COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2307

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

IN RE THE MARRIAGE OF:

JOHN C. KASTOR,

PETITIONER-RESPONDENT,

v.

ROBERTA K. KASTOR,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

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

EICH, J. Roberta Kastor appeals from the maintenance provisions of a judgment divorcing her from John Kastor.[1] She argues that the circuit court

[1] In their divorce, the parties stipulated to all issues save maintenance.

erroneously exercised its discretion when it: (1) "miscalculated" the amount of her maintenance award by failing to "account for the impact of … income taxes on [her] gross income as required under section 767.26 of the Wisconsin Statutes;"[2] and (2) limited the term of the award to ten years. We reject her arguments and affirm the judgment.

The facts are not in dispute. John is a nurse-anesthetist and Roberta is a registered nurse. They also were general partners (along with a third party) in a failed restaurant business, leaving them with known debts of approximately $96,000 and unknown debts estimated at trial to be approximately $300,000. Their share of the partnership debt is to be borne by them equally.

The court's findings on the question of maintenance are lengthy and detailed—they comprise two memorandum decisions, eleven and five pages in length, and an additional eleven pages of findings of fact and conclusions of law, and they discuss in considerable detail the several factors set forth in § 767.26, STATS. Insofar as the found facts are relevant to the issues on this appeal, the court found Roberta's earning capacity to be $30,000 per year, and that her reasonable monthly expenses totaled approximately $4,800, or $57,600 annually. Then, believing that setting maintenance at a sum adequate to meet the resulting shortfall of $27,600 per year would be inadequate, because it would "barely meet her needs," the court determined that she "needs [a] total income of $60,000 [per

[2] Section 767.26, STATS., sets forth several factors to be considered by the court in setting maintenance—factors such as the length of the marriage, the parties' ages, health, and earning capacities, and the nature of the property division. In particular, § 767.26(7) requires the court to consider "[t]he tax consequences to each party."

year] to live."[3] Then, after considering the various statutory factors—including John's $110,000 annual income and his monthly expenses of $3,100—the court determined that an equalization of the parties' incomes was neither necessary for Roberta's support, nor fair to John, and ordered maintenance set at $2,500 per month, or $30,000 per year.

Finally, noting that Roberta's share of the restaurant debt would be paid off in ten years, and that by that time she would also have the benefit of her share of John's "considerable pension plan/retirement account," plus her own, the court determined that she would be self-supporting and "able to live at a reasonable standard without maintenance." Accordingly, the court limited the maintenance award to ten years. Other facts will be discussed below.

As indicated, Roberta's primary challenge to the maintenance award is that it fails to take "the tax consequences" into account because the court used her gross, rather than net, income as a base, and thus failed to consider the effect of the income taxes she will be required to pay on the annual award of $30,000. In her brief, she calculates that, "after paying taxes on the $60,000," she will have a net income of only $42,036, leaving her with a "shortfall of $15,564 a year." And while she offers a record citation for the calculation, that citation led us only to a statement in her own trial brief, not to any evidence of record. She has not referred us to any place in the record where evidence of her income tax liability appears.

[3] "This level of income," said the court, "will meet her expenses, allow her to save a minimal amount of money for the future, acknowledge her contributions to the marriage, and allow her to return to her present employment."

She made the same argument to the trial court in support of her motion for reconsideration, and the court rejected it, stating that she had failed to offer into evidence any information or calculations of her net income.

> At all times throughout these proceedings [Roberta] took the position that maintenance should be awarded by the court equalizing the income of the parties.… Basically [she] proposed a mechanistic approach to maintenance: that is, a straight 50-50 division of income.
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> At trial, [Roberta] did not submit any evidence of her net income. Even this small bit of testimony would have provided the court with an avenue to explore the consequences of various maintenance levels. [Her expert witness] provided the court with tax calculations assuming an equal division of income between the parties. Those were the only income tax calculations presented to the court.

Responding to Roberta's argument that the court must first decide the issues surrounding the parties' incomes, living expenses and earning capacities before evidence can be presented on the effect of taxes, the court stated that it had not been provided with any authority for such a "bifurcated" trial process in divorce cases. After noting that it is the parties' responsibility to provide sufficient evidence "*at trial*" to carry the burden of proof assigned to them, the court rejected Roberta's claim that it had "miscalculated" maintenance:

> [T]he court did not make a mathematical error in its calculation. The court did not overlook the tax consequences …. Instead, the court analyzed the statutory factors and considered the need and fairness objectives of maintenance. The court's decision is not inconsistent with the *evidence presented at trial*. R[oberta] did not even present evidence to establish her net income. Even this small amount of evidence would have assisted the court in its calculations. R[oberta] put all of her eggs in the basket of a 50-50 division of income. 50-50 is only the starting point in the analysis. This is where the court began its analysis, but the analysis ended elsewhere. R[oberta] lost the gamble. The time to present tax calculations and

> scenarios was at trial. This was not done. No request to bifurcate the maintenance issues was made …. No statutory authority has been presented to the court to provide for a bifurcated maintenance hearing. Both parties had an equal opportunity to make their record at trial…. The parties must live with the consequences of how they present evidence and what evidence they present.

In its decision, the court had this to say about the tax consequences to the parties:

> At it[]s simplest level, maintenance will be a [deduction] for John reducing his taxable income and maintenance will be taxable income to [Roberta] increasing her taxable income. Due to the tax losses that the [restaurant] investment presents, [Roberta] will experience some reduction of taxable income.
>
> All tax calculations presented by [Roberta's expert] were made assuming an equal division of income between the parties. [The witness] did not state actual tax consequences in dollars. [Roberta]'s post-trial brief presents calculations at different income levels but only at an equal division of income. The court has considered this information, but does not fully rely upon it as other calculations at other rates would have also been helpful to the court.

As the trial court noted in its decision denying Roberta's reconsideration motion, the situation is analogous to that in ***Fowler v. Fowler***, 158 Wis.2d 508, 518-19, 463 N.W.2d 370, 373 (Ct. App. 1990), where we held that where the parties fail to "present[] the … court with evidence from which [it] could determine the tax consequences of [a] property division," the court does not erroneously exercise its discretion in failing to consider them.

> The trial court is not an advocate; it is not up to the court to provide the evidence. Rather, it is the court's responsibility to decide on the basis of the evidence. If the parties do not present the trial court with any evidence or other reliable data as to the tax consequences of the court's decision, the court does not [erroneously exercise] its discretion in failing to take those consequences into consideration.

Roberta argues that there was evidence in the record on the tax consequences of maintenance—specifically, the parties' tax returns for the prior three years, their current W-2 forms, and their monthly budgets. According to Roberta, these documents provide "the tools which the circuit court needed to analyze its award and apply the tax laws … prior to issuing its … [d]ecision." Given the state of the record, however, we do not see how the court could do more than it did. Setting maintenance is a highly discretionary function. ***Grace v. Grace***, 195 Wis.2d 153, 157, 536 N.W.2d 109, 110 (Ct. App. 1995). "We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "[W]here the record shows that the trial court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citation omitted). Indeed, "we generally look for reasons to sustain discretionary decisions." ***Id.*** at 591, 478 N.W.2d at 39.

We have already noted the trial court's lengthy discussion of the statutory and common-law factors applicable to the maintenance analysis in its memorandum decision and formal findings and conclusions. Roberta would add another requirement to the trial court's decisional process: that it undertake an accountant's task by figuring her income tax liability in future years based solely on her W-2 forms, and consideration of state and federal loss carry-back and carry-forward statutes. We decline to do so. As we discuss in more detail below,

Roberta's own accountant testified at the hearing on her motion for reconsideration that, due to the complicated nature of these statutes, calculating her tax liability for future years would involve a "very detailed computation." The court's analysis of maintenance is as thoughtful as it is long. It is based on the record put before it by the parties, considered in the light of the applicable law; and Roberta simply has not persuaded us that its decision was anything other than a sustainable exercise of discretion.

Roberta disagrees. She says she offered further testimony in connection with her post-judgment reconsideration motion indicating that the court's maintenance award did not correctly reflect her after-tax income, and was thus unfair. At the hearing on Roberta's motion, she attempted to supplement the trial record in this respect by re-calling her trial expert, George Kiskunas, to provide additional evidence on the tax consequences of the couple's investment loss. John's attorney objected, stating that she was simply attempting to re-try the case after judgment had been entered, and the trial court expressed similar concerns. The court allowed the testimony, largely, it appears, for the convenience of the parties, again expressing doubt that such testimony was proper on a post-judgment reconsideration motion.

Kiskunas, who even at the motion hearing could do no more than estimate the extent of the Kastors' future partnership liabilities, stated that they could be as high as $460,000; and he estimated that the tax deductions arising from such a loss would completely erase any tax liability for the couple on their 1997 state and federal returns. In that year, he said, "all of their income taxes will be refundable." He also stated that while their incomes would be taxable in 1998 and succeeding years, both John and Roberta would also have "carry-back" deductions for federal tax purposes, and "carry-forward" deductions on their

Wisconsin returns. In so testifying, Kiskunas acknowledged that calculating the actual deductions to which they may be entitled would involve a "very detailed computation," and that the true extent of the Kastors' losses were still unknown. And while he did state his opinion that after 1997—at least in years in which she would not receive substantial investment-loss tax deductions—Roberta would experience a "shortfall" in maintenance in that she would not net out the $60,000 the court said she needed—he also acknowledged that even his post-trial $460,000 estimate represented the debt of the entire partnership, which included not only the Kastors, but a third party; and he assumed—without any reference to facts of record regarding that third party—that the Kastors would have to assume the entire debt themselves.

It thus appears that, even considering this "add-on" testimony, Roberta would not have any income tax liability for 1997, and would likely be able to take advantage of the carry-back and carry-forward provisions of the federal and state tax codes to further reduce her tax liability in succeeding years. This testimony, however, was no less speculative than Kiskuna's testimony at trial with respect to the tax consequences to Roberta resulting from the court's maintenance award, for not only was the extent of the loss unascertainable at that point, but it assumed, without record evidence on the point, that they would also have to assume their one-third partner's share of the loss.

Beyond that, the trial court, in its decision denying Roberta's reconsideration motion, cited ***Estate of O'Neill,*** 186 Wis.2d 229, 519 N.W.2d 750 (Ct. App. 1994), for the proposition that a motion for reconsideration is not a

proper vehicle for offering new evidence or arguments.[4] In ***O'Neill***, we considered whether a party who had failed to appear at a probate hearing could move for reconsideration of the order construing his uncle's will. Concluding that the trial court's decision granting the motion was improper, we contrasted motions to reopen under § 806.07, STATS., and motions for reconsideration, concluding that the latter motion

> assumes that the question has previously been considered. If a party has not … presented arguments in the litigation, the court has not considered that party's arguments in the first instance.
>
> … Absent [a showing of grounds for relief under § 806.07], Daniel has waived his opportunity to present his argument …. To hold otherwise, would allow a litigant to resurrect an issue laid to rest by virtue of waiver, abandonment, stipulation or concession under the guise of reconsideration. Our conclusion provides finality as to orders or judgments rendered by the court and promotes judicial economy by requiring argument to be presented at the time scheduled in the litigation except in extreme circumstance. Any injustice this rule affords litigants is justified by these public policy concerns as well as the knowledge that the litigants affected brought about the situation through their own [actions or] inaction.

Id. at 234-35, 519 N.W.2d at 752-53.

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[4] The court stated:

> Now [Roberta] seeks to present new and different tax calculations after the evidence is closed, basically bringing forth argument that this court did not consider or entertain in the first instance at trial. To allow the presentation of new evidence at this date allows [her] the opportunity "to resurrect an issue laid to rest" (quoting from ***Estate of O'Neill,*** 186 Wis.2d 229, 519 N.W.2d 750 (Ct. App. 1994)).… If no evidence presenting various tax calculations and scenarios is put in the record at trial, the court cannot consider it post-trial—the court cannot consider what is not there. A party cannot present new evidence that was available at trial and expect relief.

We think similar considerations apply where, as here, a dissatisfied party, post-trial, attempts to present new evidence in the guise of a request for reconsideration of the trial court's decision. Even so, as we have indicated above, the testimony presented by Roberta at the reconsideration hearing was only slightly less speculative than that presented at trial. We conclude, therefore, that the trial court did not erroneously exercise its discretion in setting the amount of maintenance, or in denying Roberta's motion to reconsider that decision.

Finally, Roberta argues that the trial court erred in limiting maintenance to ten years. She claims there is no evidence supporting that determination.

The term of maintenance, like the amount and the decision whether to award maintenance in the first place, is committed to the sound discretion of the trial court. ***Wikel v. Wikel***, 168 Wis.2d 278, 282, 483 N.W.2d 292, 293 (Ct. App. 1992). In its memorandum decision, the circuit court stated as follows in setting the term of Roberta's maintenance at ten years:

> [Roberta] has amortized her [share of the partnership debt] over ten years.[5] This is reasonable although no calculation can be made with certainty At that time both John and [Roberta] will be 65 or older. Presumably [Roberta] will have retired the … debt. [Roberta] will be able to tap into her considerable pension plan/retirement account received in the property division and those she subsequently accumulates through her efforts. Her financial needs will be reduced.
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> This court believes [Roberta] will be able to be self-supporting in ten years. Once the [restaurant] debt is retired, Kay will be able to live at a reasonable standard

[5] Roberta's budget, as approved and utilized by the trial court in setting maintenance, included a monthly payment she testified would enable her to pay off her share of the debt in ten years.

> without maintenance. She will have considerable retirement benefits Social Security to live off [of]. In ten years presumably John will be retired and he will not be able to pay maintenance for an indefinite period of time. [citing ***LaRocque v. LaRocque,*** 139 Wis.2d 23, 406 N.W.2d 736 (1987).] Further, John's income will be reduced to his retirement benefits. It would be unfair to expect John to pay maintenance for an indefinite period of time as [Roberta] will be self-supporting, in this court's view, in ten years and John will be retired and have reduced income. Maintenance is not meant to be a permanent annuity. [Citing ***Hefty v. Hefty,*** 172 Wis.2d 124, 493 N.W.2d 33 (1992)].

In ***LaRocque v. LaRocque***, 139 Wis.2d 23, 32-33, 406 N.W.2d 736, 740 (1987), the supreme court said that maintenance is designed to further two objectives: to support the recipient according to the parties' needs and earning capacities and to insure a fair and equitable financial arrangement in the individual case. To that end, the circuit court must consider the recipient's spouse's ability to become self-supporting by the end of the maintenance period at a standard of living reasonably similar to that enjoyed before the divorce, and the payor spouse's ability to continue supporting the other spouse for an indefinite period of time. ***Id***. at 41, 406 N.W.2d at 743. The court must, of course, take care to be "realistic" about the recipient spouse's future earning capacity so that it will not "prematurely relieve a payor spouse of a support obligation lest a needy former spouse become the obligation of the taxpayers." ***Id***.

Citing these principles, Roberta argues very generally that the basis for the trial court's decision was solely its "assumption" concerning retirement of Roberta's share of the restaurant debt in ten years, and that it "failed even to analyze the [statutory] factors" applicable to maintenance decisions. She does not explain the argument further, and our response need be no more lengthy or detailed. We have already referred to the trial court's comprehensive findings on

all of the statutory factors affecting maintenance. We have also quoted from the court's memorandum decision on the question of the term of Roberta's maintenance—including its references to ***LaRocque***. There is no question that Roberta's budget included a monthly payment believed to be adequate to retire the restaurant debt in ten years—at least insofar as either she or John have put in evidence as to the amount of the debt—and she states in her brief that that debt was the primary reason underlying her need for maintenance. Nor is there any question that she received a significant interest—approaching $350,000—in John's retirement fund, or that, as a full-time registered nurse, she will have her own retirement account in place when she reaches retirement age. We see no misuse of the circuit court's discretion in the portion of its decision limiting Roberta's maintenance to ten years.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.