COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP985 **Cir. Ct. No. 2011FA266**

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

IN RE THE MARRIAGE OF:

BONNIE L. CHRISTNER,

PETITIONER-RESPONDENT,

V.

KENNETH D. CHRISTNER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: THOMAS B. EAGON, Judge. *Affirmed*.

Before Blanchard P.J., Lundsten and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. Kenneth Christner appeals the portion of a judgment of divorce in which the circuit court denied him an award of

maintenance, following his twenty-four-year marriage to Bonnie Christner. Ken[1] contends that the court erroneously exercised it discretion in making the maintenance decision, based on what he argues were "four distinct but related errors."

¶2 Ken's most substantial arguments are that the circuit court failed to recognize that the "foundation" for Bonnie's highest, post-separation income was "laid during the marriage," and that the court improperly based its maintenance decision in part on a finding that Ken did not sacrifice his earning capacity for the marriage. That is, Ken argues that his contributions helped provide the "foundation" for Bonnie's post-separation income, and that the court should have "avoid[ed] an inquiry into the relative contributions of the spouses" in its determination regarding maintenance and instead assumed that their contributions were "roughly equal."

¶3 We conclude that the court properly applied the pertinent law to its factual findings. As to the arguments about the "foundation" of Bonnie's income-earning capacity and the parties' relative contributions, we conclude that Ken's arguments fail in light of extensive, pertinent fact finding conducted by the circuit court, and our application of precedent, including ***Gerth v. Gerth***, 159 Wis. 2d 678, 465 N.W.2d 507 (Ct. App. 1990), to those facts. Accordingly, we affirm the judgment.

[1] We follow the parties in referring to themselves and each other by first name (in the husband's case, Ken), given their shared last name.

BACKGROUND

¶4 Ken does not argue that the circuit court's maintenance decision rested on any erroneous finding of any fact.

¶5 Broadly summarizing the court's findings, throughout the course of their marriage, Ken and Bonnie mutually agreed that each of them would work outside the home. Despite this, Ken "did little work outside the home during the majority of the marriage," and contributed in only a "minimal" way to child care. In sum, he failed to make "a significant contribution" to Bonnie's extensive efforts to increase her own earning capacity.

¶6 We now turn to the more specific facts found by the court. After Ken and Bonnie were married in 1988, they first lived in Spooner, Wisconsin. Ken had already obtained bachelor's degrees in chemistry and math. However, he did not pursue employment related to his undergraduate degrees while they lived in Spooner. "[F]or the first half of the marriage, [Ken] was engaged in a collection of self-employed enterprises ranging from auto mechanic and general Mr. Fix-it [to] landscaper to excavator." While "successful at fixing things," Ken was "not financially successful."

¶7 During these same years, Bonnie was "a partner in the business activities" of Ken. In addition, she worked as a substitute teacher in a Spooner area school district and at a college part-time.

¶8 During the early part of their marriage, the two lived "a subsistence lifestyle," one that required them to receive assistance from relatives and government aid. They had "little reportable income." They "first lived with [Ken's] father and built a home in a pole building on the adjacent property."

¶9 The couple had three children, the youngest born in 1995. The court made findings that included the following regarding child care over the course of the marriage:

> Testimony was clear that [Bonnie] was the primary caretaker for the children during ... the entire marriage. This included preparing the meals, doing the shopping, buying the clothes, making the doctor's appointments, ... taking the children to the doctor's appointments, although [Ken] had indicated he would take the children to the doctor in case of emergency.

The court found that "all in all," Ken's "supportive contribution" to child care "was minimal" over the course of the marriage. Ken's "role in the family was somewhat independent, doing what he chose to do."

¶10 In 2000, the family moved to Grand Forks, North Dakota, so that Bonnie could attend law school there. Bonnie chose this law school "because it was family friendly." "The children's school was in close proximity to the law school and the school hours were such that [Bonnie] could prepare the kids for school in the morning, drop them off on the way to the law school, and then pick them up on the way home." Ken's participation in childcare at this time was minimal: attending sports events, helping coach a soccer team, and playing outside after supper so that Bonnie could study.

¶11 Bonnie graduated law school in May 2003, passed the bar exam, and worked for a law firm based in Bismarck, North Dakota. The entire family moved with Bonnie to Bismarck.

¶12 As when the family had lived in Spooner, after the move to Grand Forks and then to Bismarck, Ken did not pursue employment related to his undergraduate degrees. While in North Dakota, he "worked briefly at a couple of

different companies ... but nothing extensive." Ken "worked minimally during the marriage[,] even after the parties moved to North Dakota," while Bonnie attended law school and took care of the household. Ken helped build the house the family lived in while in Bismarck, with contractors being hired for some work, and Bonnie contributing to that work as she was able after work and on weekends.

¶13 Focusing on the move to North Dakota and the years in North Dakota, the court had "a difficult time finding a significant contribution of [Ken] to [Bonnie's] increased earning power due to her law degree." Putting it differently, the court found "that [Ken's] role in [Bonnie's] increased earning capacity was neutral. He didn't stand in her way, but he didn't take on any extra family responsibilities, either." Ken "did not sacrifice much." "[D]uring the course of this marriage [Ken] pretty much did what he wanted."

¶14 By the same token, the court found that Ken's ability to earn was not hindered by responsibilities he undertook on behalf of Bonnie or the children. "[T]he Court can find no evidence indicating that [Ken] suffered a loss of earnings or earning capacity as a result of the marriage."

¶15 The work opportunities that Ken gave up as part of the family's move to North Dakota had not been "financially successful." While still in Spooner, the parties "accumulated $220,000 by selling everything they had in the home, lot, pole building, and the insurance proceeds [following a fire], and the business equipment" to help finance the move to North Dakota and the start of Bonnie's law school period, "[b]ut then [Bonnie] ... used scholarship money and her work on the law review to pay for her tuition and books in years two and three of the law school, and used her income as well."

¶16 The only exception to the general rule that Bonnie was "the primary caretaker for the children" occurred during the spring of 2005, when the family planned a move back to Wisconsin and Ken assumed one "extended period of responsibility for the children." This occurred because, in February 2005, Bonnie took a job as a claims adjuster with an insurance company in Stevens Point, with the rest of the family following after the children finished the school year and Ken could sell the house in Bismarck. As a claims adjuster, Bonnie grossed approximately $65,600 a year.

¶17 During the fall of 2007, after the family had moved back to Wisconsin, Ken obtained a job as a maintenance worker for a property management firm in Portage County. His gross income in 2012 was approximately $42,000. This exceeded any annual income level he reached during the course of the marriage.

¶18 Regarding Ken's skill sets, the court found the he "has skills beyond math and chemistry and he has skills in general home building, roofing, and construction, and [Bonnie] testified that he's very skilled at fixing things." In addition he has "a commercial driver's license and a tanker certification," as well as "certifications in the past for hazardous materials and combination trailers," as well as a private pilot's license that he obtained "at a significant expense," approximately $10,000, during the course of the marriage.[2] The court also found that "there is no significant health issue that would impair or impede either party's ability to work."

[2] The court observed that it may have cost the family more for Ken to obtain a pilot's license, which he never used to generate income for the family, than it cost the family for Bonnie to obtain a law degree.

¶19 The court found that Ken, "through the course of the marriage, was capable of earning a significant income. However, his reported earnings ... do not reflect that he earned much at all."

¶20 In 2012, after this divorce action was pending, Bonnie received a new position as a staff attorney with the same insurance company, and her annual gross income increased to approximately $98,000. This change in jobs occurred "at a time when the husband was no longer in the household and ... the husband had little or no impact on her getting the new position."

¶21 The court found that Ken "is able to support himself at a comparable standard [to that which] the parties achieved during the marriage," making "more money now than he ever did during the course of the marriage." "[Ken] will be able to support himself and meet [his] needs based on his current income ... at a standard of living at least equal to the standard he enjoyed at any other time of the marriage."

¶22 Summarizing, the court concluded as follows:

> [Ken] earned little during the course of the marriage, which was not to say that he didn't contribute his labors, as he did, and ... [this] is reflected in the assets of the marriage, along with [Bonnie's] efforts, and ... the parties' efforts are reflected in the property division. But [Ken's] efforts did not increase [Bonnie's] earning capacity. His efforts ... were neutral, and therefore, fairness doesn't demand [that] maintenance be paid....
>
> ….
>
> The court determines that it is fair for the parties to have different income levels and that each party's individual income level is based on that individual's own interests and drives and was unaffected by the other party.
>
> ….

> The parties agreed to work to build their own home, and did so, together.
>
> But ... in every other aspect of the marriage the parties lived independent[] or separate lives.

¶23 Based on these findings, the circuit court denied Ken an award of maintenance from Bonnie, and Ken now appeals.

DISCUSSION

¶24 Ken argues that the "court erred" in denying maintenance by: (1) "failing to begin with the premise that income should be equally divided in a long term marriage"; (2) "failing to apply established principles of law governing increases in income and standard of living occurring after the parties separate"; (3) "attempting to assess the relative contributions the parties made to the marriage as a whole"; and (4) "failing to apply applicable factors other than the contribution each spouse made to the marriage." As suggested above, the second and third of Ken's arguments overlap so heavily that we address them together in a single discussion section below.

¶25 As both parties here recognize, maintenance determinations are left to the sound discretion of the circuit court, and are upheld unless the circuit court erroneously exercised its discretion. *See* ***Steinmann v. Steinmann***, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145. An exercise of discretion is erroneous if the circuit court makes an error of law or fails to base its decision on the facts of record. ***Id.***

I. Consideration of Equal Division of Income

¶26 Ken challenges the following statement of the court: "Maintenance is not automatic and a 50-50 split of income is not required." Ken argues that this

statement reveals that the court improperly failed to "begin with the premise that a 50-50 income split was appropriate." Ken cites ***Hefty v. Hefty***, 172 Wis. 2d 124, 136, 493 N.W.2d 33 (1992), and ***Bahr v. Bahr***, 107 Wis. 2d 72, 84-85, 318 N.W.2d 391 (1982), to support his argument that the court must "begin the maintenance evaluation with the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties."

¶27 This argument is without merit. The legal authority Ken cites to support this argument relates to *dependent* partners. *See, e.g.*, ***Bahr***, 107 Wis. 2d at 85 (courts "begin the maintenance evaluation with the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties."). As summarized above and discussed further below, the court made findings to the effect that Ken was in fact not a "dependent partner," and therefore no maintenance was required for his support or as a matter of fairness. Ken fails to cite any legal authority for the proposition that in all divorce proceedings, each partner, dependent or not, is entitled to the "premise" that income will be split 50-50.

¶28 Furthermore, even assuming that Ken's proposition is correct, Ken fails to persuade us that the circuit court did not in fact use the potential for a 50-50 split in income as a starting point for its analysis. The statement quoted above on which Ken focuses is one of the first observations the court made in its discussion of maintenance. This observation acknowledged the possibility of an even split in income, and included the accurate statement that an even split is "not required." *See* ***Gerth***, 159 Wis. 2d at 683-84 (circuit court has the discretion to award or deny maintenance). The court then went on to support its decision to deny maintenance to Ken in detail, using the correct legal standards. The difference between a court, on the one hand, considering this proposition to be a

"premise" and, on the other hand, giving this proposition due consideration without using specific "premise" terminology is at best a very fine line. In any case, Ken fails to provide us with a basis to conclude that the court failed to give adequate consideration, perhaps even as a "premise" or starting point, that the case might call for an equal division of total income, if any maintenance at all was merited. And, under our standard of review we do not assume that the circuit court misunderstood the law. *See* ***Arave v. Creech***, 507 U.S. 463, 471 (1993).

II. Increases in Income Post-Separation and Assessment of Relative Contributions

¶29 As referenced above, Ken makes the following two closely related arguments: (1) the circuit court failed to recognize that the "foundation" for Bonnie's highest, post-separation income was "laid during the marriage"; and (2) the court improperly based its maintenance decision in part on a finding that Ken did not sacrifice his earning capacity for the marriage. We now explain why these arguments are untenable, given the findings of the circuit court and court precedent, most notably ***Gerth***.

¶30 We begin with ***Gerth***, because we conclude that, once its holding and rationale are understood, little remains of Ken's argument in light of the findings of the circuit court here.

¶31 The circuit court in ***Gerth*** denied the wife's request for maintenance following the termination of her twenty-year marriage. ***Gerth***, 159 Wis. 2d at 680. The parties were both high school graduates with no apparent health problems. ***Id.*** The husband had been employed as a "production planner" for twenty-six years and made $37,727 a year, plus fringe benefits including a 401K plan, a pension plan, and group health insurance. ***Id.*** The wife had worked outside the home over

the last seventeen years of the marriage, most recently as a machine operator, and earned less than half what her husband earned, $17,436 a year, plus group health insurance. ***Id.***

¶32 The circuit court in ***Gerth*** found that the husband and wife had after-tax monthly incomes of $1,929.31 and $1,124.69 respectively, and that

> both parties were able to meet their reasonable needs from their earned income although with little money to spare. Thus, the court concluded that [the husband] did not have the financial ability to make maintenance payments and [the wife] did not require them. *The court also found that [the wife] did not sacrifice her earning capacity for the marriage.* The court, therefore, denied maintenance.

Id. at 681 (emphasis added).

¶33 This court in ***Gerth*** explained the two objectives of an award of maintenance: "'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 in each individual case (the fairness objective).'" ***Id.*** (quoting ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987)). Pointing to both of these objectives, the wife in ***Gerth*** argued that the circuit court had overlooked the length of the marriage and the disparate earning capacities of the parties. ***Id.*** at 682.

¶34 Addressing first the support objective, this court concluded that it could not say that it was an "abuse" of discretion (today's "erroneous exercise") for the circuit court to have determined that the husband had insufficient income to pay maintenance and that the wife had insufficient need. ***Id.***

¶35 The court then reached the point of its opinion directly rejecting the arguments Ken now raises:

> The [circuit] court held that while their incomes are different, [the wife] worked throughout the marriage and *suffered no loss of earnings or earning capacity as a result of the marriage*. This is not a situation where one spouse left either school or the work force to raise their children or take care of their home. The court also found that *[the wife's] efforts did not increase [the husband's] earning capacity*. The court determined that it was fair for the parties to have different income levels *if those levels were unaffected by the marriage and obtained only through their own natural abilities and hard work*. The court reasoned that a disparity in income is *unfair when the disparity is attributable at least in part to one party's sacrifice of his or her earning capacity*. *Where a 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 for those nonmonetary contributions to the marriage*. ***LaRocque***, 139 Wis. 2d at 39, 406 N.W.2d at 742. Applying this standard, the facts of this case did not compel a maintenance award.
>
> The fairness objective must be viewed in light of both the payor and payee. The court held it would be unfair to require [the husband] to pay maintenance to [the wife] when his income barely covered his own expenses and [the wife] had sufficient resources to meet her needs. *Additionally, [the wife] had not sacrificed her earning capacity during their marriage. Thus, fairness does not require a maintenance award*. Because the court properly applied the law to the facts it found, we conclude the court did not abuse its discretion by denying maintenance payments to [the wife].
>
> .... While maintenance could have been ordered in this case, the issue requires the exercise of judicial discretion.... *To the extent [the wife] contends that maintenance is required in every case where there [are] disparate earnings between parties to a long-term marriage, we reject such a hard and fast rule*.

Id. at 683-84 (emphasis added).

¶36 The findings of the circuit court in the instant case largely mirror the facts in ***Gerth***, and the arguments Ken now advances mirror those rejected in ***Gerth***. Here, Ken's efforts did not increase Bonnie's earning capacity, and the

circuit court determined, as in ***Gerth***, "that it was fair for the parties to have different income levels if those levels were unaffected by the marriage and obtained only through their own natural abilities and hard work." And here, there is none of the unfairness that arises "when the disparity is attributable at least in part to one party's sacrifice of his or her earning capacity." Ken did not "subordinate his ... 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."

¶37 Ken fails to address and distinguish ***Gerth*** in his principal brief. In his reply brief, Ken does not suggest that ***Gerth*** is not good law, but he attempts to distinguish ***Gerth*** in two ways. The first is to point out that ***Gerth*** does not address the "premise" of even income division, which we have already addressed above. The second is to observe, correctly as far as it goes, that this court in ***Gerth*** rested its decision in part on the finding of the circuit court that the husband's income was insufficient to meet his living expenses and also pay maintenance. Ken calls this a "key difference," suggesting that it was clearly the dispositive factor. However, a reading of ***Gerth*** undermines this position. The passage from ***Gerth*** quoted above in this opinion at ¶35 reflects a view of the law that squarely meets and rejects the precise arguments that Ken now advances, putting aside the separate factor of the husband's ability to pay maintenance in ***Gerth***. By failing to address the ***Gerth*** view of the law on its own terms, Ken concedes the point.

¶38 Moreover, as Bonnie points out, the precedent relied on by Ken involves cases in which spouses sought maintenance following marriages in which there was an apparent mutual agreement during the course of the marriage that one spouse *would be dependent* on the other for income generated outside the home, in sharp contrast to the findings made here. *See* ***Heppner v. Heppner***, 2009 WI App

90, ¶¶3, 5-6, 12-13, 319 Wis. 2d 237, 768 N.W.2d 261 (healthy, "workaholic" husband with high-compensating, demanding job agreed with ailing wife who had little employment history that wife would not work outside the home and that husband would retire sometime between the ages of fifty-five and sixty in a "tradeoff" for the couple); ***Hefty***, 172 Wis. 2d at 136 (wife's "homemaking and child care efforts as well as her willingness to make many moves" "allowed" husband "to take advantage of the opportunities that were presented to him and to devote substantially all of his time to his work."); ***Bahr***, 107 Wis. 2d at 74-75 (wife with medical ailments and slight employment history "devoted her time to caring for the children and home during" twenty-four year marriage, while healthy radiologist husband built successful practice).

¶39 In sum, we reject Ken's arguments in light of applicable precedent including ***Gerth*** and the circuit court's factual findings in this case.

III. Application of Statutory Factors

¶40 Ken acknowledges that the circuit court listed the factors found at WIS. STAT. § 767.56 (2011-12) in addressing maintenance.[3] However, Ken

[3] WISCONSIN STAT. § 767.56 provides:

> Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(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. 767.61.

(continued)

submits that the court failed to properly apply even one of these factors. We reject this argument, because it is largely a recycling of Ken's argument, which we reject above, that the court improperly based its decision on a finding that Ken did not sacrifice his earning capacity for the marriage.

¶41 For example, Ken asserts that the court did not discuss "why Ken should not share in the predictable increase in the parties' standard of living due to the emancipation of their children and wife's promotion." As summarized above,

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> **(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, if the 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.

(Emphasis added).

the court made specific findings and applied the rationale found in ***Gerth*** to those facts on these issues. In the same vein, Ken suggests that the court ignored the fact that the parties entered the marriage "on roughly equal footing" in terms of earning power, and left the marriage "in vastly different circumstances." Again, however, the court transparently applied the logic of ***Gerth***, namely, that it can be "fair for the parties to have different income levels if those levels were unaffected by the marriage and obtained only through their own natural abilities and hard work."

¶42 In sum, the circuit court had before it a record strongly showing that Bonnie achieved a higher income level not because of anything Ken did, but despite the fact that he did not make sacrifices to contribute to her education, training, or increased earning power. The fact that the circuit court found this factor to be especially significant, given the particular facts of the case, is not a basis for reversal, where the court addressed both the support and fairness objectives in a rational manner.

CONCLUSION

¶43 For these reasons, we affirm the maintenance portion of the judgment of divorce.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.