

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2050

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

**IN RE THE MARRIAGE OF:
ROBERT DONALD LEWERENZ,**

PETITIONER-RESPONDENT,

V.

JANE CAROL LEWERENZ,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: DENNIS D. CONWAY, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Vergeront and Deininger, JJ.

DEININGER, J. Robert and Jane Lewerenz were divorced after twenty-seven years of marriage. They agreed on a property division, and on custody, placement and child support for their minor son. The trial court awarded

Jane maintenance in the amount of \$200 per month, indefinitely, and authorized Robert to claim the income tax exemption for the minor child. Jane appeals the judgment of divorce, claiming the court erred in both determinations. We conclude that authorizing Robert to claim the minor son for income tax purposes was proper, but that the trial court erroneously exercised its discretion in establishing the maintenance award. Specifically, the court improperly disregarded Jane's testimony regarding her anticipated post-divorce costs for health insurance and medical expenses, and it failed to consider the disparity in the parties' incomes in light of the "fairness" objective. Accordingly, we reverse the judgment as it pertains to the maintenance award and remand for reconsideration of that issue.

Jane and Robert were married in 1970. At the time of their divorce in 1997, Robert was forty-six years old, Jane was forty-seven, and one of their two children was fourteen years old and in eighth grade. His primary placement was to be with Jane, and Robert agreed to pay seventeen percent of his gross income as child support, which amounted to approximately \$570 per month.¹ The parties agreed to a property settlement which approximated a 50-50 division of their assets. Under the property agreement, Jane acquired the marital residence, which she was to refinance in order to make equalization payments to Robert. Although the exact equalization amount was not known at trial due to late modifications to the property division, Jane estimated that her monthly payments after refinancing would be approximately \$250.

¹ Robert testified that he was paying "approximately 560 or 70 dollars per month as child support." His financial disclosure statement, however, shows a monthly child support deduction in the amount of \$528. Seventeen percent of the "Total Gross Monthly Income" shown on Robert's financial disclosure statement (\$3,462) produces a monthly child support obligation of \$588.

The divorce judgment does not contain specific findings regarding the income of each of the parties at the time of the divorce. Robert's financial disclosure statement, however, shows that he was employed as an "estimator-purchasing agent" and had gross monthly earnings of \$3,462. Jane's financial statement and testimony indicated that she had had full-time seasonal employment since 1990, and that in 1996 her earnings and unemployment compensation produced an average monthly income of \$575. In its oral decision at the conclusion of the divorce hearing, the court found that Robert was "making around \$35,000 a year and [Jane is] making about six or seven thousand dollars, and it's probable that [Jane] will not be able to reach his standard of income."

Robert waived maintenance from Jane and requested the court to set Jane's earning capacity at \$9,900 per year, representing full-time year-round employment at minimum wage. He requested a maintenance award for her of \$100 per month. He acknowledged that Jane had not worked full-time outside the home for the last fifteen to eighteen years of the marriage, and that she "did principally the home care, the grocery shopping, and the care for the minor children."

Jane testified that her only job skills were those gained through working part-time "in the last 25, 26 years," and that she would be seeking full-time employment following the divorce. She testified to some health problems, and the trial court found that "they may affect her ability to work full time. Nevertheless ... I don't know as though [she will] have much choice but to try to get full-time employment ... to have a reasonable income over the balance of [her] life."

Jane also testified that she would have to start paying for health insurance separate from her husband's policy through his employer, which had covered the family during the marriage, and she estimated the monthly premium for her continuation coverage to be \$175. She testified further that some medical costs, such as prescriptions and counseling expenses, would not be fully covered by insurance; that the insurance called for deductible and co-pay obligations; and that her budget included \$365 per month for these costs. She made it clear that she had not yet paid health insurance premiums or some of the other medical costs, but that these expenses would commence immediately upon the granting of the divorce.

In its oral decision from the bench, the trial court took issue with a number of the items claimed in Jane's monthly budget in her financial statement. In particular, with respect to the health insurance and other medical costs, the court commented: "We have two insurance matters here that she's already said she's not actually paying," and it concluded that "there is some fat in that budget." Immediately after the court's oral ruling, Jane's counsel attempted to point out to the court that "the insurance is something she's going to encounter in 30 days," but the court cut off the effort stating, "I have already given the decision."

This court will not disturb a maintenance award unless the trial court has erroneously exercised its discretion. *LaRocque v. LaRocque*, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). "[A] discretionary determination 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." *Id.* (quoted source omitted). To determine the amount of maintenance, the trial court must apply the facts to the relevant statutory factors. *Id.* at 31, 406 N.W.2d at 739; *see* § 767.26, STATS. A

trial court does not properly exercise its discretion when it relies upon a mistaken view of the evidence. *Krolkowski v. Chicago & N.W. Transp. Co.*, 89 Wis.2d 573, 581, 278 N.W.2d 865, 868 (1979). We conclude that the trial court's implicit factual finding that Jane would not incur monthly costs for health insurance premiums and uncovered medical expenses upon the finalization of the divorce was clearly erroneous. *See* § 805.17(2), STATS.

On remand, the court should consider Jane's unrefuted testimony that, as of the date of the divorce, she will be required to obtain separate health insurance at her own expense, and that she will incur certain medical costs that are not covered by insurance. We acknowledge that a trial court is free to evaluate both the credibility of a party's testimony regarding his or her monthly expenses and the reasonableness of the claimed expenses. We are not suggesting that the court must necessarily accept Jane's testimony that she will incur uncovered medical expenses and health insurance premiums amounting to \$540 per month, but the court may not totally disregard these expenses simply because some of them were not being incurred prior to the finalization of the divorce.²

Section 767.26, STATS., lists a number of factors for a trial court to consider when determining the amount and duration of a maintenance award, including the length of the marriage, the age and health of the parties, the property division, the parties' respective educational levels and earning capacities, the

² The court's error was perhaps occasioned by a misimpression created during Jane's cross-examination by Robert's counsel. In response to counsel's questions, Jane acknowledged that she was not incurring some of these expenses "right now," although she again attempted to point out that this was "because I have insurance through my husband at work, but now that the divorce is final, I won't have insurance." On redirect, she further clarified that she was in fact incurring some of the uncovered expenses at present, and that she would incur her first separate health insurance premium within "the next month."

contributions of one party to the education or earning power of the other, tax consequences, and the standard of living enjoyed during the marriage. These factors “are designed to further two distinct but related objectives in the 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).” *LaRocque*, 139 Wis.2d at 32-33, 406 N.W.2d at 740.

Thus, maintenance payments are not based solely on need or limited to situations where one spouse is not self-supporting. *Lundberg v. Lundberg*, 107 Wis.2d 1, 12-13, 318 N.W.2d 918, 923-24 (1982). Maintenance may also be used for compensation purposes, when one spouse has been socially or economically handicapped by his or her contribution to the marriage. *Id.* at 14-15, 318 N.W.2d at 924. A trial court erroneously exercises its discretion when it “constru[es] the support objective too narrowly and disregard[s] the fairness objective.” *LaRocque*, 139 Wis.2d at 33-34, 406 N.W.2d at 740. That is, a trial court’s discretion is misused if “it fails to give full play to the dual objectives of maintenance.” *Forester v. Forester*, 174 Wis.2d 78, 86, 496 N.W.2d 771, 774 (Ct. App. 1993).

The starting point for a maintenance evaluation following a long-term marriage is to award the dependent spouse half of the total combined earnings of both parties. *Bahr v. Bahr*, 107 Wis.2d 72, 85, 318 N.W.2d 391, 398 (1982). This amount may then “be adjusted following reasoned consideration of the statutorily enumerated maintenance factors.” *Id.* However, even if “[t]he increased expenses of separate households may prevent the parties from continuing at their pre-divorce standard of living [a] court must not reduce the recipient spouse to subsistence level while the payor spouse preserves the pre-

divorce standard of living.” *LaRocque*, 139 Wis.2d at 35, 406 N.W.2d at 741. Furthermore, where one party developed a stream of income as the principal wage-earner during a marriage, while the other contributed to the marriage as a homemaker, the court cannot rely solely on the property division to compensate the homemaker for his or her loss of income following the divorce. *Id.* at 38, 406 N.W.2d at 742.

In its oral decision, the court commented briefly on many of the factors set forth under § 767.26, STATS.: the ages and health of the parties; the absence of evidence relating to any changes in the educational level of the parties throughout the marriage, or any contributions by either party to the education, training or increased earning power of the other; and the unlikelihood that Jane could become self-supporting at a standard of living reasonably comparable to that she enjoyed during the marriage. Based on its review of the factors, and in view of the twenty-seven year length of the marriage, the court determined that permanent maintenance was in order. The court explained its rationale for the amount of the award, \$200 per month, as follows:

[T]he Court is setting that maintenance at \$200 per month, and the reason for that is that number one, I am very leery of the expense factors listed here on behalf of [Jane]. It seems to me that this is an awfully big -- we have entertainment, \$75, and incidentals, 150, and other expenses, 100. That's 325 a month for which there is not much explanation. We have two insurance matters here that she's already said she's not actually paying. Clothing and shoes are -- seem to me high. So I think there is some fat in that budget. Secondly, he is paying support for the minor child, and the last item that is of question is what will happen at such time as the minor child, James, becomes 18 or finishes high school, and the answer to that is I don't know, because that will be taken up at that time. In the meantime, I would certainly expect that [Jane] would be in a position to work on a full-time basis, and the Court encourages her to do so. It would be a mistake, I think, to not at least make that effort to work on a full-time basis, and the theory that the Court would -- if that effort is not made, I don't think that at the time this matter is brought

back to the Court, that the Court is likely to give you everything and make him pay for you forever, but I think you have to make some effort to work on your own.

Although the trial court touched on many of the statutory factors in its decision, it applied the wrong legal standard for calculating maintenance when it focused solely on Jane's budgetary needs and earnings, and neglected to address the significant disparity in the parties' incomes following a long-term marriage. In other words, it considered the support objective, but not the fairness objective of a maintenance award. Following the directive in *Bahr*, the starting point for a maintenance calculation in this twenty-seven year marriage should have been the equal division of Robert and Jane's incomes.

Robert's annual gross income is \$41,544, while Jane's is \$6,900, based on the parties' respective financial disclosure statements. Even if the court were to adopt Robert's request that an earning capacity of \$9,900 be attributed to Jane to represent full-time employment, a disparity in excess of \$30,000 per year remains. Robert will pay \$7,062 annually in child support for the next several years (17% of \$41,544), and the court may properly consider Robert's child support obligation in determining his ability to pay maintenance. When comparing the net disposable income of the two parties, however, the court must also take into account the facts that: (1) during the time she receives child support, Jane will be required to maintain a household for herself and the minor child of the parties; and (2) the percentage child support standards used to establish Robert's support obligation assume that Jane also contributes seventeen percent of her income directly to the support of their child. *See* WIS. ADM. CODE § HSS 80 Preface; *Cook v. Cook*, 208 Wis.2d 166, 184 n.13, 560 N.W.2d 246, 254 (1997); *and Kjelstrup v. Kjelstrup*, 181 Wis.2d 973, 976, 512 N.W.2d 264, 266 (Ct. App. 1994).

We recognize that the equalization of income is only a starting point for a proper maintenance calculation, and that consideration of the facts and factors in a given case may often dictate a different ending point. *See Olson v. Olson*, 186 Wis.2d 287, 295, 520 N.W.2d 284, 287 (Ct. App. 1994). On remand, the court should supplement its consideration of Jane's need for support and her earning capacity with an express consideration of: (1) the disparity in the incomes of the parties, and (2) whether the length of the marriage, or other "fairness" factors, require an amount of maintenance to be ordered that will reduce the disparity in the parties' incomes.

Jane cites six separate grounds for setting aside the maintenance award.³ We have concluded that the \$200-per-month award must be set aside because the court erred by disregarding the impact of Jane's post-divorce costs for medical insurance and uncovered medical expenses, and because the court failed to consider the fairness objective when it determined the amount of maintenance. We do not address her remaining claims that: (1) the court failed to consider Jane's non-economic contributions to the marriage and to Robert's increased earning power; (2) the court undervalued Robert's income by not including various non-taxable fringe benefits he receives; and (3) the court failed to properly consider whether Jane's health problems adversely affect her ability to gain full-time employment. Since it does not appear that counsel were given the opportunity to argue the maintenance issue before the trial court made its ruling,⁴

³ Two of Jane's arguments are premised on the court's failure to consider the fairness objective and to acknowledge a 50-50 division of income as the starting point for its analysis, both of which we have addressed above. We have also addressed her claim of error regarding the trial court's treatment of medical and health insurance expenses in her budget.

⁴ Before ruling on the maintenance issue at the conclusion of the testimony at the divorce trial, the court stated, "I am well behind, so I am going to proceed without any statements."

we suggest that they be given that opportunity on remand, in whatever manner the trial court deems appropriate. Both counsel may then call to the court's attention those facts and factors they believe relevant to the maintenance issue.⁵

Finally, we address the trial court's allocation of the income tax exemption for the minor child to Robert. The court found that "[t]here is no reason to give it to [Jane] because she doesn't have the income to make it worthwhile." We conclude that the trial court's decision to allow Robert to claim the minor child as an income tax exemption was not an erroneous exercise of discretion. The court correctly noted that, given the disparity in taxable income between the parties, the exemption was of much more value to Robert than it would be to Jane. It is not inappropriate for a court to allocate the income tax exemption for a minor child in such a fashion as to maximize the overall tax benefit to the parties. The authorization for Robert to claim the exemption is thus affirmed. If, however, upon its reconsideration of maintenance, the court orders an amount of maintenance, or of family support, that would significantly alter the distribution of taxable income between the parties, the trial court may, if it deems it appropriate, revisit the issue of who should claim the exemption.

By the Court.—Judgment reversed and cause remanded with directions.

⁵ We do not contemplate the need for further evidentiary proceedings on remand since the parties have made their record on what each deemed to be the relevant testimony and exhibits with respect to their financial circumstances at the time of the divorce.

Not recommended for publication in the official reports.

