COURT OF APPEALS DECISION DATED AND FILED

December 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-0718

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

IN RE THE MARRIAGE OF:

BETTY L. RUNCHEY-WOLFF,

PETITIONER-APPELLANT,

V.

WILLIAM A. WOLFF,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Betty Runchey-Wolff appeals that portion of her divorce judgment awarding maintenance to her former husband, William Wolff, in

the sum of $29,880 annually for five years. Betty argues that the record does not support the maintenance ordered and that the court erroneously offset William's child support obligation against his maintenance award. She also challenges the unequal property division in William's favor. Because the trial court did not articulate its reasoning and because the record does not permit us to discern the basis for its decision, we reverse the judgment respecting maintenance and property division, and remand for further proceedings consistent with this opinion.

¶2 The parties were married in 1988 and have two daughters, born in 1985 and 1986. The trial court found that the parties lived together since approximately 1983.

¶3 At the time of the divorce, William, age fifty, was employed as a floor covering salesman. William had received a bachelor's degree in business administration in 1972. Although his actual earnings were less, he stipulated that his earning capacity was $23,500 per year based upon his previous experience as a retail store manager between 1978 to 1992.[1] William had been married previously and was divorced in 1987.

¶4 Betty, age forty-three, operated two businesses at the time of the divorce. One was a country crafts business called "Something Old, Something New." Betty initially made dolls on a sewing machine set up in the parties' bedroom. When her children were ages one and two, she sewed primarily at night when her housework was done and the children were asleep. She eventually

[1] Because William stipulated to an earning capacity greater than his actual earnings, we conclude that he has no objection to the use of the stipulated figure in determining his financial circumstances.

expanded her product line to include pillows, curtains, and Christmas tree skirts. By 1992, her business earned $15,000 per year.

¶5 In September 1992, the parties agreed that William should quit his job in order to help Betty in Something Old, Something New. Betty testified that William assisted in building an addition to the family home for the business, ran errands, made deliveries, helped with light production and attended trade shows.

¶6 In 1994, Something Old, Something New changed from retail to wholesale sales and, in 1996, Betty moved the business out of the parties' residence. That year she also started a second business, "The Quilt Factory," selling fabric, patterns, gifts and notions at retail. Betty testified that in both companies, she bore responsibility for financial matters, product design, personnel management and training.

¶7 Something Old, Something New's profits increased to $106,655 in 1994 and $161,583 in 1995. In 1996, profits declined to $150,830 and in 1997, profits dropped to $111,605. Betty attributed this decrease to an industry trend caused by increased costs, competition from imports and the reduced popularity of country style furnishings. Betty projected a $90,000 profit in 1998, a figure not challenged by William.

¶8 Betty testified that she did not take all the profits out of the business, but took out only what was needed to live on. She left the rest in the business as working capital for payroll, taxes and supplies. Her 1997 balance sheet showed a cash balance of $31,556, which she earmarked for these expenses. The trial court found:

> Petitioner has an earning capacity as determined to be $90,000.00 a year which reflects a potential down turn in

> the business and/or increased efforts on her part to maintain the business gross sales. Also, said figure recognizes the fact that a portion of net profit from the business must be retained by the business to allow for a positive cash flow.

¶9 The court found that before their marriage, William had $40,000 and Betty had $4,000 they used for living expenses during periods of unemployment. The court also found that at the time of their 1988 marriage, William had interests in three rental units with a total net equity of $45,439.33.

¶10 The court awarded William these three properties, along with the parties' residence, a vehicle and other investments, totaling $238,170.42. In addition, Betty was ordered to pay William a $14,466.11 "equalization payment." Betty was awarded the businesses, a vehicle, and other investments; she was also ordered to be responsible for the parties' debts. Taking into account the debts and equalization payment, Betty received property valued at $232,636.52. The $20,000 discrepancy reflects the court's credit to William for the property he had before the marriage.

¶11 The parties stipulated to joint legal custody and to Betty having primary placement. The trial court ordered William to pay Betty annual child support of $5,880 for the two minor children. It awarded William $29,880 per year maintenance for five years. The court offset William's child support obligation against Betty's maintenance obligation, resulting in a net payment from Betty to William of $2,000 per month.

¶12 The trial court did not articulate its reasoning on the record and it did not write a memorandum decision, but instead filed findings of fact and conclusions of law. The trial court found that "[d]uring the course of the parties' marriage until approximately 1996, [Betty] did the majority of the domestic chores

including the cooking, laundry, cleaning, and shopping …." William does not challenge this finding.

¶13 It also found that William "contributed his best efforts both as [a store manager] and in the operation of Something Old, Something New and to family operations." The court concluded: "This is a long-term marriage, ten years coupled with approximately five years preceding the marriage when the parties lived together essentially as husband and wife. … Based upon the statutory factors but most importantly on the vast discrepancy between incomes and earning capacities of the parties, petitioner has a maintenance obligation to respondent."

¶14 Betty argues that the trial court erroneously exercised its discretion when it awarded William $29,880 per year for a period of five years. We agree. The question of maintenance is addressed to the trial court's discretion, and its decision will be upheld unless it has erroneously exercised its discretion. *See* ***Bisone v. Bisone***, 165 Wis.2d 114, 118, 477 N.W.2d 59, 60 (Ct. App.1991). A circuit court erroneously exercises its discretion if it fails to "exhibit a reasoned, illuminative mental process with which to logically connect its decision, findings and conclusions to the maintenance award. The trial court must not stop at reciting its findings of fact and conclusions of law and its decision; it must also set forth the factors on which it relied in reaching the maintenance award." ***Steinke v. Steinke***, 126 Wis.2d 372, 388-89, 376 N.W.2d 839, 847 (1985).

¶15 A maintenance decision must begin with the list of factors in § 767.26, STATS., which are designed to further the dual maintenance objectives: (1) to support the recipient spouse and (2) to facilitate a fair financial arrangement between the parties. *See* ***LaRocque v. LaRocque***, 139 Wis.2d 23, 33-35, 406

N.W.2d 736, 740 (1987).[2] Case law discussing maintenance fails to support the view that disparate earnings necessarily entitle a spouse to maintenance. *See* ***King v. King,*** 224 Wis.2d 235, 251, 590 N.W.2d 480, 486 (1999); *see also* ***Gerth v. Gerth***, 159 Wis.2d 678, 682-84, 465 N.W.2d 507, 510 (Ct. App. 1990) (holding that circuit courts are not legally required to award maintenance in cases involving long-term marriages with disparate earning capacities between spouses). There is

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[2] Section 767.26, STATS., reads:

> 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.

no mechanical formula with respect to discretionary determinations such as maintenance. ***Gerth***, 159 Wis.2d at 682-84, 465 N.W.2d at 510.

¶16 Once the court decides to award maintenance, it begins with the reasonable assumption that the dependent partner may be entitled to fifty percent of the total earnings of both parties, ***Bahr v. Bahr***, 107 Wis.2d 72, 84-85, 318 N.W.2d 391, 398 (1982), but considers statutorily enumerated factors, *see* § 767.26, STATS., to arrive at an ultimate award that meets the dual objectives of support and fairness. ***LaRocque***, 139 Wis.2d at 31-33, 406 N.W.2d at 739. A goal of the support objective is to provide support at the standard enjoyed during the marriage. *See* ***id***. at 35, 406 N.W.2d at 741. However, "[t]he 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." ***Id***.

¶17 The fairness objective requires the trial court to give weight to such statutory factors as the length of the marriage and the contribution by one party to the education, training or increased earning power of the other. ***Id***. at 37, 406 N.W.2d at 741. For example, if one spouse has "subordinated his or her education or career to devote time and energy to the welfare, career or education of the other spouse or to managing the affairs of the marital partnership, maintenance may be used to compensate this spouse for these nonmonetary contributions to the marriage." ***Id***. at 37, 406 N.W.2d at 741-42. "The fairness objective must be viewed in light of both the payor and payee." ***Gerth***, 159 Wis.2d at 683, 465 N.W.2d at 510 (Fairness does not dictate maintenance award where recipient spouse has not sacrificed his or her earning capacity during the marriage.). Another factor to be considered is whether the property division leaves the spouse

in a far better position than when he or she entered the marriage. *See* § 767.26(3), STATS.; *see also* ***King***, 224 Wis.2d at 251-52, 590 N.W.2d at 486.

¶18 Failure to apply the statutory factors together with insufficient consideration of the objectives of maintenance is error. *See* ***LaRocque***, 139 Wis.2d at 37, 406 N.W.2d at 741. We conclude that the trial court erroneously exercised its discretion by failing to apply several of the statutory factors and not giving full consideration of the objectives of maintenance. Although the court stated that it considered "the statutory factors," it focused almost exclusively on the parties' disparate incomes. Circuit courts may not acknowledge the statutory factors in form but disregard them in substance. *See* ***Bahr***, 107 Wis.2d at 82, 318 N.W.2d at 397.

¶19 When the trial court's reasoning is not expressly stated, we may search the record to determine whether discretion was exercised and the record supports the court's decision. *See* ***Schauer v. De Neveu Homeowners Ass'n***, 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1995). In this instance, however, our review of the record raises more questions than it answers. For example, the trial court stated that "[t]his is a long term marriage, ten years coupled with approximately five years preceding the marriage when the parties lived together essentially as husband and wife."

¶20 The court did not indicate that it took into account William's marital status during the cohabitancy, given that his previous marriage was not dissolved until 1987, one year before the parties' marriage. This raises the question whether the court concluded that a premarital relationship, while married to a third party, is a factor weighing in favor of substantial maintenance. *Cf.* ***Greenwald v. Greenwald***, 154 Wis.2d 767, 789-90, 454 N.W.2d 34, 42-43 (Ct. App. 1990)

(legislature intended that family code does not apply to unmarried cohabitants). Although William contends that the trial court did not consider the parties' five years of cohabitancy in making its maintenance decision, we cannot reach this conclusion when the court did not explain the significance of its finding.

¶21 In addition, liability for debts and child support, as well as custodial responsibilities for the children, are factors to be considered in determining the amount of maintenance. *See* ***Van Wyk v. Van Wyk***, 86 Wis.2d 100, 108, 271 N.W.2d 860, 863 (1978). The fact that a spouse is awarded custody of minor children has a direct relationship to how much maintenance he or she can pay. *See* ***Hirth v. Hirth***, 48 Wis.2d 491, 496, 180 N.W.2d 601, 604 (1970). If the trial court assumed that Betty would bear the children's support needs that exceed the $5,880 per year William pays, there is no indication that her obligations to support her children were part of the court's maintenance consideration.[3] The record suggests the court did not account for Betty's responsibilities for these items.

¶22 Betty's testimony, that she anticipated annual profits of $90,000, but that this sum includes approximately $30,000 in working capital not available for personal expenses, is undisputed. If the court accepted as true Betty's undisputed testimony, the record indicates that her annual profits, minus business and maintenance obligations, plus child support, leaves her approximately $36,000 to pay debts and support herself and the two children. This sum contrasts with William's earning capacity which, when considered together with his maintenance

[3] The statutory percentage standards presume Betty contributes at least 25% of her gross income to the children's support, thereby reducing the income disparity that William relies upon to justify the maintenance award. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis.2d 280, 306, 544 N.W.2d 561, 571 (1996). In the case of high earnings, this assumption may be inaccurate but, in any event, whatever portion of Betty's income the court attributes to her child support obligations would not be available to pay William's maintenance.

award minus child support, results in an approximate annual income of $47,500 for him alone. The record lacks findings with respect to the parties' monthly budgets or any explanation to conclude that the maintenance award is consistent with the objectives of fairness or support.

¶23 William argues that the trial court made findings of fact with respect to each applicable statutory factor, and appropriately set maintenance. We are unpersuaded. When making a discretionary decision, the court must not only make factual findings, but must also carefully weigh the data before it. Failure to "provide a rational explanation of how its findings as to the statutory factors squared with its award of maintenance" reflects an erroneous exercise of discretion. ***King***, 224 Wis.2d at 252, 590 N.W.2d at 486.

¶24 William concedes that the court relied heavily on the discrepancy in the parties' incomes. He proposes that this factor, combined with the length of the marriage, is sufficient to support the maintenance award without additional explanation. Without taking issue with his proposition that a ten-year marriage is "long-term" under the ***LaRocque*** standard, this contention was rejected in ***Gerth***, 159 Wis.2d at 681-82, 465 N.W.2d at 509. "Essentially, this argument urges the proposition that in a long-term marriage where there is disparate earnings between the spouses, the law compels payment of maintenance. We do not agree." ***Id***. at 682, 465 N.W.2d at 509.

¶25 Maintenance is designed to maintain a party at an appropriate standard of living, under the facts and circumstances of the individual case, until the party exercising reasonable diligence has reached a level of income where maintenance is no longer necessary. *See* **Vander Perren v. Vander Perren**, 105 Wis.2d 219, 230, 313 N.W.2d 813, 818 (1982). Here, the record lacks a rational

explanation supporting the need for and the duration of the maintenance awarded. Therefore we reverse the maintenance decision and remand for the trial court to exercise its discretion with respect to maintenance.

¶26 We further conclude that the court's decision to deduct William's child support obligations from his maintenance award, resulting in a net payment from Betty to William of $2,000 per month, reflects an erroneous exercise of discretion. It does not appear that the court took into account the tax effect on the parties. *See* § 767.26(7), STATS. It is unclear whether the court intended Betty or William to be responsible for the taxes on William's child support obligation. On remand, the trial court should take into consideration the tax consequences of any offset it may order.

¶27 Finally, we turn to Betty's contention that the trial court erroneously entered an unequal property division. Generally, nongifted and uninherited property is presumed to be subject to equal division. Section 767.255, STATS. Because the amount of maintenance is a factor intertwined with the property division, *see* § 767.255(3)(i), STATS., the property division must be re-evaluated in light of the court's maintenance decision on remand. Also, it is unclear whether the court considered not only the property brought to the marriage, but also property the parties spent before the marriage. Property spent before the marriage is not a statutory factor. *Cf.* ***Greenwald***, 154 Wis.2d at 789-90, 454 N.W.2d at 42-43. Accordingly, we also reverse the property division and remand for a new property division in light of the court's decision on maintenance.[4]

[4] Because we reverse on the grounds discussed, we do not reach Betty's additional arguments. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Judgment reversed and cause remanded with directions.

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