

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 8, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 98-3016

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

BETH E. HAMMOND,

PETITIONER-RESPONDENT,

v.

DENNIS W. HAMMOND,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Dennis W. Hammond appeals from a judgment of divorce awarding his former wife, Beth E. Hammond, maintenance of \$778 per month. Mr. Hammond argues: (1) that the evidence does not support the trial

court's underlying factual finding that it is unlikely that Mrs. Hammond will become self-supporting at a standard of living reasonably comparable to that which she enjoyed during the marriage; (2) that the amount of maintenance awarded is unfair and results in unreasonable hardship to him; and (3) that the trial court erred in basing the maintenance award on the standard of living that the parties enjoyed during the marriage because the standard of living was inflated by gifts from relatives. We affirm.

BACKGROUND

¶2 Dennis and Beth Hammond married in June of 1975, and subsequently had three children together. Prior to the marriage, both Mr. and Mrs. Hammond worked at Wilke Dairy. Mrs. Hammond did clerical work for Wilke Dairy, including typing, bookkeeping, and receptionist duties. Upon the birth of their first child in 1977, however, Mrs. Hammond quit her job to stay home and care for the child and home.

¶3 Thereafter, with the exception of running an unprofitable concession stand for four summers, Mrs. Hammond did not return to the workforce until 1995, when she and Mr. Hammond separated. The three children continued to live with Mrs. Hammond after the separation, and she began a job at Larry's Market, where she worked at the delicatessen counter, prepared food, and did some catering. She earned \$7 per hour at Larry's Market, and worked approximately 35 hours per week, resulting in a gross income of approximately \$1,053 per month. She occasionally worked additional hours, but attempted to be available to care for the children during the hours when they were out of school.

¶4 During the separation, Mr. Hammond worked as a sales-representative supervisor at Wilke Dairy, and worked a second job as a cashier at a convenience store. He earned a gross income of approximately \$3,181 per month.

¶5 Mrs. Hammond filed a petition for divorce in February of 1996. The parties eventually resolved all issues related to the divorce, except for the issue of maintenance.¹ After an evidentiary hearing, the trial court found that “[g]iven [Mrs. Hammond’s] age, health, education and training, it is unlikely that she will become self-supporting at a standard of living reasonably comparable to that which she enjoyed during the marriage,” and entered the following order for maintenance:

[Mr. Hammond] shall pay to [Mrs. Hammond] the amount of \$778 per month as maintenance, commencing forthwith. This shall continue during [Mrs. Hammond’s] lifetime, but terminate on the death of either party or the remarriage of [Mrs. Hammond], and should be reviewed upon the minor child of the parties’ reaching the age of 18, or 19 if he in fact continues a course of study intended to obtain a high school diploma.

Maintenance is arrived at as follows: Gross income of [Mrs. Hammond] at \$1,053 per month and that of [Mr. Hammond] at \$3,181 per month, or a total of \$4,234. Dividing that figure by two, one obtains an average of \$2,117. Subtracting the sum of \$1,053 from \$2,117 would result in an exactly equal requirement of \$1064 payment from [Mr. Hammond] to [Mrs. Hammond]. Since [Mr. Hammond] is to pay child support in the sum of \$286 (9 percent) that sum is deducted from the \$1,064.

¹ At the time of the divorce, only one of the parties’ three children was a minor. The parties agreed to joint legal custody of the minor child and shared physical placement. They further agreed that Mr. Hammond was to pay child support of 9 percent of his gross income, or \$286 per month.

DISCUSSION

¶6 Mr. Hammond argues that the evidence does not support the trial court's underlying factual finding that it is unlikely that Mrs. Hammond will become self-supporting at a standard of living reasonably comparable to that which she enjoyed during the marriage. He asserts that Mrs. Hammond is able to earn more than she does at her present employment, and that she is therefore not entitled to maintenance because she chose to remain in her present employment.

¶7 WISCONSIN STAT. § 767.26 (1997–98) provides:

Maintenance payments. 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.
- (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.

The factors enumerated in section 767.26 are “designed to further two distinct but related objectives: to support the recipient spouse in accordance with the needs and earning capacities of the parties and to ensure a fair and equitable financial arrangement between the parties in each individual case.” *Bisone v. Bisone*, 165 Wis. 2d 114, 119–120, 477 N.W.2d 59, 60–61 (Ct. App. 1991). “The support objective of maintenance is [addressed] when the trial court considers the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal, if the goal is feasible.” *Kennedy v. Kennedy*, 145 Wis. 2d 219, 223, 426 N.W.2d 85, 87 (Ct. App. 1988). “[T]he [trial] court must take particular care to be realistic about the recipient spouse’s future earning capacity. The [trial] court must not prematurely relieve a payor spouse of a support obligation lest a needy former spouse become the obligation of the taxpayers.” *LaRocque v. LaRocque*, 139 Wis. 2d 23, 41, 406 N.W.2d 736, 743 (1987).

¶8 When a couple has been married for many years, it is reasonable to consider an equal division of total income as a starting point in determining maintenance. *See id.*, 139 Wis. 2d at 39, 406 N.W.2d at 742. This division may be adjusted after a proper consideration of the factors enumerated in WIS. STAT. § 767.26. *See id.* Maintenance determinations are within the sound discretion of

the trial court, and will not be disturbed unless the trial court erroneously exercised its discretion. *See id.*, 139 Wis. 2d at 27, 406 N.W.2d at 737.

¶9 The record reveals that the trial court’s finding of fact regarding Mrs. Hammond’s ability to become self-supporting is supported by the evidence. Mrs. Hammond was 49 years old at the time of the divorce. She had completed high school and one year of general education coursework at college, but had been absent from the workforce for approximately eighteen years before she took a job at Larry’s Market. Her previous work experience was limited to clerical work and work in the food industry, and a vocational expert testified that Mrs. Hammond’s job at Larry’s Market was appropriate for someone with her educational and employment background. Further, the trial court found, and Mr. Hammond does not challenge the finding, that Mrs. Hammond “suffers from sciatic, low back problems and migraine headaches which limit her employment.” Mrs. Hammond earned a gross monthly income of \$1,053, and a net monthly income of about \$800, at Larry’s Market, but had monthly expenses of over \$2,100. This evidence supports the trial court’s finding that “[g]iven [Mrs. Hammond’s] age, health, education and training, it is unlikely that she will become self-supporting at a standard of living reasonably comparable to that which she enjoyed during the marriage.” We reject Mr. Hammond’s speculative assertion that Mrs. Hammond could make more money at a different job.

¶10 The trial court properly considered the factors enumerated in WIS. STAT. § 767.26 in awarding maintenance to Mrs. Hammond. As noted, the trial court considered Mrs. Hammond’s age, health, education and training in determining that she was earning an income consistent with her earning capacity and in concluding that she would not be able to become self-supporting at a standard of living comparable to that enjoyed during the marriage. The trial court

also noted that the parties had been married for over 20 years, and that the maintenance payments would constitute income for Mrs. Hammond and a tax deduction for Mr. Hammond. Additionally, the trial court's award of maintenance is supported by Mrs. Hammond's testimony that her ability to work is limited by her obligations to her children. *See* WIS. STAT. § 767.26(5) (1997–98) (trial court should consider “custodial responsibilities for children” in determining maintenance); *Hartung v. Hartung*, 102 Wis. 2d 58, 63, 306 N.W.2d 16, 19 (1981) (“[A]n important consideration of maintenance is that custodial mothers should be free to give primary attention to their maternal responsibilities, and a corollary duty of divorced husbands is that they support the family in the manner to which the family is accustomed according to their ability to pay.”) (brackets in *Hartung*).

¶11 Mr. Hammond argues that the amount of maintenance awarded is unfair and results in an unreasonable hardship to him. He asserts that his expenses exceed his available resources after he pays the ordered maintenance. He further asserts that the evidence does not establish that the amount is necessary to meet Mrs. Hammond's needs, rather than the needs of their children, who all live with Mrs. Hammond.

¶12 Mrs. Hammond filed a financial disclosure statement establishing her monthly expenses. After the payment of maintenance and child support to Mrs. Hammond, neither Mr. nor Mrs. Hammond has enough available income to meet their monthly expenses. In light of the fact that the expenses of each of the parties exceed one half of the total disposable income available to the parties, the trial court did not err in awarding Mrs. Hammond an amount of maintenance that would place the parties in approximately the same financial position. *See LaRocque*, 139 Wis. 2d at 35, 406 N.W.2d at 740 (“The increased expenses of

separate households may prevent the parties from continuing at their pre-divorce standard of living, but both parties may have to bear the sacrifices that the cost of an additional household imposes.”); *Bisone*, 165 Wis. 2d at 120, 477 N.W.2d at 61 (“One of the unfortunate realities of divorce for many parties is that their economic status cannot be maintained at precisely the same level as before the divorce.”). Under these circumstances, we conclude that although the financial statements filed by the parties did not separate their personal expenses from the total household expenses, the maintenance award does not unjustly impose the children’s expenses upon Mr. Hammond.

¶13 Moreover, the trial court subtracted Mr. Hammond’s child support obligation from the amount he was to pay for maintenance; thus, insofar as Mrs. Hammond’s expenses may have included expenses relating to the minor child, Mr. Hammond received credit for his separate payment of those expenses. Additionally, we reject Mr. Hammond’s implicit assertion that Mrs. Hammond’s monthly expenses must be based solely on her own personal needs and cannot include the needs of the children who live with her. Indeed, in *LaRocque*, the Wisconsin Supreme Court held that the trial court took “too narrow a view of Mrs. LaRocque’s needs,” when it “did not consider the expenses Mrs. LaRocque incurred by having adult children live with her,” but “credited Mr. LaRocque’s [expected] payment of college expenses for adult children.” *Id.*, 139 Wis. 2d at 37, 406 N.W.2d at 741.

¶14 Finally, Mr. Hammond argues that the trial court erred in basing the maintenance award on the standard of living enjoyed during the marriage because the standard of living was inflated by gifts from relatives. As noted, Mrs. Hammond’s monthly expenses exceed her total disposable monthly income, including the maintenance and child support payments. Under these

circumstances, an allegedly inflated standard of living is not obtained by the maintenance award. We therefore reject Mr. Hammond's claim of error.

By the Court.—Judgment affirmed.

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

