

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 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. 97-3823

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE MARRIAGE OF:

GARY L. RETZLAFF,

PETITIONER-RESPONDENT,

v.

BETTY A. WINTERS F/K/A BETTY A. RETZLAFF,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: DONN H. DAHLKE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Betty Winters appeals from a post-divorce maintenance order as well as from the denial of her motion for reconsideration. She contends that the trial court erroneously exercised its discretion when it set the

amount and duration of her maintenance award. We agree. She also argues that the trial court erroneously exercised its discretion when it denied her motion for attorney's fees on appeal and for post-judgment interest on the maintenance award. We disagree. Accordingly, we affirm in part and reverse in part, and remand with instructions for the court to consider the factors outlined in this opinion.¹

BACKGROUND

Betty Winters and Gary Retzlaff were divorced in 1994, after twenty-one years of marriage. In 1978, the parties started G&G Printing, a business that they initially ran from their home. G&G Printing originally was a partnership that Gary owned equally with Gerald Hencke.² Betty, although not a partner, worked in the business as it grew, often for minimal or no pay.

At the time of divorce, Betty was working in retail for about six dollars per hour. Gary, on the other hand, was earning over \$100,000 per year from G&G Printing. When the trial court divided the marital property, it awarded the interest in G&G Printing to Gary but required him to pay Betty \$195,153 to equalize the property division. Gary initially paid \$27,000 of this amount, and was ordered to pay the remaining balance in installments of \$3,250 per month, starting August 1, 1994. Payments were to include interest of seven percent per year. The court also awarded custody of the parties' son to Gary, but did not

¹ Although we only review Judge Dahlke's order, we note that other matters were heard by Judge Storck, who decided those matters in an extensive and well-reasoned opinion. This appeal does not consider the matters heard by Judge Storck.

² There are multiple spellings of Mr. Hencke's name in the record. "Hencke" is used most consistently.

require Betty to pay child support. The court denied Betty's request for maintenance.

Betty appealed from the divorce judgment. We affirmed much of the trial court's order, but reversed and remanded on the issue of maintenance. Following remittitur, Betty moved the trial court for maintenance in the amount of \$1,000 per week, for attorney's fees and other relief. A hearing was then held. The only testimony offered at the hearing concerned the issue of attorney's fees.

The trial court rendered its decision, awarding Betty maintenance in the amount of \$762 a month for a period of ten years beginning July 1, 1994, and denying her a contribution toward her appellate attorney's fees. Betty later moved for reconsideration of this order, requesting that the trial court: (1) increase the amount of the maintenance; (2) order that the maintenance be permanent rather than limited, (3) award post-judgment interest on the maintenance award, and (4) order Gary to contribute to her appellate attorney's fees. The trial court made no decision on the motion within the statutory time period; therefore, it was deemed to have been denied. *See* § 805.17(3), STATS. Betty appeals.

DISCUSSION

1. *Maintenance*

The amount and duration of maintenance awards rests within the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of that discretion. *See LaRocque v. LaRocque*, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). An erroneous exercise of discretion occurs when "the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either

excessive or inadequate.” *DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 582-83, 445 N.W.2d 676, 679 (Ct. App. 1989). Therefore, the “court’s decision must ‘be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.’” *Trieschmann v. Trieschmann*, 178 Wis.2d 538, 541-42, 504 N.W.2d 433, 434 (Ct. App. 1993) (quoting *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981)).

In reviewing the maintenance award, we must consider whether the trial court’s application of the factors in § 767.26, STATS.,³ achieves the dual

³ Section 767.26, STATS., reads as follows:

Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.

(continued)

objectives of maintenance, which are support and fairness. *See LaRocque*, 139 Wis.2d at 33, 406 N.W.2d at 740. The support objective is to maintain the recipient spouse in accordance with the parties' needs and earning capacities. *See id.* The fairness objective is meant to ensure that the financial arrangement between the parties is fair and equitable. *See id.*

Betty first argues that the trial court unfairly reduced her maintenance award by using a distorted view of Gary's income. The court's decision stated that because Gary's income fluctuated due to his business, his income should be calculated by averaging his gross incomes for 1990, 1991 and 1992, \$93,547, \$129,037 and \$151,338 respectively. It then deducted state, federal and social security taxes from each of these amounts, added the net amounts together (\$244,628) and divided by three, for an average of \$81,542 per year. From this amount, the trial court deducted \$13,542 for child support and \$39,000 for the property settlement payments, leaving a total of \$28,680.

The court then concluded, based on the testimony at trial, that Betty could earn five dollars an hour, producing a net income of \$10,400. It added this amount to the \$28,680 it determined Gary had available, for a total of \$39,080. It

(8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(9) The contribution by one party to the education, training or increased earning power of the other.

(10) Such other factors as the court may in each individual case determine to be relevant.

then divided this amount in half and subtracted it from Betty's estimated annual income of \$10,400, for a total maintenance award of \$9,140 per year or \$762 a month.

Betty raises several arguments concerning the court's calculation. First, she argues that there was no basis for the trial court to average Gary's incomes. We agree. The trial court stated that it averaged the incomes because they fluctuated. The word "fluctuate" connotes a rising and falling trend, yet Gary's income steadily increased each of these years and continued to increase in the years that followed. We therefore find no support to justify the trial court's decision to average Gary's income.

Second, Betty argues that the court erroneously exercised its discretion when it failed to consider the tax implications of the maintenance award, which it is required to do under § 767.26(7), STATS. Upon reviewing the trial court's decision, we conclude that it took into account taxes and social security deductions when it calculated each party's net income. Betty, however, points out that the court's state tax estimates for Gary were higher than the amounts he actually paid. She also argues that the 1992 federal tax "reduction" was based to some extent on extraordinary investment and capital gains income. On remand, the court should consider the effect the maintenance award will have on both parties' taxable incomes.

Third, Betty argues that the trial court erroneously exercised its discretion when it subtracted \$39,000 a year (\$3,250 a month x 12 months) from Gary's net income to account for the property settlement payments that Gary was ordered to pay to Betty in lieu of selling his printing business. She points out that the trial court failed to consider that these annual payments were to end in 1999,

which meant that Gary's income would increase by that amount starting in the year 2000. Betty argues that the court's decision to deduct this amount from Gary's income, despite the fact that it would only be paid for half of the maintenance period, unfairly reduced her annual income. We agree.

Section 767.26(3), STATS., requires the court to consider property division when awarding maintenance, which the court did in this case. The court also recognized that Gary was not going to be making these payments for the entire maintenance period. Yet, it deducted these payments for the entire maintenance period without providing any reason for doing so. Without any reasoning, we cannot conclude that the trial court properly and thoroughly considered the fairness objective of maintenance. On remand, the trial court should consider that Gary's property division payments end in 1999.

Finally, Betty argues that the trial court unfairly deducted \$13,862 from Gary's net income for child support, despite the fact that such payments would end as of March 1998, when their son turned eighteen years old. We agree that the trial court erroneously exercised its discretion in failing to consider this fact when setting Betty's maintenance award.

In addition to challenging the amount of the maintenance award, Betty challenges the length of the maintenance period. The trial court offered two reasons for limiting the maintenance period to ten years. The first reason was that Gary suffered from a heart attack in 1989, and now has a pacemaker. The second reason was that Gary would be fifty-seven years old when the maintenance period ended and would need some time to prepare for his own financial future.

Betty concedes that Gary had a heart attack and now wears a pacemaker; however, she points out that he testified at trial that he had made a full

recovery, was in excellent health, and felt the best he had in a long time. She therefore argues that there was no evidence that Gary's health is such that he cannot be expected to work productively until normal retirement age. Finally, while Betty recognizes that Gary will be fifty-seven years old when the maintenance award ends, she argues that there is no evidence to suggest that at that age he will have any special need to prepare for his future.

In *LaRocque*, 139 Wis.2d at 41, 406 N.W.2d at 743, the supreme court held that when a trial court awards limited-term maintenance, it must consider:

[T]he ability of the recipient spouse to become self-supporting by the end of the maintenance period at a standard of living reasonably similar to that enjoyed before divorce; the ability of the payor spouse to continue the obligation of support for an indefinite time; and the need for the court to continue jurisdiction regarding maintenance.

In its decision, the court did not address the likelihood that Betty would become self-supporting at the end of the ten-year period. Its concern was directed almost exclusively toward Gary's health and well-being, despite the fact that Betty suffered from a collapsed lung in 1991, and has her own health-related problems. The court also failed to address the fact that Betty has been unable to acquire additional employment skills due to her age and education, or the fact that she is limited in her employment options because of her lung-related health problems. Overall, we conclude that because the trial court did not adequately consider several relevant factors before it limited the maintenance award to ten years, it erroneously exercised its discretion.

2. *Attorney's Fees*

Betty also argues that Gary should be required to make a contribution toward her attorney's fees on appeal. Whether to award attorney's fees is within the discretion of the trial court and is subject to reversal only upon the trial court's misuse of that discretion. *See Ably v. Ably*, 155 Wis.2d 286, 293, 455 N.W.2d 632, 635 (Ct. App. 1990). Generally, the trial court addresses three factors when awarding attorney's fees: (1) the spouse receiving the award needs the contribution, (2) the spouse ordered to pay has the ability to do so, and (3) the reasonableness of the fee. *See id.*

In its order, the trial court held as follows regarding Betty attorney's fees:

This court is going to deny any contribution for attorney's fees. This court previously denied any contribution and this was upheld by the Court of Appeals. There has not been a sufficient showing that the fees were reasonable, that [Betty] is in need of having [Gary] pay the fees, and that [Gary] has the ability to pay. This is especially true now as [Gary] has the additional financial burden of maintenance, and [Betty] has the additional income. Even before the maintenance award, [Gary] still owed his attorney and the State of Wisconsin for income taxes, as he was unable to pay these in full.

Betty points out that her motion was not for attorney's fees at the trial level but rather for fees at the appellate and post-appellate proceedings. She therefore contends that the trial court erred because it misconstrued her motion. We disagree. While the trial court stated that it had previously denied any contribution for attorney's fees, which would apply to attorney's fees at trial, the court also stated that it was going to deny *any* contribution for attorney's fees. This is sufficiently broad to apply to attorney's fees at the trial, appellate and post-

appellate levels. As a result, we reject Betty's contention that the court misconstrued her motion.

Betty further argues that there was undisputed evidence presented at the motion hearing that her attorney's fees were reasonable, that she could not afford to pay them, and that Gary had sufficient income to pay the amount owed. We are satisfied that the court considered each party's financial situation, particularly in light of the maintenance award, and determined that contribution was unwarranted. We conclude that such a finding was not an erroneous exercise of its discretion.

3. *Post-Judgment Interest*

Betty also contends that she should be awarded interest on the maintenance award, because it was applied retroactively as of July 1, 1994. She points out that the trial court did not address post-judgment interest in its decision or upon reconsideration, which she argues is an erroneous exercise of discretion. Whether to award post-judgment interest is within the trial court's discretion. *See Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 224 Wis.2d 312, 592 N.W.2d 279 (Ct. App. 1998). Therefore, on remand, the trial court should determine whether interest is warranted.⁴

⁴ In Gary's brief, his attorney refers to Betty as "vindictive," and offers examples of her conduct which he asserts proves his point. Whether this opinion as to Betty's motives is correct or not is irrelevant. Betty is entitled to seek relief in the trial court and here, subject to the limits found in § 814.025, STATS., RULE 809.25(3), STATS., and *Ondrasek v. Ondrasek*, 126 Wis.2d 469, 484, 377 N.W.2d 190, 196 (Ct. App. 1985). Name calling and attacks on character are counterproductive, and in any event, unprofessional. We expect not to see this material in future briefs.

By the Court.—Order affirmed in part; reversed in part, and cause remanded with directions.

Not recommended for publication in the official reports.

