaining cattle in those years. Thus, there was a reasonable basis for the circuit court to have concluded that Sharon’s approach would distort the income picture by excluding years in which the cattle operation was more of a drain on Richard’s income and including years in which it was more profitable, instead of capturing both the gains and losses.

¶10 In addition to the fact that using a three-year average would not adequately reflect his gains and losses from livestock, the circuit court determined that using a longer term average “most accurately reflects [Richard’s] farm income” as a whole, including his grain production. This conclusion was based on explicit findings of the circuit court that Richard’s farm income “varies widely from year to year,” in part because Richard has “considerable leeway regarding the timing of sales of grain and livestock raised.” These findings are supported by

³ Sharon also argues that the circuit court should have used a three-year average because the couple separated in 2009, at which point Sharon was no longer aiding in the farm operation. However, Sharon does not explain why the circuit court should have concluded that the separation and her subsequent absence from the farm affected Richard’s income in any way, much less why this means that the circuit court improperly exercised its discretion in using an eight-year look back rather than a three-year one.

facts in the record illustrating that income from grain, as well as cattle, fluctuated between 2005 and 2012. For example, Richard testified that his income from grain sales was negative in 2007 because he “didn’t sell ... corn that year. We held it over into the next year because I thought prices were going up.”

¶11 While other options were no doubt open to it, the court made a rational decision on this issue by applying proper legal standards to the facts. Simply because other look back periods might also have been justified does not render the eight-year period “arbitrary,” as Sharon submits.

¶12 Sharon next argues that the circuit court improperly exercised its discretion in denying Sharon’s request for maintenance.

¶13 In determining a maintenance reward, a circuit court must examine the list of statutory factors set forth in WIS. STAT. § 767.56. *Ladwig v. Ladwig*, 2010 WI App 78, ¶17, 325 Wis. 2d 497, 785 N.W.2d 664.

These factors reflect and are designed to further the two primary objectives of maintenance—“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.” The support objective is fulfilled when the trial court considers the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal, if the goal is feasible. What will satisfy the fairness objective must be determined on a case-by-case basis, considering the statutory factors. A trial court erroneously exercises its discretion when it fails to fully consider the dual objectives of maintenance.

Id. (quoted sources and citations omitted). Sharon argues that the court failed to properly exercise its discretion by misapplying these standards in two ways.⁴

¶14 First, Sharon argues that the court double counted Richard's bankruptcy obligations, artificially exaggerating his debts, in concluding that Richard should not pay maintenance. This argument is not well developed. As best we can discern, Sharon is not arguing that the court literally subtracted the debts that Richard claimed in the bankruptcy proceedings two times in calculating his income for purposes of a maintenance decision, which would present, at least in part, a math question. Instead, she apparently argues that the court properly considered Richard's income for purposes of determining whether maintenance is merited, but then improperly considered his bankruptcy debt as an *additional* burden, despite the fact that this debt is largely if not entirely already accounted for in the determination of his income.

¶15 We further clarify that Sharon's argument appears to assume the following, which we agree may be accurate. In calculating Richard's annual income, the circuit court subtracted out the farm expenses reflected on his tax returns. These farm expenses took into account all or substantially all of the debts that Richard claimed under his chapter 11 bankruptcy plan. The circuit court used the calculation of Richard's annual income to arrive at its finding of his disposable monthly income. In this way, most or all of Richard's bankruptcy obligations

⁴ We are not clear, but if Sharon means to make additional arguments regarding denial of her maintenance request, she does not develop them with proper citation to legal authority and the record and, thus, we need not address them. We decline to do so. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

were subtracted, as farm expenses, from the calculation of his disposable monthly income calculation.

¶16 With those clarifications in mind, Sharon’s double counting argument appears to rest entirely on the following statement of the circuit court, addressing the maintenance issue, in particular the sentence that we emphasize:

The earning capacity of the parties is not equal. [Richard] has farm and rental properties which provide the potential for greater income. However, his potential has not prevented him from seeking protection from creditors through the Bankruptcy Court. *The Bankruptcy Plan requires [Richard] to pay substantial debt which reduces his ability to pay maintenance.* The attached “Estimate of Disposable Income” shows [Richard’s] monthly disposable income [at \$3,880] is less than [Sharon’s] [at \$4,241]. The court concludes [that Richard] does not have the ability to pay maintenance to [Sharon].

(Emphasis added.) Sharon asserts that the emphasized statement demonstrates that the circuit court decided that Richard’s bankruptcy obligations constituted an additional burden, beyond consideration of his income, that the court counted as weighing against an award of maintenance to Sharon.

¶17 We disagree that the emphasized statement illustrates that the court in any sense “double counted” Richard’s bankruptcy obligations. Simply because the court juxtaposed a reference to the bankruptcy plan with a reference to income does not mean that the court did not understand or did not assume that the income determination already took into account the bankruptcy obligations. If Sharon means to argue that the circuit court did not understand that chapter 11 involves the reorganization of existing obligations, not the creation of new debts, we see no hint that the circuit court misunderstood this elementary legal principle.

¶18 The statement of the circuit court on which Sharon bases her argument simply explains the court's assessment of one of the factors to be considered pursuant to WIS. STAT. § 767.56 in setting maintenance: the earning capacity of each party. The circuit court found that Richard had a lower monthly disposable income than Sharon, due in part to his bankruptcy obligations, and this factored into its decision that Richard "does not have the ability to pay maintenance" to Sharon.

¶19 This was not an improper use of discretion. It is true that a reasonable starting point for the maintenance evaluation is a fifty-fifty split between the parties involved in a long-term marriage. However, a circuit court has the discretion to adjust this division "following reasoned consideration of the statutorily enumerated maintenance factors." *Bahr v. Bahr*, 107 Wis. 2d 72, 85, 318 N.W.2d 391 (1982). The circuit court did not improperly adjust the division of income for purposes of the maintenance decision here.

¶20 As a second maintenance argument, Sharon contends that the circuit court improperly exercised its discretion by failing to account for the fact that Richard would be relieved of both his child support obligations and of many of his debts discharged through the bankruptcy proceedings over the course of the following four to seven years and, thus, Richard's disposable income would eventually exceed Sharon's.

¶21 To clarify, the circuit court correctly set Richard's child support obligation prior to making a determination regarding maintenance, as required by WIS. ADMIN. CODE § DCF 150.03(6). To the extent that Sharon may mean to argue that the circuit court erred in doing so, she would be incorrect.

¶22 Moving to the core of her argument, we conclude that the argument is off base because the record reflects that the circuit court did not make a determination regarding maintenance based solely on the parties' relative disposable incomes, but instead based on a review of all the factors enumerated in WIS. STAT. § 767.56 and the dual objectives of maintenance: support and fairness. *See Ladwig*, 325 Wis. 2d 497, ¶17. To cite just one example, the court explained that, pursuant to their property division, Sharon would receive annual payments equal to the net worth of Richard's property division, and 4% interest annually on those payments. *See* WIS. STAT. § 767.56(1c)(c). The circuit court found that this interest would "enable [Sharon] to invest in other income producing enterprises" in the future. *See* § 767.56(1c)(e), (f).

¶23 Based on the "evidence in totality," the court concluded that both Sharon and Richard are "capable of supporting themselves at a level reasonably comparable to the living standard enjoyed by each prior to the initiation of the divorce" and that "an award of maintenance by either party to the other would be contrary to a fair and equitable resolution ... considering all the factors" in WIS. STAT. § 767.56. This was a proper exercise of the court's discretion, considering pertinent factors and setting forth its reasoning.

¶24 Turning to the attorney fee argument, Sharon contends that the circuit court improperly exercised its discretion in failing to require Richard to contribute \$25,000 toward her attorney fees. Sharon suggests that the court failed to take into account that her attorney fees were substantially increased due to the fact that her divorce attorneys had to navigate Sharon's interests in light of the bankruptcy that Richard unilaterally decided to file, and also that the court did not factor into its decision her low earning capacity.

¶25 A court may order either party to pay a reasonable amount for the other party's attorney fees after considering the financial resources of the parties. WIS. STAT. § 767.241(1)(a). In determining whether to award attorney fees, a court should consider the need of the party seeking fees, the other party's ability to pay, and the reasonableness of the fees. *Kastelic*, 119 Wis. 2d at 290.

¶26 One problem with Sharon's arguments, and we consider it dispositive, is that the court explicitly addressed the only factors that she now asserts the court overlooked. The court found that the parties each had "incurred substantial attorney fees" that "are attributable to [Richard's] bankruptcy and the divorce action." However, the court found that "neither party has the capacity to immediately pay the attorney fees incurred" nor will Richard have that ability to do so in the foreseeable future. As to the reasonableness of the fees, the court further found that while "each party pursued their own self-interest" during the course of the bankruptcy and divorce, neither party "improperly increased attorney fees incurred by the other." This last finding goes directly to what we understand to be the core argument Sharon makes, to the effect that Richard needlessly generated legal costs for Sharon in the divorce through the bankruptcy proceedings.

By the Court.—Judgment affirmed.

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

