COURT OF APPEALS DECISION DATED AND FILED

June 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP2836 **Cir. Ct. No. 2003FA365**

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

IN RE THE MARRIAGE OF:

BRYAN H. LARSON,

PETITIONER-APPELLANT,

V.

LISA M. LARSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Bryan Larson appeals a judgment of divorce. He argues that the trial court erroneously exercised its discretion because it (1) awarded excessive maintenance to his former wife, Lisa Larson; and (2) refused to consider the tax implications of the property division equalization

payment. Because the record reflects the court reasonably exercised its discretion, we affirm the judgment.

BACKGROUND

¶2 The parties were married in 1987 and have two children, born in 1990 and 1992. The parties, who were in their early forties at the time of the divorce, were in good health. Bryan is employed as a physician and at the time of the final hearing earned $378,960 per year.

¶3 Lisa is trained as a dental hygienist, but has not worked outside the home since 1990. The court stated:

> At the time of the final hearing, Mrs. Larson was engaged in the full-time occupation the parties agreed upon in 1990, to-wit: that of a stay-at-home mother. [T]he children … are engaged in a wide variety of time consuming academic and extra-curricular activities. …. [T]hey are only 13 and 11 years of age, they depend on their mother to transport them to school during the academic year and to various extra-curricular activities and functions ….

¶4 The court determined that Lisa's earning capacity was $23,000 per year. The court found her skills were not current and it was unrealistic to expect that she could obtain employment beyond an entry-level position. The court determined that her desire to receive training and certification to pursue a teaching occupation was reasonable. It further found that over time, with experience and seniority, she might achieve an annual earning capacity of $48,000. In a twenty-three-page memorandum decision, the trial court explained its rationale for its twenty-year maintenance award to Lisa consisting of $7,500 per month for four years and $7,000 per month for the following sixteen years.

¶5 The court noted that both parties worked full time until 1990 when Bryan entered medical school and Lisa gave birth to their first child. The court discussed the parties' contributions:

> Between the fall of 1990 and the spring of 1994, Bryan and Lisa Larson lived in Vermillion, South Dakota while Bryan attended medical school. The couple's [youngest child] was born in Bryan's third year of medical school in October of 1992. Throughout their medical school experience, Bryan and Lisa had very little money. Their financial condition was so precarious during medical school, they qualified for a governmental housing subsidy program. They lived for free and were paid $10.00 per month for occupying their subsidized government apartment. Bryan and Lisa received periodic financial bequests from their parents to assist them during medical school. Because of the young ages of their children, the couple jointly decided Lisa would remain a full time, stay-at-home mother. From the time [their oldest] was born in September of 1990 to the date of the final hearing, Lisa Larson was never again employed outside the home for a wage or salary. She devoted her full time efforts to homemaking and the care of the couple's young children. The heavy demands of medical school left little time for Bryan to fully participate in household domestic chores.

¶6 Bryan did well in medical school and obtained a five-year orthopedic residency in Flint, Michigan. During the years the parties lived in Michigan, Lisa's parents gave them $6,000 as a down payment for a house and additional sums, including $6,000 for a new roof.[1] The house was in need of extensive remodeling and Lisa "devoted herself to these tasks during the five years of their occupancy." As with medical school, the residency program was very demanding on Bryan's time. He started earning $31,000 per year and, five years

[1] The trial court noted that both parties' parents contributed financially during the marriage.

later, earned $90,000 one year, in part as the result of moonlighting in a hospital emergency room.

¶7 In 1999, Bryan accepted a one-year fellowship in Virginia. Bryan was paid $40,000 for the yearlong fellowship and his earnings reduction resulted in financial hardship for the family. The court explained:

> The couple was unable to repair their automobiles adequately; they placed increased reliance on gifts from both his and her side of the family; and Mrs. Larson reduced her food intake so her children could be adequately fed. As a result of limiting her food intake, Mrs. Larson experienced some transitory health difficulties [that] had resolved by the time of the final hearing.

¶8 Because the parties were unable to locate suitable housing in Virginia for the entire family, Lisa and the children stayed in Michigan. Periodically Bryan would come back to Flint, Michigan, but only for brief visits; one to three days at most. During the fellowship year, Lisa cared for the parties' children and tended to the running of their home. Bryan's one-year fellowship concluded in 2000 and, by October 2000, he obtained his current position in Wisconsin as an orthopedic surgeon with a starting salary of $325,000 per year. The court found that the decision for Bryan to accept work in Wisconsin was made by the parties jointly. Lisa and the children did not move to Wisconsin until June 2001. After their move, the parties continued to maintain separate residences.

¶9 The court ordered the first four years of maintenance payments to be set at a slightly elevated level reflecting the necessity of further occupational training for Lisa. The court stated that it was "appropriate not to impute income to Mrs. Larson because she will find herself engaged full time as a stay-at-home mother and as a student for the next four years." The court noted that as a result,

Bryan will have approximately 45% and Lisa and the two children will have approximately 55% of the total monthly disposable income.

¶10 The court ruled that starting with the fifth year and extending to the twentieth year, maintenance would remain constant at $84,000 per year, despite an anticipated increase in Lisa's earnings, stating, "Although non-declining maintenance at $84,000.00 a year is not common – this is not a common case." The court set maintenance until Lisa would be sixty-two years old, to allow her to provide herself with savings for her retirement years. The court noted that the termination of maintenance would also correspond with the time anticipated for Bryan's retirement.

¶11 In addition, the court considered that once Bryan's child support obligations end in 2011, he would retain the majority of his earnings. The court decided not to divide equally the future income stream during the entire maintenance term, explaining,

> Although Mrs. Larson and the children initially receive more monthly disposable income, after a while, Dr. Larson is entitled to reclaim a majority of his monthly disposable income. While it is true Mrs. Larson devoted herself to the family home and children and surrendered a career in the public marketplace, it must be remembered Dr. Larson's elevated earning capacity also has its origins in his hard work and native talents.

¶12 While the parties' assets were not substantial, the property division resulted in Lisa owing Bryan $55,024. The court ordered that "[B]ecause of the gross disparity in earning capacity … and because [the parties] previously agreed Mrs. Larson should be a full time, stay-at-home mother, payment … will be amortized and applied as an offset against maintenance." Bryan appeals.

STANDARD OF REVIEW

¶13 The determination of maintenance and property division is addressed to trial court discretion and is sustained on review unless there has been an erroneous exercise of discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. "Because the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions." ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 155 Wis. 2d 365, 374, 455 N.W.2d 250 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 296, 470 N.W.2d 873 (1991). Therefore, we must look to the record to determine whether the trial court undertook a reasonable inquiry and examination of the facts, and whether the record discloses a reasonable basis for the court's determination. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶14 When reviewing the facts the trial court relied upon in reaching its discretionary decision, we do not overturn the facts found unless clearly erroneous. *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 153, 502 N.W.2d 918 (Ct. App. 1993); *see also* WIS. STAT. § 805.17(2).[2] Our role is to search the record for evidence to support the findings the trial court made, not for evidence to support findings the court could have but did not make. ***In re Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). When the trial judge is the finder of fact and there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility. ***Gehr v. Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). We review questions of law de novo. ***Michael A.P.***, 178 Wis. 2d at 147.

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[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

1. Maintenance

¶15 Bryan argues that the trial court awarded excessive maintenance. We conclude that the maintenance order reflects a reasonable exercise of discretion. A maintenance decision must begin with consideration of the factors in WIS. STAT. § 767.26,[3] designed to further the dual objectives to support the

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[3] WISCONSIN STAT. § 767.26 provides:

> 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.

(continued)

recipient spouse and to facilitate a fair financial arrangement between the parties. *See* ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32-35, 406 N.W.2d 736 (1987). "The support objective of maintenance is fulfilled 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 (Ct. App. 1988).

¶16 The fairness objective must be determined on a case-by-case basis, ***id.***, and requires the trial court to weigh 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. ***LaRocque***, 139 Wis. 2d at 37. A family court does "not discharge its decisionmaking responsibility with respect to maintenance simply by equalizing or attempting to equalize the post-divorce income between the parties." ***Kennedy***, 145 Wis. 2d at 223.

> It would seem reasonable for the trial court to begin the maintenance evaluation with the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties. This percentage may, as in the

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> (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.

> case of property division, be adjusted following reasoned consideration of the statutorily enumerated maintenance factors. We would stress, however, that while this starting point is important, it is not the determinative factor which controls the ultimate award. For, "[i]t is the equitableness of the result reached that must stand the test of fairness on review," and such a result requires a reasoned starting point adjusted to reflect thoughtful consideration of other important factors.

Bahr v. Bahr, 107 Wis. 2d 72, 84-85, 318 N.W.2d 391 (1982) (citation omitted).

¶17 The record reflects the court's thoughtful consideration of relevant factors. The court characterized the parties' seventeen-year marriage as "mid-way between a marriage of 'intermediate duration' and 'long-term duration.'" *See* WIS. STAT. § 767.26(1). It considered their ages and their health. *See* WIS. STAT. § 767.26(2). The court noted that the parties' net assets "at this point are not significant." *See* WIS. STAT. § 767.26(3).

¶18 The court was impressed with the parties' heavy workload, their sacrifices and their dedication to reaching their goals. The court found that between 1990 when Bryan started medical school and 2000 when he obtained employment as a surgeon, the parties "lived a dramatically Spartan lifestyle." The court determined that they

> jointly decided to sacrifice their time and efforts in favor of a respected, high-income producing profession (medicine) and a well cared for and nurtured family of two children. Together, the parties jointly decided to make extraordinary sacrifices of immediate pleasures and benefits for what they hoped to be long term gains.

¶19 The court further found that there "always will be … a dramatic disparity in the parties' earning and earning capacity." *See* WIS. STAT. §767.26(6). The court noted Lisa's employment skills, length of absence from the

job market, custodial responsibilities for the children and the time and expense necessary to acquire additional training. *See* WIS. STAT. § 767.26(5). The court determined that the level of "self-support" Lisa could achieve as a teacher would not adequately recognize the fairness component of maintenance. *See* ***LaRocque***, 139 Wis. 2d at 37. Thus, the court reasoned that fairness permits maintenance to be set at a level above subsistence needs and exceeding the recipient's budget. *See* ***id.*** at 37-38.

¶20 The court explained:

> A reasonable maintenance award is not necessarily measured by average annual earnings over the duration of a marriage, but by the lifestyle the parties enjoyed in the years immediately before the divorce and could anticipate enjoying if they were to stay married. Thus, a court may decide maintenance based upon the amount and nature of the income at the time the divorce is granted.

This was an appropriate consideration. *See* ***id.*** ("We believe that a reasonable maintenance award is measured not by the average annual earnings over the duration of a long marriage but by the lifestyle that the parties enjoyed in the years immediately before the divorce and could anticipate enjoying if they were to stay married.").

¶21 The trial court further explained, "[w]hen a recipient's earning capacity is such that the recipient will never earn enough money to support a pre-divorce lifestyle, the court may award maintenance for an indefinite period of time." Here, however, the court limited the award to twenty years. In so doing, the court reasoned that Lisa "is entitled to an adequate, dignified retirement." Because she would be commencing her teaching profession at age forty-six, the value of her retirement fund would be limited due to the relatively short term of

her contributions. Consequently, the court awarded maintenance in an amount and for a term that would permit her to enjoy the lifestyle enjoyed immediately before the marriage, while also providing for her retirement. The termination date would also coincide with Bryan's anticipated retirement.

¶22 In addition, the court found that although both parties' incomes were expected to increase, Bryan's was expected to increase by a larger proportion and, therefore, he would suffer no detriment by his maintenance obligation remaining constant for sixteen years. *See* ***Gerth v. Gerth***, 159 Wis. 2d 678, 682-84, 465 N.W.2d 507 (Ct. App. 1990) (The fairness objective must be viewed in light of fairness to both the payor and the payee.). Our review of the trial court's decision satisfies us that the court properly discharged its decision-making responsibility when it considered at length the factors enumerated in WIS. STAT. § 767.26 and explained the facts of record that led to its decision.

¶23 Bryan, nonetheless, characterizes his seventeen-year marriage as "intermediate," implying that the ***LaRocque*** case does not apply. We disagree. There is no mechanical formula by which to set maintenance. ***Gerth***, 159 Wis. 2d at 682-84. The length of the marriage is but one factor of many that the court was entitled to consider. WIS. STAT. § 767.26. Based on the length of the marriage, the parties' ages, earning capacities and contributions, the court was entitled to rely on ***LaRocque*** as guidance for determining maintenance.

¶24 Bryan further argues that during the last five years of the marriage the parties did not reside in the same household. In its decision, the court explained that in 1999, Bryan accepted a one-year fellowship in Virginia and

because the parties were unable to locate suitable housing in Virginia for the entire family, Lisa and the children stayed in their home in Michigan.[4] Thereafter, they maintained separate residences in Wisconsin. The court considered that while Bryan was away from the children's home studying or working, Lisa was primarily responsible for day-to-day parenting and household duties. We conclude that the court's consideration of separate residences and the weight it accorded to this factor did not result in error.

¶25 Bryan also points out that during the majority of the marriage, the parties lived a "Spartan lifestyle" and excessive maintenance thwarts the goal of self-support by discouraging Lisa from diligently pursuing sources of income. Bryan's argument is unpersuasive. The court's observations regarding the parties' "Spartan lifestyle," went to their respective contributions during the marriage, *see* WIS. STAT. § 767.26(9), not to the standard of living that would be appropriate for Lisa to maintain post-divorce. *See* WIS. STAT. § 767.26(6). The court found, in effect, that regardless of Lisa's diligence at finding employment, given her age and work history, it would be impossible for her to achieve self-support at a level comparable to that anticipated had the marriage not ended.

¶26 Our supreme court has observed:

> But in a marital partnership where both parties work toward the education of one of the partners and the marriage ends before the economic benefit is realized and property is accumulated, it is unfair under these circumstances to deny the supporting spouse a share in the anticipated enhanced earnings while the student spouse keeps the degree and all the financial rewards it promises. As this court has recognized, "in a sense," the degree "is

[4] Bryan testified that he spent less than three months in the household with Lisa after 1999 when he left for his fellowship in Virginia.

> the most significant asset of the marriage" and "it is only fair" that the supporting spouse be compensated for costs and opportunities foregone while the student spouse was in school.

Haugen v. Haugen, 117 Wis. 2d 200, 207, 343 N.W.2d 796 (1984).

¶27 Here, the court determined that Lisa's responsibilities to household and child care duties while Bryan attended medical school were significant contributions to his ability to obtain his education and increased earnings. *See* WIS. STAT. § 767.26(8). The court was entitled to conclude that it would be unfair to Lisa to deny her anticipated standard of living because the marriage ended at the time her newly educated spouse achieved higher earnings. *See* ***Haugen***, 117 Wis. 2d at 207-08.

¶28 Next, Bryan claims that after their children started school, Lisa refused to begin working outside the home. He implies, therefore, that any diminution in her earning capacity must be discounted. We disagree. The court found that the parties jointly decided to sacrifice their time and efforts in favor of a respected, high-income producing profession of medicine and a well cared for and nurtured family of two children. The court found that pursuant to this agreement, Lisa devoted her full time efforts to household duties that included child care and renovating their housing. These findings of fact are not challenged on appeal. Based on these findings, the court was entitled to conclude Lisa's earning capacity was diminished, while her contributions to the marriage were significant. *See* WIS. STAT. § 767.26(5).

¶29 Bryan further argues Lisa's budget is unreasonable. This argument fails to demonstrate error. The court recognized that certain items of Lisa's budget were unreasonable. However, the court explained that it did not base the

maintenance amount on Lisa's budget. Rather, it reasoned that fairness permits maintenance to be set at a level above subsistence needs and exceeding the recipient's budget. Because the court's decision recognized the unreasonable budgetary items, and based the award on other factors than the unreasonable budgetary items, we reject Bryan's argument.

¶30 Next, Bryan argues that because he pays $5,712 per month in child support, an additional $7,500 per month maintenance is excessive. We disagree. The court considered that maintenance, together with child support, account for 55% of Bryan's monthly disposable income until 2011. However, this percentage represents support for a three-person household. Because it is rational for the court to conclude that a three-person household has greater expenses than Bryan would,[5] the court's decision is not overturned.

2. Equalization payment

¶31 Next, Bryan complains that the trial court erroneously failed to consider the negative tax implications resulting from his order that Lisa's equalization payment should be a $500 offset from his monthly maintenance obligation.[6] Because the record reflects a reasonable exercise of discretion, we reject his argument.

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[5] Bryan offers no argument rebutting this inference. Bryan also makes a number of arguments about the effect his child support and maintenance obligations have on his monthly take home pay of $17,324. Here, the court determined maintenance based on Bryan's gross annual earnings of $378,960. Bryan does not explain why his monthly take home pay, rather than his gross annual income, should be used to determine maintenance. We do not develop this argument for him. ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

[6] Bryan cites to his attorney's argument that the negative tax consequence of the offset is $21,000. He cites to no evidence on the issue.

¶32 The court considered the gross disparity in the parties' earning capacities. The court's decision acknowledges that it would be a number of years before Lisa would be able to secure employment and earnings as a teacher. The trial court explained it ordered that the equalization payment be paid in installments offset against maintenance because the parties agreed that Lisa would be a full time, stay-at-home mother. Also, at the motion hearing held subsequent to the divorce trial, the court apparently adopted Lisa's argument that requiring her to write a check to Bryan for $500 a month, as opposed to an offset, would adversely affect her tax liability. The court stated, "There's no requirement that I maximize everybody's tax benefit."

¶33 The court also explained that the offset procedure was efficient to administer, rather than having the parties

> trade checks every month, because I had a suspicion that we might be having more hearings like this if we did. That kind of business of people paying A to B and then having B remit half of what A paid back is problematic. And if this relationship needs anything, it needs less opportunity for things to be misunderstood.

¶34 We conclude that the record reflects the court reasonably exercised its discretion. The court was entitled to determine that the installment method of payment was reasonable given Lisa's current lack of income. The court also found that because of the parties' disparate earning capacities, Bryan rather than Lisa would ultimately be able to absorb the negative income tax consequences of using an offset rather than a payment method. In addition, the court reasoned that using an offset eliminated sources of misunderstandings with respect to payments,

thus avoiding potential litigation. Because the record reflects a rational basis for the court's determination, we do not reverse it on appeal.[7]

By the Court.—Judgment affirmed.

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

[7] Bryan also argues that the court violated 15 U.S.C. § 1673(b)(2), a section of the Consumer Credit Protection Act that establishes the aggregate disposable earnings of an individual subject to garnishment to support a court order. A party who appeals has the burden to establish "by reference to the record, that the issue was raised before the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted). Bryan fails to indicate this argument was raised before the trial court and therefore it is not preserved for appellate review.