

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

No. 97-2650

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

GARY L. BENDIX,

PETITIONER-RESPONDENT,

v.

LINDA A. BENDIX,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: ALLAN J. DEEHR, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Linda A. Bendix challenges the maintenance provision of the judgment divorcing her from Gary L. Bendix. Because we conclude that the circuit court properly exercised its discretion in awarding maintenance, we affirm.

Gary and Linda were married for twenty-three years. Their child was fourteen when Gary petitioned for divorce. The parties reached a partial marital settlement agreement which resolved custody and placement issues and partially resolved the property division. Other issues, including maintenance, were tried to the court. The court awarded \$1000 per month maintenance to Linda for a six-year period. Linda appeals. Other relevant facts will be stated as we discuss the appellate issues.

The determination of the amount and duration of maintenance is discretionary with the trial court, and the award will be upheld unless the trial court misused its discretion. See *Bisone v. Bisone*, 165 Wis.2d 114, 118, 477 N.W.2d 59, 60 (Ct. App. 1991). We will affirm a discretionary decision if the court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. See *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

In reviewing a maintenance award, we consider whether the circuit court's application of the factors in § 767.26, STATS., achieves both the fairness and support objectives of maintenance. See *Forester v. Forester*, 174 Wis.2d 78, 84-85, 496 N.W.2d 771, 773-74 (Ct. App. 1993). The support objective is intended to maintain the recipient spouse in accordance with the needs and the earning capacities of the parties. See *LaRocque v. LaRocque*, 139 Wis.2d 23, 32-33, 406 N.W.2d 736, 740 (1987). The fairness objective is meant to ensure a fair and equitable arrangement in each case. See *id.*

The starting point for a maintenance award following a long-term marriage is to award half of the total combined earnings of both parties. See *Bahr v. Bahr*, 107 Wis.2d 72, 85, 318 N.W.2d 391, 398 (1982). This amount may then

“be adjusted following reasoned consideration of the statutorily enumerated maintenance factors.” *Id.*

The court employed the following analysis in setting maintenance at \$1000 per month for six years. The court noted that need and ability to pay are factors to be considered as part of meeting the support and fairness objectives of maintenance. The court found that both parties were in good health and employed consistent with their educations and abilities. *See* § 767.26(2), (4), STATS. Gary’s income for maintenance purposes was \$100,800, which was the average of his previous seven years’ income due to fluctuation in his private law practice income. Linda’s income was \$34,000 from her full-time employment as a librarian with advanced degrees.

The court considered an equal property division, *see* § 767.26(3), STATS., and that Linda would not be required to pay child support to Gary because their daughter was going to roughly split her time between her parents’ homes. The court considered the substantial marital estate which the parties had accumulated and that the property division left Linda with investment income of \$15,000 per year from her postdivorce assets in addition to her earned income. The court noted that although this was a long marriage, *see* § 767.26(1), neither party had placed himself or herself at an employment disadvantage due to its length and each party had used his or her education “to the best advantage possible.” The court noted that once the child reaches adulthood, in approximately three years, Linda will have the opportunity to pursue an additional advanced degree and/or relocate which would enhance her earning potential by \$10,000 to \$15,000. *See* § 767.26(5), (6). The court did not give great weight to preserving the parties’ savings and investment plan for Linda, particularly because the property division left each party with substantial assets. The court found that Linda’s budget was overstated in the areas of restaurant

expenses, clothing and automobile replacement, medical expenses and savings plan, and that Gary's budget was more credible.

The court determined that a six-year maintenance term was reasonable because it recognized the minority of the child for the first three years, which would hinder Linda's ability to seek additional education or relocate to enhance her earning potential (if she chooses to do so). The court noted that thereafter Linda would have increased flexibility to pursue another advanced degree at a reasonable pace while maintaining full-time employment.

On appeal, Linda argues that in setting maintenance, the court did not give sufficient weight to the parties' savings and wealth accumulation strategies during the marriage. The court did consider this but concluded that other factors weighed more heavily in setting maintenance, namely, the property division,¹ Linda's lack of a child support obligation and her less than credible budget proposal. The court noted that Linda did not have to invade the corpus of her property division to support herself. The assets Linda received in the property division may be the basis for a wealth accumulation program.

Linda suggests that the court did not make appropriate findings to support a six-year maintenance award. We disagree. The court considered the age of the parties' child, Linda's custodial and placement obligations, and Linda's options to increase her income through additional education or relocation (which Linda did not preclude in her testimony) once the child is an adult. The court also noted Linda's testimony that with increased training or upon relocation, she could

¹ Maintenance and property division are interdependent and cannot be awarded in a vacuum. *See Weiss v. Weiss*, 122 Wis.2d 688, 697-98, 365 N.W.2d 608, 613 (Ct. App. 1985).

expect to increase her income by \$10,000 to \$15,000 per year. Finally, the court noted that the length of the maintenance award took into account that Linda will have weathered the financial consequences of establishing her separate home.

Linda challenges the trial court's calculation of Gary's income for maintenance purposes. The court averaged the previous seven years' income to account for the fluctuations in income associated with private law practice. This was a rational basis for calculating Gary's income.

Linda argues that the court's maintenance award did not take into account the needs of the parties' child. However, the court found that Linda's budget, which included projected items for the child, was overstated. Moreover, the court did not require Linda to pay child support to Gary, which the court calculated as a \$466 per month savings to Linda. Linda has income available for discretionary spending on behalf of the child.

Linda argues that while she has taken full professional advantage of her degrees and employment opportunities in their community, she nevertheless relocated to that community when Gary obtained employment there. She suggests that this is a factor the court should have considered in setting maintenance because Linda voluntarily limited her employment opportunities. However, the court also found that neither party has been disadvantaged professionally in the marriage. Based on this record, the parties' different levels of income are not a consequence of the marriage. *See Gerth v. Gerth*, 159 Wis.2d 678, 682-83, 465 N.W.2d 507, 509-10 (Ct. App. 1990).

Linda protests the trial court's treatment of her budget. She concedes that her current budget needs are approximately equal to Gary's. However, the budget she offered at trial contained numerous items which contemplated future

needs based upon the parties' standard of living during the marriage. The trial court found that these expenses were beyond Linda's level of need and would be discretionary decisions for Linda to make in light of her postdivorce income. We do not agree that the court arbitrarily dismissed portions of Linda's budget or failed to assess her needs.

Finally, we note that in anticipation of the divorce the parties purchased separate homes and Linda's home is not encumbered by a mortgage. We note that Linda's \$34,000 in earnings, her \$15,000 in investment income and her \$12,000 in maintenance come close to a fifty/fifty split of the parties' income.

In summary, the court cited facts that justified a deviation from the presumed fifty/fifty split of income at divorce in a long-term marriage. *See Bahr*, 107 Wis.2d at 85, 318 N.W.2d at 398. We conclude that the court properly exercised its discretion in setting maintenance and met the objectives of fairness and support.

By the Court.—Judgment affirmed.

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

