COURT OF APPEALS
DECISION
DATED AND RELEASED

August 30, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2446

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

In re the Marriage of:

JEANNE M. KLINE,

Petitioner-Respondent,

v.

KENNETH J. KLINE,

Respondent-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha County: CLAIR VOSS, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Kenneth J. Kline appeals from a judgment of divorce and an order denying his motion for reconsideration. He argues that the trial court failed to exercise its discretion, that the maintenance award is excessive, that indefinite maintenance constitutes an impermissible annuity to Jeanne Kline and does not meet the fairness objective of maintenance, and that the child support percentage standard should not have been used to determine child support. Although the trial court failed to set forth adequate reasons to

support the exercise of its discretion, we can determine from the record that the maintenance and child support awards are appropriate. We affirm the judgment and the order.

We agree with Kenneth's contention that the trial court failed to demonstrate on the record its reasoning process in determining maintenance and child support. The trial court's decision, to be a proper exercise of discretion, must "be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). To comply with this requirement, a court must not only state its findings of fact and conclusions of law, but also state the factors upon which it relied in making its decision. *See* ***Steinke v. Steinke***, 126 Wis.2d 372, 388-89, 376 N.W.2d 839, 847 (1985). Here, the trial court rendered its decision and, other than a mention of the length of the marriage and the number of children, it did not explain why or how it made the determinations.

A decision which requires an exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an erroneous exercise of discretion. ***Schmid v. Olsen***, 111 Wis.2d 228, 237, 330 N.W.2d 547, 552 (1983). However, we need not reverse for the trial court's failure to express the exercise of its discretion. A reviewing court is obliged to uphold a discretionary determination if it can independently conclude that the facts of record applied to the proper legal standards support the trial court's decision. *See* ***Andrew J.N. v. Wendy L.D.***, 174 Wis.2d 745, 767, 498 N.W.2d 235, 242 (1993); ***Schmid***, 111 Wis.2d at 237, 330 N.W.2d at 552. "We may independently search the record to determine whether it provides a basis for the trial court's unexpressed exercise of discretion." ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 78, 443 N.W.2d 50, 62 (Ct. App. 1989). We look for reasons to sustain discretionary decisions. ***Prosser v. Cook***, 185 Wis.2d 745, 753, 519 N.W.2d 649, 652 (Ct. App. 1994).

We first address the award of $550 per month indefinite maintenance to Jeanne. Despite Kenneth's claim that the amount is excessive because it exceeds Jeanne's budget, we conclude that the record supports the award.

This was a marriage of twenty-seven years. The parties raised five children, one of whom was ten years old at the time of the divorce. Jeanne is employed in food service at a nearby technical college during the academic year and earns $13,604.40 annually. Kenneth earns $58,943.16 as an engineer. Jeanne has not had any schooling or training beyond high school. Kenneth finished his undergraduate and master's degree during the early years of the marriage. Both parties worked during the marriage. Jeanne had some periods when she was not employed outside the home, but she returned to work in order to pay parochial school tuition for the children.

It was appropriate here for the trial court to award maintenance such that the parties' postdivorce income would be nearly equal. *See* ***Wikel v. Wikel***, 168 Wis.2d 278, 282, 483 N.W.2d 292, 293 (Ct. App. 1992) (when a couple has been married many years and achieves increased earnings, an equal division of total income is a reasonable starting point in determining maintenance). We note that if child support is added to Jeanne's income, her income is still less than Kenneth's.

Kenneth contends that maintenance should not be awarded because Jeanne earns enough to cover her monthly budget and with the award her income exceeds that budget. Support is not to be calculated at bare subsistence levels. ***Forester v. Forester***, 174 Wis.2d 78, 89, 496 N.W.2d 771, 775 (Ct. App. 1993). Kenneth fails to account for the fact that Jeanne only works during the academic year and is unemployed in the summer months. We reject the notion that the award of maintenance allows Jeanne to shirk her duty to seek full employment during the summer. Maintenance is designed to maintain a party at an appropriate standard of living. *See* ***id.*** at 89, 496 N.W.2d at 775-76. Jeanne's employment permits her to be home with the parties' minor daughter during the summer, something Jeanne did during the marriage. Thus, Jeanne's availability to care for the minor child during the summer is part of the marital standard of living. Maintenance which fosters that arrangement is appropriate.

Kenneth argues that the indefinite nature of the maintenance award renders it an impermissible annuity to Jeanne. There is no evidence in the record suggesting an appropriate date on which maintenance should terminate. Kenneth did not offer any proof of how Jeanne could become self-supporting at the marital standard of living. Indeed, Kenneth only speculates

that Jeanne could obtain further training because of her proximity to the technical college. He failed to offer evidence of the impact of such an opportunity. Further, there is nothing to suggest that Jeanne is deliberately underemployed such that a "seek work" order was necessary. We reject Kenneth's claim that the maintenance award was simply a permanent annuity.

Kenneth also claims that the trial court failed to consider the support and fairness objectives of maintenance as applied to his circumstances. The support objective ensures that the payee spouse is supported in accordance with the needs and earning capacities of the parties and the fairness objective ensures a fair and equitable financial arrangement between the parties in the individual case. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 32-33, 406 N.W.2d 736, 740 (1987). The award is within Kenneth's ability to pay. In light of the fact that the award leaves Kenneth with a greater amount of the parties' combined income, we conclude that the award meets the fairness objective. We sustain the trial court's maintenance award.

Kenneth argues that the trial court erroneously exercised its discretion when it set child support pursuant to the percentage standard guidelines. Section 767.25(1j), STATS., mandates the use of the percentage standard and it is presumed that child support established pursuant to the percentage standard is fair. ***Abitz v. Abitz***, 155 Wis.2d 161, 179, 455 N.W.2d 609, 617 (1990). The trial court may only deviate from the percentage standard upon proof, by the greater weight of the credible evidence, that use of the standard is unfair to the child or any of the parties. ***Id.***

Kenneth has not made the requisite showing that the use of the percentage guideline is unfair to him. This is not a case where support based on a percentage of Kenneth's income results in an exorbitant payment. Kenneth's payment is $835 per month. Kenneth attempts to show that support based on the percentage standard is absurd by calculating total child support to include seventeen percent of Jeanne's gross income. He calculates a total figure of $1105. Kenneth's reliance on ***Kjelstrup v. Kjelstrup***, 181 Wis.2d 973, 977, 512 N.W.2d 264, 266 (Ct. App. 1994), as mandating such a calculation is misplaced. In ***Kjelstrup***, the court considered the percentage of the custodial parent's income presumably dedicated to child support simply because the trial court looked to a postsupport income comparison in determining whether or not use of the percentage standard was fair. *See* ***id.*** at 976, 512 N.W.2d at 266. A

calculation of the presumed contribution of the custodial parent is not required in every case.

Kenneth's claim that the amount of child support is excessive is solely based on Jeanne's testimony that the parties never expended over $500 a month to support the remaining minor child. However, Kenneth ignores the fact that Jeanne's testimony was based on an intact family unit. Common sense dictates that the separation of the household increases and duplicates expenses necessary to maintain a household for a child. We sustain the trial court's application of the percentage standard in determining child support.

By the Court.—Judgment and order affirmed.

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