

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-0994

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN RE THE MARRIAGE OF:
CHRISTOPHER KING,**

PETITIONER-APPELLANT,

V.

SONIA G. KING,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed in part and reversed in part.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Christopher King appeals from a judgment of divorce from Sonia G. King. He argues that the circuit court erroneously exercised its discretion in awarding maintenance and in assigning as marital debt bills Sonia incurred after commencement of the divorce action. We conclude that

under the factors identified by the circuit court, an award of maintenance is not justified. The finding that Sonia's expenditures were consistent with marital conduct is not clearly erroneous. We reverse the award of maintenance and affirm that part of the judgment holding that the \$30,000 post-commencement debt was marital debt.

The Kings were married for approximately seven years and had no children. Sonia has four children from her prior marriage who resided with Christopher and herself throughout the marriage. Prior to the marriage, Sonia worked very little and she supported herself and the children by government assistance. Christopher is a neurosurgeon who earns \$533,000 a year. Sonia only worked a very brief period towards the end of the marriage. She earned \$5.36 per hour. The circuit court awarded maintenance over a three-year period: \$200,000 the first year, \$150,000 the second year and \$100,000 the third year.

The determination of the amount and duration of maintenance rests within the sound discretion of the circuit court and will not be upset absent a misuse of discretion. *See Wikel v. Wikel*, 168 Wis.2d 278, 282, 483 N.W.2d 292, 293 (Ct. App. 1992). Discretion is properly exercised when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. *See id.* A circuit court misuses its discretion if it misapplies the statutory factors under § 767.26, STATS. *See Forester v. Forester*, 174 Wis.2d 78, 86, 496 N.W.2d 771, 774 (Ct. App. 1993).

The circuit court made the following findings with respect to the factors under § 767.26, STATS: it was a short-term marriage, the property division left each party with substantial assets, the parties' educational level was the same

as at the time of the marriage, Sonia chose not to pursue her high school diploma or seek employment and did not stay home to care for children who were the product of this marriage, Sonia has the capacity to earn \$6.60 an hour or \$13,728 annually, Sonia will never be able to be self-supporting at a standard of living comparable to that enjoyed during the marriage, no major tax ramifications exist, there was no agreement between the parties before or during the marriage with regard to contributions to the marriage, and Sonia did not make any significant contribution to Christopher's career.

While the circuit court recognized that maintenance is to meet support and fairness objectives, it ignored that its findings as to the statutory factors all negate an entitlement to maintenance. The fairness component of maintenance is based on the partnership concept of marriage. Not one of the statutory factors relevant to this case suggests that Sonia made any contribution to the partnership entitling her to maintenance. See *Gerth v. Gerth*, 159 Wis.2d 678, 683, 465 N.W.2d 507, 510 (Ct. App. 1990) (fairness does not require a maintenance award where recipient spouse has not sacrificed earning capacity during the marriage). There is no law that a spouse is entitled to take and take from the marriage without making a contribution to the marriage, and then continue to share in a payor spouse's high earnings when the marriage ends. That this is not justified is particularly true when there is a short-term marriage and the property division leaves the spouse in a far better position than when he or she entered the marriage. Cf. *Luciani v. Montemurro-Luciani*, 191 Wis.2d 67, 78-79, 528 N.W.2d 477, 481 (Ct. App. 1995), *aff'd in part, rev'd in part*, 199 Wis.2d 280, 544 N.W.2d 561 (1996).

We appreciate the dilemma facing the circuit court because Sonia had enjoyed a high standard of living for a few years and could not in the

foreseeable future support herself at that standard. The circuit court held that Sonia's inability to maintain the same standard of living could not be the controlling factor in the maintenance award. We agree.

The payment of maintenance is not to be viewed as a permanent annuity. Rather, such payment 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.

Vander Perren v. Vander Perren, 105 Wis.2d 219, 230, 313 N.W.2d 813, 818 (1982).

A party's lack of initiative or effort to become self-supporting is a relevant factor for a court to consider in awarding maintenance. *See id.* at 229, 313 N.W.2d at 818. The circuit court found that Sonia had made no effort to address her educational problems or needs, including acquisition of her graduate equivalent high school diploma. In light of her minimal efforts, Sonia should not be rewarded with the substantial maintenance award made here, particularly when Christopher's income is not attributable to her marital efforts. *Cf. Johnson v. Johnson*, No. 97-2961, slip op. at 5 (Wis. Ct. App. Feb. 18, 1998) (ordered published Mar. 25, 1998).

Further, the circuit court found Sonia's budget to be worthless in assessing her need for maintenance and the court made no dollar amount finding as to need. Sonia received a substantial amount of property and was better off than when she entered the marriage. There is no basis to conclude that Sonia had a need for maintenance. We reverse the maintenance award.

Christopher argues that Sonia alone should be held responsible for the \$30,000 debt she incurred between the filing of the divorce action on

September 12, 1995, and the hearing held on January 5, 1996. He claims that the summons served on Sonia gave her notice that she was prohibited from encumbering, concealing, damaging, destroying, transferring or otherwise disposing of any property without his consent or court approval except for the purpose of securing necessities. The division of the marital estate through the assignment of assets and liabilities is within the discretion of the circuit court. *See Liddle v. Liddle*, 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987).

Christopher's reliance on *Weiss v. Weiss*, 122 Wis.2d 688, 699, 365 N.W.2d 608, 614 (Ct. App. 1985), that debts incurred after the filing of the divorce petition are not joint marital debts is misplaced under the facts here. The circuit court found that the debt Sonia incurred was marital debt because her spending was in accordance with the parties' life-style and no temporary order had been entered settling the parties' financial relationship. Although the items Sonia purchased were generally not necessities, we cannot conclude that the circuit court's finding of a marital purpose is clearly erroneous. The record suggests that Christopher was aware of Sonia's proclivity for excessive expenditures and approved certain expenditures for Christmas presents for the children. There was not the clear cessation of "marital activities" as found in *Weiss*. The circuit court's determination that all debts were marital until the temporary order was entered was a reasonable exercise of its discretion given the parties' pattern of conduct.

By the Court.—Judgment affirmed in part and reversed in part.

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

