

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 29, 2014

Diane M. Fremgen
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. 2013AP2371

Cir. Ct. No. 2012FA16

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

JENNIFER ANN DWORAK,

PETITIONER-APPELLANT,

V.

MATTHEW ROBERT DWORAK,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County:
CHAD G. KERKMAN, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Jennifer Ann Dworak appeals from a judgment of divorce, arguing that the trial court erroneously exercised its discretion by awarding (1) maintenance from Jennifer to Matthew Dworak, (2) a property

division equalization payment to Matthew, (3) the majority of the parties' debt to Jennifer, and (4) a contribution to Matthew's attorney fees. We conclude that the trial court's orders were supported by its findings of fact and the record as a whole. We affirm.

¶2 The parties were married in 2002 and have two minor children. Jennifer filed a petition for divorce in 2012, along with a request for a temporary hearing. At the temporary hearing, the court commissioner directed the parties to attend mediation and ordered shared physical placement and family support payments to Matthew. Jennifer failed to attend mediation, and at a second hearing, the court commissioner entered a new order for mediation as well as an order requiring Jennifer to release certain household items to Matthew.¹ The parties entered into a partial marital settlement agreement providing for joint legal custody of the children and a detailed shared placement schedule. The first court trial was rescheduled so that Jennifer could retain new counsel.²

¶3 The parties appeared for trial on July 16, 2013. After considering the testimony, documentary evidence and the record, the trial court found that Jennifer's annual income, exclusive of any bonuses, was \$76,127.76, while

¹ In the meantime, the trial court conducted a de novo hearing pursuant to Jennifer's request. Though the appellant has not provided a transcript from this hearing, it appears from the record that the parties resolved their placement dispute prior to the hearing, and that at the de novo hearing, the trial court denied Jennifer's request to lower the amount of her support payments.

² On the morning of trial, Jennifer's attorney informed the court that he had taken new employment and was closing his law office. The court was informed that the parties had known of counsel's intent to withdraw for some time. The court explained to Jennifer that she should have already obtained successor counsel, but granted counsel's motion to withdraw along with an adjournment. The trial court awarded attorney fees in the amount of \$1000 to Matthew. Jennifer retained successor counsel. At trial, Jennifer testified that prior counsel agreed to pay the attorney fees from his retainer since he bore some responsibility for the last-minute adjournment.

Matthew's was \$42,203.20. Jennifer was ordered to pay child support in the amount of \$530 per month based on a shared-placement formula. *See* WIS. ADMIN. CODE § DCF 150.04 (through Sept. 2014). Based on the numbers provided by the parties, the trial court determined that the marital assets totaled \$86,809 and that Jennifer received assets totaling \$45,388. The trial court ordered Jennifer to make a one-time \$2133.50 property equalization payment to Matthew.³ Additionally, the trial court assigned the parties' debts and ordered Jennifer to contribute \$4000 to Matthew's attorney fees. The trial court also ordered Jennifer to pay maintenance to Matthew in the amount of \$250 per month for three years. In determining the propriety and amount of maintenance, the trial court explained:

So I have reviewed all the statutory factors under [WIS. STAT. §] 767.56 [(2011-12)]⁴ with respect to maintenance. There are two objectives of maintenance. Number one is support. Number two is fairness.

I'm a bit concerned about fairness in this case because there has been evidence that one spouse has taken care of the children, taken care of the family, and—while one spouse is getting her degree and receiving higher raises every year. And I'm a bit concerned about the support factor [] given the debt and how we're dividing the debt between the parties.

So I am going to make a finding that this is a maintenance case. Maintenance will be in the amount of \$250 per month ... from the Petitioner to the Respondent for a period of 3 years.

Jennifer appeals.

³ Based on the numbers submitted by Matthew's attorney, \$1983.50 was required to equalize the asset distribution. To this, the court added \$150, which represented Jennifer's unpaid half of the house appraisal. Jennifer was awarded the family residence in the divorce.

⁴ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Maintenance

¶4 Jennifer acknowledges that the trial court explicitly cited to the maintenance factors enumerated in WIS. STAT. § 767.56, but argues that it erroneously exercised its discretion by “failing to articulate how the statutory factors provided a basis” for maintenance in this case. Maintenance determinations are entrusted to the discretion of the trial court and will be upheld if the court examined the relevant factors, applied a proper standard of law, and using a rational process, reached a conclusion that a reasonable judge could reach. *Ladwig v. Ladwig*, 2010 WI App 78, ¶15, 325 Wis. 2d 497, 785 N.W.2d 664. Section 767.56 lists a number of factors for a trial court to consider when determining the amount and duration of a maintenance award, including the length of the marriage, the age and health of the parties, the property division, the parties’ respective educational levels and earning capacities, the contributions of one party to the education or earning power of the other, and the standard of living enjoyed during the marriage. These factors

are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective).

LaRocque v. LaRocque, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736, 740 (1987).

¶5 The trial court’s maintenance award represents a proper exercise of discretion. In making its determination, the court considered the parties’ income disparity as reflective of their respective educational levels and earning capacities, and as relevant to their different standards of living. The court considered that Jennifer’s income and earning capacity increased each year while due to the

economic downturn, Matthew had to change careers and find a new line of work. Because household funds were used to help pay for Jennifer's schooling and Matthew assisted by watching the children at times when Jennifer needed to study or participate in online classes, the court found that Matthew contributed to Jennifer's education and increased earning power. These findings are not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶6 Additionally, the trial court considered that Jennifer was awarded more of the parties' debt in the divorce. *See* WIS. STAT. § 767.56(3) (citing property division as a permissible consideration).⁵ Whereas Matthew requested a monthly maintenance award of \$500 for four and one-half years on the theory that this would equalize the parties' incomes, the trial court ordered half that amount and for fewer years than requested. In recognition of the fact that "this is a 10-year marriage, which is short to medium length[.]" and the parties' relative youth and physical health, the court ordered payment for three years, less than half the length of the parties' ten-year marriage, with the thought that the extra income would allow Matthew to pay down his debt and become self-supporting. *See* § 767.56(6).

¶7 We reject Jennifer's contention that the trial court considered only Matthew's needs and "focused solely on the 'fairness' objective of maintenance and failed to consider the interrelationship of the fairness and support objectives."⁶

⁵ *See also Bahr v. Bahr*, 107 Wis. 2d 72, 79-80, 318 N.W.2d 391 (1982) (although maintenance is conceptually distinct from property division, the two often must be considered together in order to achieve a fair and equitable result).

⁶ As part of this argument, Jennifer asserts that the trial court ignored her child support obligation in setting maintenance. This assertion is unsupported by the record. Also, Matthew's proposal for a maintenance award that would equalize the parties' incomes accounted for Jennifer's child support payments and in the end, was significantly reduced by the court.

In fixing maintenance, the court considered the burden placed on Jennifer's budget by her debt load. The trial court also examined Jennifer's itemized budget and found that some of her stated expenses were inflated or unnecessary. These are permissible considerations relevant to Jennifer's ability to support herself without unreasonable hardship while still paying maintenance to Matthew. *See* WIS. STAT. § 767.56(10) (a trial court can consider "[s]uch other factors" it deems relevant in an individual case).

Property Division Equalization Payment

¶8 Jennifer argues that the trial court erroneously exercised its discretion by ordering that she make a property division equalization payment of \$2133.50. She contends that this represents an unexplained deviation from the statutory presumption of equal division or, in the alternative, that if the payment was intended to effectuate an equal property division, the court failed to adequately explain its basis.

¶9 We conclude that the record provides ample support for the trial court's determination that a one-time payment of \$2133.50 was appropriate to equalize the division of the parties' assets. The court stated its reliance on the more complete and comprehensive statement of assets and valuations provided by Matthew's attorney. *See Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995) (stating that valuation of marital estate is within the sound discretion of the trial court). Though Jennifer disputed some of the assets' values or characterization as divisible property, the court found that Matthew's numbers

were fair and his testimony was credible.⁷ Further, there was never any confusion about the basis for the equalization payment at trial and, in fact, Jennifer’s attorney drafted the Findings of Fact, Conclusions of Law and Judgment of Divorce which was signed by the court and entered as the final judgment.

Debt Allocation

¶10 Jennifer contends that the trial court erroneously awarded her the “vast majority” of the marital debt. Specifically, Jennifer asserts that the following debts assigned to her should have been divided: (1) a 401(k) loan from Jennifer’s employer, Cardinal Health, in the amount of \$9022.15; (2) a Capital One credit card bill in the amount of \$536.30; (3) a Johansen & Schneider bill in the amount of \$77.50; (4) a Verizon Wireless bill in the amount of \$460.31; and (5) a Time Warner Cable bill in the amount of \$393.99.

¶11 We conclude that the trial court properly exercised its discretion in assigning these debts to Jennifer. There was disputed testimony and conflicting evidence about the nature and amount of the debts. As to the Capital One credit card bill, Jennifer testified that although the account was solely in her name, it was opened while the parties were still together. Matthew testified that he was not even aware the Capital One account existed. In her financial disclosure statement prepared in anticipation of the temporary order hearing, Jennifer made no mention

⁷ For example, though Jennifer argued that the car awarded to her was a gift, the court credited Matthew’s testimony and found that it was a marital asset. Similarly, the trial court accepted Matthew’s testimony that his truck’s value was \$1200. When the trial court acts as the fact finder, we defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony. *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2) (“due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses”).

of this debt and referred only to a Chase Bank credit card account. At trial, Jennifer presented a Capital One statement from September 2012 which failed to indicate when the initial purchases were made and demonstrated that the majority of the balance was attributable to interest charges and late fees accrued in the year 2012, after Matthew left the residence.⁸ On this record, the trial court reasonably found that the debt should be paid by Jennifer.

¶12 Concerning the Time Warner Cable bill, both parties agreed that the debt arose from unfulfilled contract fees assessed when Jennifer unilaterally decided to cancel service in favor of another provider. The trial court reasonably allocated this household debt to Jennifer, who resided in the home and was responsible for household-related decisions and expenses under the temporary order.⁹

¶13 The largest disputed debt is the loan Jennifer took out against her employer's 401(k) plan. It is undisputed that at the time of the temporary order, the balance was around \$4500. At some point thereafter, rather than continuing to pay down the loan, Jennifer testified that she took out a new loan of approximately \$9000 which she used to pay off the prior loan and for household expenses. Jennifer was awarded her 401(k) in the divorce. Given that Jennifer incurred this debt after the parties' separation and that the trial court considered Jennifer's debt load in fixing maintenance, we find no erroneous exercise of discretion. *See* WIS.

⁸ At trial, Matthew's counsel pointed out that Jennifer was provided with interrogatories asking that she provide statements showing the basis for the account balance. Jennifer acknowledged that she failed to provide the requested documentation. Additionally, according to Jennifer's trial exhibits, the Capital One balance was only \$148.04 as of March 13, 2012.

⁹ Though the judgment lists the debt amount as \$393.99, Jennifer's trial exhibits reflect a debt of \$188.46.

STAT. § 767.61(3)(i) (in dividing property, trial court may consider “[t]he amount and duration” of maintenance orders “and whether the property division is in lieu of such payments”).¹⁰

Attorney Fees

¶14 In ordering Jennifer to contribute to Matthew’s attorney fees, the trial court stated:

With respect to attorney fees, I agree with [Matthew’s attorney], you look at what is reasonable. Both parties have spent a lot of money on attorney fees and that’s quite unfortunate because I think this is a case that should have settled, as I mentioned before. This was—about 98, 99 percent of cases settle. I did not hear any good reasons why this case should be in the 1 percent. The Petitioner has caused additional hearings, not calling the mediator, and we had a de novo hearing. This case has been pending for a long period of time.

The Court can look at willingness to compromise and the Respondent did compromise coming down on the house value from 135,000 per year to 125,000 per year. And I think it’s unfortunate that the parties could not come to an agreement on more issues. Especially debt allocation. And child support, eventually, finally, once the parties got to trial today, then they agreed upon child support. I think that’s unfortunate. That’s something that should have been done much sooner than today.

So I am going to award the Respondent \$4,000 in attorney fees. That’s to be paid when the parties receive their refund.

¹⁰ For these reasons, we determine that the trial court properly assigned the Johansen & Schneider and Verizon debts to Jennifer. The Johansen & Schneider bill stems from their minor child’s missed counseling appointment which was arranged by Jennifer and for which Matthew testified he had insufficient notice. The Verizon bill is attributable to a cell phone used during the marriage by Matthew which he returned to Jennifer once he was forced to leave the residence.

¶15 A trial court has broad authority to award attorney fees in a family action based upon consideration of each party's need and ability to pay under WIS. STAT. § 767.241, or upon a finding of overtrial. *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985). Overtrial refers to a party's unreasonable approach to litigation that results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time. *Id.* at 483. Whether excessive litigation occurred and the appropriate amount of a fees award are both matters committed to the discretion of the trial court. *See Zhang v. Yu*, 2001 WI App 267, ¶11, 248 Wis. 2d 913, 637 N.W.2d 754 (overtrial determination); *Bisone v. Bisone*, 165 Wis. 2d 114, 123-24, 477 N.W.2d 59, 62 (Ct. App. 1991) (amount of award).

¶16 We conclude that the trial court's award of attorney fees represents a proper exercise of discretion. The trial court explained that two unnecessary hearings were attributable to Jennifer. Her failure to sign up for mediation, whether or not for the purpose of delay, resulted in additional preparation and in-court time for Matthew's attorney. As to the de novo hearing, the appellant has not provided a transcript, and in its absence, we presume it would support the trial court's finding that it was excessive or unnecessarily protracted. *See Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979) (in the absence of a transcript, this court will assume that the facts necessary to sustain the trial court's decision are supported by the record). Further, the trial court found that Jennifer's unwillingness to compromise contributed to Matthew's attorney fees. Here, the court specifically cited to Jennifer's impromptu agreement during trial to utilize the statutory formula in calculating child support as well as the protracted

litigation concerning the allocation of the parties' debt.¹¹ When acting as fact finder, the trial judge is the ultimate arbiter of credibility, *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979), and here, was uniquely positioned to “view the parties and assess their actions vis-a-vis the case.” *Ondrasek*, 126 Wis. 2d at 484.

¶17 Jennifer further argues that even if an award of attorney fees was warranted, the trial court did not adequately explain its reasons for selecting \$4000. This sort of arithmetic precision is not required. Matthew's attorney submitted an itemized list of her pretrial fees totaling \$10,000. The trial court was informed that the itemization did not include her fees for that day's trial or any time spent thereafter and that Matthew had so far paid \$5000 toward his bill. The trial court determined that the attorney fees were reasonable. *See Holbrook v. Holbrook*, 103 Wis. 2d 327, 343-44, 309 N.W.2d 343 (Ct. App. 1981). Having considered the total amount of reasonable fees incurred, the trial court properly determined that a \$4000 contribution was warranted on the facts of this case. *See Zhang*, 248 Wis. 2d 913, ¶17 (we review only “whether the court examined the relevant facts, applied the correct standard of law and came to a conclusion a reasonable court could reach”).

By the Court.—Judgment affirmed.

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

¹¹ At trial, in addition to the enumerated outstanding debts, Jennifer sought reimbursement from Matthew for various household expenses from the time he lived in the house until his removal. Noting that these were not outstanding debts that needed to be assigned, the trial court refused to entertain Jennifer's attempts to recreate additional amounts she believed Matthew should have contributed to the household.

