COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3232

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

IN RE THE MARRIAGE OF:

JANE COLLIS GEERS,

PETITIONER-APPELLANT,

V.

JOHN F. GEERS,

RESPONDENT-RESPONDENT.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. Jane Collis Geers appeals from a judgment for divorce. She claims the trial court erroneously exercised its discretion when it: (1) ordered her to pay her ex-husband, John F. Geers, maintenance for seven

years; (2) employed the shared-time payer provisions in determining the child support that John must pay; and (3) failed to include a $600 per month value associated with John's company car in determining his gross income for child support purposes. Because the trial court did not erroneously exercise its discretion in ruling on any of these issues, we affirm.

I. BACKGROUND

¶2 Jane and John were married on August 11, 1979. They had four children together: Jeffrey, born 11/16/80; Sarah, born 6/2/83; Jason, born 8/27/86; and Alexander, born 5/24/90. At the time of the divorce, Jane worked as an ophthalmologist, earning approximately $175,000 annually, and John worked as president of his company, earning approximately $100,000, annually. The parties stipulated to child custody and property division. The issues of maintenance and child support were tried to the court.

¶3 The trial court determined that Jane should pay $2,304 per month maintenance to John for seven years (until he turns 62 and is eligible for early retirement benefits), and John should pay $1,955 per month for child support. Jane appeals.

II. DISCUSSION

A. Maintenance.

¶4 Jane claims that the trial court erroneously exercised its discretion when it ordered her to pay John maintenance. She asserts that the trial court committed the error by "misapplying the statutory factors regarding health, earning capacity and self-support." She claims that although health is a consideration, it should only influence a maintenance award if the poor health

affects one's ability to earn, and that the trial court should not have accepted John's testimony alone to conclude that he was in poor health. She claims that in considering earning capacity, the trial court looked solely at the difference in her and John's income, instead of focusing on John's earning capacity, and that the trial court did not consider self-support.

¶5 The seminal decision on maintenance awards is ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 406 N.W.2d 736 (1987). The objectives of an award of maintenance are to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties (the fairness objective). *See* ***id.*** at 32-33. Pursuant to WIS. STAT. § 767.26(6) (1997-98)[1] "[t]he legislature ... has expressly declared that the standard of living for maintenance is a standard of living comparable to the one enjoyed during the marriage." ***LaRocque***, 139 Wis. 2d at 35.

¶6 We review a maintenance award for an erroneous exercise of discretion. *See* ***id.*** at 27. An erroneous exercise of discretion occurs when the trial court fails to consider relevant factors, bases its award on a factual error, or grants an excessive or inadequate award. *See* ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (Ct. App. 1989). We conclude that the trial court did not erroneously exercise its discretion when it awarded maintenance.

¶7 As noted by the supreme court in ***LaRocque***, when deciding whether to grant limited term maintenance, the trial court must consider: "the ability of the recipient spouse to become self-supporting by the end of the maintenance period at

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

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." ***LaRocque***, 139 Wis. 2d at 41. The trial court is guided in its decision-making process by the factors set forth in WIS. STAT. § 767.26.[2] *See* ***Trattles v. Trattles***, 126 Wis. 2d 219, 229, 376 N.W.2d 379 (Ct. App. 1985).

¶8 We have reviewed the trial court's decision. The trial court considered all the factors listed in the statute. It applied the facts to those factors and reached a reasonable conclusion. The trial court noted that this was a long-term marriage; that Jane was in good health, but that John had significant health problems; that the division of property was equal; that the educational level now and at the time of the marriage is the same; that Jane earned $175,000 per year to John's $100,000 per year; that the marital standard of living was great; that the tax consequences were considered; that there was no agreement on maintenance by the parties; and that neither party contributed to the other's education or earnings.

¶9 Although Jane now argues about the trial court's conclusion regarding John's health, this is insufficient to constitute an erroneous exercise of discretion. John testified to his health problems. Jane did not object. Accordingly, the findings regarding John's health are not clearly erroneous.

[2] WISCONSIN STAT. § 767.26, states, in relevant part, that the trial court may grant an order requiring maintenance after considering: (1) length of marriage; (2) age and physical and emotional health of parties; (3) division of property made under WIS. STAT. § 767.255; (4) educational level of the parties; (5) earning capacity of the party seeking maintenance; (6) feasibility that the party making the maintenance can become self-supporting at a standard reasonably comparable to that enjoyed during the marriage; (7) tax consequences; (8) any mutual agreements made prior to or during the marriage; (9) any contribution by one party to the education, training or increased earning capacity of the other; and (10) such other factors as the court deems relevant to the inquiry.

Further, her argument that a health condition cannot be considered unless it affects earning capacity, although interesting, is not persuasive. The trial court considered John's health condition, among the other factors, in determining the maintenance award. The trial court did not award maintenance on the health factor alone. The statute instructs the court to consider this factor and leaves its effect to the discretion of the trial court. *See* WIS. STAT. § 767.26.

¶10 Similarly, Jane's additional complaints about earning capacity and self-support do not establish an erroneous exercise of discretion. The trial court considered all the statutory factors and reached a reasonable determination. In addressing earning capacity and self-support, the trial court acknowledged the goal of maintaining the lifestyle enjoyed during the marriage and that both parties must share equally in the sacrifices inherent in a divorce, which involves increased costs associated with maintaining two households. *See* ***Fowler v. Fowler***, 158 Wis. 2d 508, 521, 463 N.W.2d 370 (Ct. App. 1990). Even if this court or another trial court may have reached a different conclusion, our standard of review is limited. We cannot conclude that the trial court's decision constituted an erroneous exercise of discretion.

B. Child Support.

¶11 Next, Jane claims that the trial court erroneously exercised its discretion when it determined John's child support amount under the shared-time provisions of WIS. ADMIN. CODE § HSS 80.04 (1987).[3] We do not agree.

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[3] WISCONSIN ADMIN. CODE § HSS 80.04(2) (1987) provides:

> (2) DETERMINING THE CHILD SUPPORT OBLIGATION OF A SHARED-TIME PAYER. The child support obligation for a parent who the court determines is a shared-time payer may be calculated as follows:

(continued)

¶12 Determining the appropriate amount of child support is committed to the sound discretion of the trial court. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). We will not interfere with that determination if the trial court examined the relevant facts, applied the proper standard of law and reached a reasonable conclusion using "a demonstrated rational process." ***Id.***

¶13 A "shared-time payer" is defined by WIS. ADMIN. CODE § HSS 80.02(22) (1987) as "a payer who is not the primary custodian but who provides overnight child care beyond the threshold and assumes all variable child care costs in proportion to the number of days he or she cares for the child under the shared-time arrangement." The "threshold" is defined as "30% of a year or 109.5 out of every 365 days." WIS. ADMIN. CODE § HSS 80.02(25) (1987). Jane argues that,

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(a) Determine the payer's base in accordance with s. HSS 80.03 (1) (intro.);

(b) Multiply the appropriate percentage under s. HSS 80.03 (1) by the payer's total annual income for child support to establish the payer's original annual level of child support;

(c) Divide the payer's original annual level of child support in par. (b) by 365 to determine the payer's original daily child support obligation;

(d) Determine the number of days a year the payer will care for the child overnight;

(e) Determine the number of days a year above the threshold and less than 183 that the payer will care for the child overnight;

(f) Multiply the number of days a year above the threshold the payer will care for the child overnight in par. (e) by the payer's original daily child support level in par. (c) to determine the amount by which the payer's annual support obligation is to be reduced;

(g) Subtract the amount by which the payer's annual support obligation is to be reduced in par. (f) from the payer's original annual level of child support as identified in par. (b) to determine the payer's final annual child support obligation;

(h) Divide the amount determined under par. (g) by 12 to determine the payer's monthly level of child support; and

(i) Express the shared-time payer's monthly child support obligation either as a fixed sum or as a percentage of the payer's base.

although the custody agreement reflects that John will have the children 37% of the time, he failed to establish that he will contribute 37% of the children's variable costs as required by the code. We are not persuaded.

¶14 Whether to utilize the shared-time payer provisions is a discretionary determination. Here, after being presented with the evidence, the trial court concluded that the provisions should apply. Jane claims that John failed to demonstrate that he is assuming his share of the variable costs. This is not clear from the record. Neither party offered this comparison of variable costs or sought reimbursement from the other for overpayment pursuant to WIS. ADMIN. CODE § HSS 80.02(30) (1987). We have not been presented with any reason to conclude that the trial court erroneously exercised its discretion in this regard.

C. Company Car.

¶15 Next, Jane claims that the trial court should have considered the $600 per month benefit John derives from use of a company car when calculating his income for child support purposes. John claims he uses the car for business purposes and must reimburse the company for personal miles. Jane did not present any evidence contradicting this assertion. Accordingly, John argues it should not be considered income. Such fringe benefits are subject to inclusion in a support obligation only if and when they represent income actually realized as defined in WIS. ADMIN. CODE § HSS 80.02(12) (1987). *See* ***Stephen L.N. v. Kara L.H.***, 178 Wis. 2d 466, 474, 504 N.W.2d 422 (Ct. App. 1993). That was not the case here.

¶16 Under these circumstances, we cannot conclude that the trial court erroneously exercised its discretion when it found that the $600 monthly benefit should not be included in John's income for child support purposes.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶17 SCHUDSON, J. *(concurring in part; dissenting in part).* I agree with the majority's resolution of the issues involving the shared-time payer provisions of the Wisconsin Administrative Code in determining John's child support obligation, and the consideration of John's health in determining maintenance. I would remand, however, for the trial court's determination of the extent to which John's company car provided personal benefits that would be "considered federal gross income under 26 CFR 1.61-1," to be included in the calculation of his "[g]ross income" for purposes of setting his child support payment. *See* WIS. ADMIN. CODE § HSS 40.02(13)(a) (1995).

¶18 Accordingly, I concur in part and respectfully dissent in part.