

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-2822

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

LESLIE A. SIEBERT,

PETITIONER-RESPONDENT,

V.

JANET E. SIEBERT, N/K/A JANET E. JENKINS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County:
MARK A. MANGERSON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Janet Jenkins appeals her divorce judgment, challenging the trial court's denial of maintenance and contribution to her attorney fees. She contends that the trial court failed to consider proper factors, erroneously imputed to her an earning capacity of \$17,000 annually, and erroneously determined her former husband's income. She further contends that

the court erroneously denied her request for a contribution to her attorney fees. Because the record reflects a rational basis for the trial court's discretionary decisions, we affirm the judgment.

Janet and Leslie Siebert were married in 1985 and have two children, ages seven and twelve at the time of the divorce. During the marriage, Janet assumed the household and child rearing responsibilities. She had occasional part-time employment and, in 1994, completed a two-year accounting degree with honors. She ultimately obtained employment as a bookkeeper and earned \$7 an hour for fifteen hours a week. She left this employment after seven months due to stress. She later started working in a friend's karaoke business earning approximately \$300 per month.

Janet submitted a financial disclosure statement claiming expenses of \$2,333 per month for herself and the two children. Janet testified that for most of her life she has suffered poor emotional health and currently takes three medications and participates in counseling every other week. Janet testified that she suffers from depression and alcoholism, but has not had a drink in eighteen months.

Leslie has been employed throughout the marriage and recently entered an apprenticeship program at the paper company where he works. The year before the divorce, he earned \$45,000. The apprenticeship program was lower paying, but he expects to receive periodic raises that will bring his pay scale after four years to \$19 per hour. Leslie testified that he works an average of forty-three or forty-four hours a week. He sometimes earns overtime pay and has taken pay in lieu of vacation. He estimated that \$40,000 per year was an accurate estimate of his current salary. He estimated that after taxes and child support

payments, his net monthly income would be \$1,374 per month. He anticipated monthly living expenses of \$1,310.

The trial court ordered the children's primary placement to be with Janet and that Leslie pay 25% of his gross income as child support, plus a one time \$1,200 payment within ninety days to assist Janet in obtaining a car. For property division, both parties were awarded the household items and personal effects in their possession. Leslie's retirement account was to be shared by virtue of a qualified domestic relations order. Each party was awarded the responsibility of significant debts: Janet's debts totaled approximately \$9,500 and Leslie's approximately \$15,000.

The trial court denied Janet maintenance. In doing so, it first found that the length of the marriage was not a significant factor because, during the marriage, Janet had obtained a two-year associate degree with honors in accounting. As a result, the court concluded that she suffered no detriment in her absence from the job market due to child care and household responsibilities.

The court next found that both were in good physical health. It noted Janet's claims of anxiety, depression, that she is under the care of a physician and social worker, and that she is taking at least three medications. It concluded, however, that the proofs fell short of demonstrating that her emotional problems prevented her from gainful employment. The court attributed an earning capacity of at least \$17,000 per year to Janet based upon expert testimony that a graduate with her degree generally earns that amount.

The court found that Leslie's present income was \$40,000 per year considering both his lowered salary and improved earning potential. It considered that Leslie assumed substantially more debt as a result of the property division.

The court noted that Leslie had tax consequences on the \$10,000 per year he pays as child support and that Janet does not. The court also found that Janet had in the past made unwise financial decisions, such as going on a shopping trip with a lump sum child support arrearage she had received, rather than saving it.

The court further considered the size of Janet's household.¹ Although she has children from a prior marriage for whom she is receiving support, the court acknowledged that it had "to be careful ... using that factor" because Leslie had no obligation to support those children and the other child support she receives is designated to a child from her former marriage. The court concluded that taking into consideration her earning capacity and the child support figure, her income would be roughly equal to Leslie's post-child support figure and that would be fair.

The determination of maintenance issues requires the exercise of judicial discretion. *See Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). It is well established that a trial court, in the exercise of its discretion, may reasonably reach a conclusion that another court would not. *Liddle v. Liddle*, 140 Wis.2d 132, 156, 410 N.W.2d 196, 206 (Ct. App. 1987). As long as the trial court reaches a reasoned decision based on the application of the correct legal standards to the record facts, the trial court's exercise of discretion will be affirmed on appeal. *Smith v. Smith*, 177 Wis.2d 128, 133, 501 N.W.2d 850, 852 (Ct. App. 1993). Underlying a discretionary decision may be questions of fact reviewed

¹ Janet testified that she has three children from a previous marriage who live with her. She receives child support of \$400 per month for one of them. Janet also has a roommate who pays her \$200 per month. Janet testified that her budget reflected expenses for only herself and the two children she had during this marriage to Leslie.

under a clearly erroneous standard. Section 805.17(2), STATS., see *In re Estate of Burgess*, 214 Wis.2d 180, 186, 571 N.W.2d 432, 436 (1997).

In deciding whether to award maintenance, the trial court must consider the factors in § 767.26, STATS.² *LaRocque v. LaRocque*, 139 Wis.2d 23, 40, 406 N.W.2d 736, 743 (1987). The trial court misuses its discretion when it fails to apply the applicable statutory factors or fails to consider the dual objectives of support and fairness. *Forester v. Forester*, 174 Wis.2d 78, 84-85, 496 N.W.2d 771, 773-74 (Ct. App. 1993). On review, the trial court's statement of reasons underlying its decisions are an important consideration. *McCleary v.*

² Section 767.26 states that 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.
- (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.

State, 49 Wis.2d 263, 280-81, 182 N.W.2d 512, 521 (1971). When the circuit court sets forth inadequate reasons or no reasons for its decision, however, this court may engage in its own examination of the record to determine whether the circuit court exercised its discretion and whether the facts provide support for the circuit court's decision. *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982). With these standards in mind, we turn to Janet's contentions of error.

Janet contends that the trial court misused its discretion because it misapplied § 767.26(2) and (5), STATS., that pertain to her emotional health, and the "earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market [and] custodial responsibilities for children" She argues that her severe depression and absence from the job market interferes with her earning potential. She claims that the court failed to give appropriate consideration to her testimony that she is unable to remember her training and maintains that the court is prejudiced because it concluded that her current situation is by choice.

First, we address Janet's contention that the trial court erroneously found that her depression did not prevent her from gainful employment. This issue is one of fact, and we are bound to sustain the court's factual findings unless they are clearly erroneous. Section 805.17(2), STATS. When the record shows that the evidence presented could have supported more than one inference, the reviewing court must accept the conclusion drawn by the fact finder. *See In re C.A.S.*, 185 Wis.2d 468, 489, 518 N.W.2d 285, 292 (Ct. App. 1994).

Here, the trial court rejected Janet's contention that her condition precluded gainful employment. The court noted that there was no absolute

requirement that an expert witness must testify, but nonetheless found that her proofs fell short of supporting her contention:

But in this case I am finding the mere assertion of the respondent as to her emotional health and it rendering her incapable of earning a substantial wage to be unconvincing. It is insufficient evidence in my estimation. We have no proof of the intensity of any emotional problems at this time. We have nobody telling us that she is disabled for all employment purposes.

We have her complaint that she feels like she is in a small space, feels claustrophobic in an office, she feels anxiety. Well, on the other hand, she has the nerves to stand up before a crowd of strangers and sing. ...

So, I really question whether she is debilitated by what she views as impediments in her emotional health. We also have no specific diagnoses of record.

... We have no prognosis.

... I simply don't have the proofs to take this case to the final finding that she can't be employed full time at least at a minimum wage job.

It is the trier of fact, not the appellate court, that has the opportunity to hear and observe testimony. Thus, when a finding of fact is premised on the court's assessment of credibility, we must give due regard to the trial court's opportunity to make this assessment. *See Jacquart v. Jacquart*, 183 Wis.2d 372, 386, 515 N.W.2d 539, 544 (Ct. App. 1994). Based on the record before us, we cannot conclude that the trial court erred by ruling on the basis of its credibility assessment that it disbelieved Janet's claims of disability due to emotional illness.

Next, we address Janet's contention that the trial court erroneously attributed an annual earning capacity of \$17,000 to her. The court found that Janet's alleged claustrophobia should not disable her from all types of employment in fields related to her degree, because bank tellers and loan officers do not work

in confined spaces. The trial court relied on the testimony of Leslie's expert witness, Michael Guckenburg, a vocational rehabilitation consultant.

Guckenburg testified that the median hourly wage for graduates with associate degrees in accounting is \$8.50, which annually amounts to \$17,680. He testified that Janet's transcripts indicate that she was an honors graduate, showing motivation and intelligence, and thereby she would be an attractive applicant for a receptionist bookkeeper position. He testified that there are four employers who currently have job openings posted for someone with Janet's qualifications. He testified that if Janet made a reasonable effort, she would find a job in her field. He acknowledged on cross-examination that he did not know Janet, was unfamiliar with her work history, and was surprised that although she had made several applications, she was not offered one of the jobs she applied for.

The trial court may consider earning capacity rather than actual earning when determining a support or maintenance obligation if it finds a spouse's job choice voluntary and unreasonable. *Sellers v. Sellers*, 201 Wis.2d 578, 587, 549 N.W.2d 481, 484 (1996). To consider earning capacity rather than actual earnings, there is no requirement that the court must find that the spouse deliberately reduced his or her earnings to avoid support obligations or to gain advantage in the divorce action. *Id.* at 587, 549 N.W.2d at 484-85. "It is sufficient that the court finds the employment decision both voluntary and unreasonable under the circumstances." *Id.* at 587, 549 N.W.2d at 485. The employment decision may be unreasonable even though it is well intended. *Id.*

The issue whether Janet's job choice in the karaoke business is unreasonable presents a question of law. *See id.* "However, we will give

appropriate deference to the trial court's legal conclusion because it is so intertwined with factual findings supporting that conclusion." *Id.*

The trial court stated: "But I heard no business plan. I heard no partnership agreement. ... If they get the business, they'll get some money." The record supports the court's determinations. Janet's testimony regarding her karaoke employment describes an uncertain business venture. "[W]e recognize that a spouse to some extent has the right to choose a career path that may realize less annual income than other career paths that may be available." *Id.* at 586, 549 N.W.2d at 484. There is, however, "some limit to the degree of underemployment one may elect to choose when the former spouse is being presented the bill for the financial consequences of the choice." *Id.* Under the circumstances presented, the trial court was entitled to conclude that Janet's career decision unreasonably diminished the income available to support herself. As a result, the court could use earning capacity rather than actual earnings in making its maintenance decision.

Janet argues that the trial court should not have relied upon Guckenburg's testimony that she is capable of earning \$17,000 per year. She further argues that the trial court erroneously found Leslie's income to be \$40,000 rather than \$45,000 annually. This argument essentially asks us to re-assess the weight and credibility of the witnesses. This is not the role of the appellate court, and therefore the argument must be rejected. Section 805.17(2), STATS.; *see also Chapman v. State*, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975) (The trial court's credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts.).

Next, Janet argues that even assuming an earning capacity of \$17,000 per year, the trial court failed to give appropriate consideration to the support and fairness objectives. She contends that the trial court inadequately considered her needs. In determining maintenance, trial courts have traditionally considered the parties' needs as well as their income producing ability. *Bahr v. Bahr*, 107 Wis.2d 72, 82, 318 N.W.2d 391, 397 (1982). Here, the trial court did not make any specific findings with respect to the parties' needs.

The record indicates that Leslie's post-tax and post-child support income of \$1,374 is sufficient to meet his monthly budget of \$1,310. Janet testified that monthly expenses for herself and her two children of this marriage were \$2,333. The trial court, in finding that she had a household of four, apparently took into consideration that her roommate's room and board was included in this budget. The court attributed an earning capacity of \$17,000 per year, which equals \$1,416 per month. The record shows that Janet will receive a \$200 monthly contribution to expenses from her roommate, and \$833 per month child support from Leslie. These sums total \$2,449. The record supports a finding that Janet's gross income is sufficient to meet the budgeted needs for herself and her children.

Janet suggests that while this approach considers Leslie's tax consequences, it fails to give sufficient weight to her tax consequences. It is not a misuse of discretion to use the payor spouse's after-tax earnings to determine maintenance. See *Enders v. Enders*, 147 Wis.2d 138, 145, 432 N.W.2d 638, 641 (Ct. App. 1988). Janet's argument fails to identify precisely what her tax consequences are. We decline to speculate as to their effect and consequently reject her argument. See *Shannon v. Shannon*, 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1989).

Janet further contends that the trial court's approach unfairly considers Leslie's child support obligations, yet fails to consider that all of the child support and a portion of her earning capacity would be used to support her children. We are not persuaded. In determining whether Janet has sufficient income to meet her needs, this approach considers not only the child support as income, but also the children's expenses as reflected in her submitted budget. The trial court's approach has a rational basis and, therefore, it reflects an appropriate exercise of discretion.

We conclude that the trial court reasonably exercised its discretion by denying maintenance. The trial court considered the length of the marriage, the parties' education, employment history and skills, their health, and the property division. It found that Janet had not sacrificed her earning capacity during the marriage. See *Gerth v. Gerth*, 159 Wis.2d 678, 683, 465 N.W.2d 507, 510 (Ct. App. 1990). The record reasonably supports the trial court's decision that in consideration of the factors in § 767.26, STATS., an award of maintenance is not required. As a result, we do not overturn it on appeal.

Next, Janet argues that the trial court erroneously denied her a contribution to her attorney fees. An award of contribution to attorney fees is addressed to trial court discretion. *Hirmer v. Hirmer*, 10 Wis.2d 365, 375, 103 N.W.2d 55, 61 (1960). The court must consider the parties' needs and ability to pay. *Hirth v. Hirth*, 48 Wis.2d 491, 497, 180 N.W.2d 601, 604 (1970). Here, the trial court considered the parties' respective financial situation and concluded that Leslie was in no better position to pay Janet's attorney fees than Janet was. The record reflects that Leslie will be responsible for approximately \$5,000 more indebtedness than Janet. The record supports the trial court's exercise of discretion.

By the Court.—Judgment affirmed.

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

