

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 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. 97-1687

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF: JACQUELINE I. DENNER,

PETITIONER-APPELLANT,

v.

GAY NORMAN DENNER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Jacqueline Denner appeals from the judgment divorcing her from Gay Denner. Gay stipulated to paying a \$5201 contribution to Jacqueline's attorney's fees and assumed without consideration approximately \$5000 of marital debt, and the trial court ordered him to pay maintenance as well.

Jacqueline contends that the trial court improperly allowed Gay to pay the attorney fee contribution in installments, without interest on the balance. She also challenges the amount and duration of the maintenance award. We reverse and remand for reconsideration on the issue of interest and on the duration of the maintenance. We otherwise affirm the judgment.

Jacqueline and Gay were married nearly twenty-seven years. At the time of divorce, she was forty-seven, he was forty-six, and both were in good health. Both worked full time, with Jacqueline earning approximately \$20,000 per year, without pension or health insurance, and Gay earning \$38,000 per year, with pension and health care coverage. The parties stipulated to most issues but could not agree on maintenance. Gay offered to pay \$125 per week for twelve years, while Jacqueline sought \$200 per week for fifteen years, although she agreed to a substantially reduced payment for the first six months, or until their one minor child turned eighteen. The trial court awarded Jacqueline \$100 per week for the first six months, \$150 per week for the next five years after that, and \$100 per week for five more years. The court reasoned:

[T]aking into consideration the fact that he is assuming a lot more of the attorney's fees and debt than he normally would have, I think that I will find that maintenance is to be awarded at the rate of ... \$150.00 per week for the first five years and reduce that, after five years to \$100.00 per week for another five years....

It seems to me ... that after 10 years, she ought to be able ... to use that time and that alimony to train herself and reach the same comparable standard of living that she enjoys at this time. And that after ten years of receiving alimony at that rate, those folks ought to be separate from each other on a permanent basis....

... [After ten years] she should be able to be trained or find a job that pays her [medical] insurance for her....

... And one of the reasons I am doing that instead of going to 12 years, is because of the extra amount that he is

going to pay her [for] attorney's fees and the property division.

With respect to attorney fees, the court permitted Gay to pay the attorney fee contribution in \$100 monthly installments because the property division left Gay without any substantial liquid assets. The court decided that interest should not accrue on the balance, without explaining its rationale.

Jacqueline argues that the court erroneously exercised its discretion when it did not consider an interest award on the attorney fee contribution. We agree. The decision to allow monthly payments was reasonable. Gay plainly lacked ability to pay a substantial lump sum until after the parties sold their house and he received his share of the equity. Even then Gay would receive only an estimated \$9000 and the trial court reasonably deemed it unfair to immediately reduce that by more than half to pay a voluntary obligation far exceeding the \$1000 the trial court stated it would have ordered him to contribute. However, when ordering installment payments on a property division, the trial court erroneously exercises its discretion unless it orders interest on the balance, or provides a reasonable explanation why interest should not be paid. *Corliss v. Corliss*, 107 Wis.2d 338, 347, 320 N.W.2d 219, 223 (Ct. App. 1982). We apply the same rule to attorney fee payments even though they are not part of the property division. We therefore remand for the trial court to award interest on the balance of the attorney fee contribution, or explain why it did not.

Jacqueline also argues that the trial court erred in its maintenance award to her. The determination of the amount and duration of maintenance rests within the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of that discretion. *LaRocque v. LaRocque*, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). An erroneous exercise of discretion occurs when

“the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either excessive or inadequate.” *DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 582-83, 445 N.W.2d 676, 679, (Ct. App. 1989) (citation omitted). Therefore, the “court’s decision 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.’” *Trieschmann v. Trieschmann*, 178 Wis.2d 538, 541-42, 504 N.W.2d 433, 434 (Ct. App. 1993) (quoted source omitted).

The dual objectives of maintenance are support and fairness. *LaRocque*, 139 Wis.2d at 32-33, 406 N.W.2d at 740. The support objective is to maintain “the recipient spouse in accordance with the needs and the earning capacities of the parties.” *Id.* The fairness objective is meant to “ensure a fair and equitable financial arrangement in each individual case. *Id.* Thus, maintenance is to be calculated not at “bare subsistence levels,” *Forester v. Forester*, 174 Wis.2d 78, 89, 496 N.W.2d 771, 775 (Ct. App. 1993), but at a standard of living the parties enjoyed in the years immediately preceding the divorce. *LaRocque*, 139 Wis.2d at 36, 406 N.W.2d at 741. In determining the amount of maintenance, the trial court should begin with an equal division of the total earnings of both parties. *Bahr v. Bahr*, 107 Wis.2d 72, 85, 318 N.W.2d 391, 398 (1982).

The trial court reasonably exercised its discretion by awarding five years of maintenance at \$150 per week followed by a reduced amount of \$100 per week. The award leaves Jacqueline with somewhat less than one-half the parties’ gross income despite the long marriage and her equal, if not greater, contribution to it. However, in departing from an equal division, the trial court considered Gay’s voluntary contribution of \$5201 to Jacqueline’s attorney fees and his

voluntary assumption of \$5000 in marital debt.¹ Although the court's maintenance analysis in a long marriage begins with an equal division of income, the court may adjust the award following a reasoned consideration of the statutory factors. *Bahr*, 107 Wis.2d at 85, 318 N.W.2d at 398. Section 767.26(3), STATS., allows consideration of the property division, and § 767.26(10), allows consideration of other factors relevant to the individual circumstances, such as Gay's contribution to Jacqueline's attorney fees. The trial court reasonably set off these voluntary assumptions of debt against Gay's maintenance obligation.

The trial court erroneously exercised its discretion, however, in its justification for reducing the duration of maintenance from twelve years to ten years, namely, Gay's voluntary payments, which it had considered and used to explain the maintenance reduction. We deem it unreasonable to essentially double-credit Gay for those payments. Additionally, although the court found that Jacqueline could substantially increase her income in ten years, there is no evidence in the record to support that finding. In fact, the evidence tends to show that Jacqueline had reached her maximum income level, given her education, training, experience and locality. We therefore remand for further consideration on the duration of maintenance.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

¹ Jacqueline contends that the \$5000 was not a marital debt because Gay incurred it after they separated. Facts of record do not support that contention.

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

