

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 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. 97-2067

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

VICTOR J. FISCHER,

PETITIONER-RESPONDENT,

v.

DEBORAH J. FISCHER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
DAVID M. BASTIANELLI, Judge. *Modified and, as modified, affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Deborah J. Fischer appeals from a judgment of divorce from Victor J. Fischer. She challenges custody, child support, the denial of maintenance, and the requirement that the parties' 1997 income tax be computed in accordance with the Wisconsin Marital Property Act. Victor

concedes error on the income tax requirement and we modify the judgment to vacate that provision. As modified, we affirm the judgment.

The Fischers were married on April 27, 1990. Deborah had two daughters from a previous marriage. Victor adopted those children. One son was born to the marriage. The parties separated in September 1994 when Deborah and the children went to Indiana. Both parties sought custody of the children. Deborah was awarded sole legal custody and primary placement of the parties' two daughters. Victor was awarded sole legal custody and primary placement of the parties' son.

Physical placement determinations are committed to the sound discretion of the circuit court and will be affirmed unless the court erroneously exercised its discretion. See *Bohms v. Bohms*, 144 Wis.2d 490, 496, 424 N.W.2d 408, 410 (1988). The exercise of discretion requires that the circuit court consider the facts of record in light of the applicable law to reach a reasoned and reasonable decision. See *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Placement of a minor child must be consistent with his or her best interests. See § 767.24(5), STATS. The determination of what is in a child's best interests is a mixed question of law and fact. See *Wiederholt v. Fischer*, 169 Wis.2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992). We will not disturb the circuit court's findings of fact unless they are clearly erroneous. See § 805.17(2), STATS. The circuit court, as the finder of fact, is entitled to judge the credibility of the witnesses and we are required to give due regard to the opportunity of the circuit court to judge such a matter. See *Hughes v. Hughes*, 148 Wis.2d 167, 171, 434 N.W.2d 813, 815 (Ct. App. 1988).

Deborah argues that the circuit court misused its discretion by separating the children from each other. She claims that findings that she and her parents would inhibit Victor's relationship with the children and that Victor did not abuse the children are clearly erroneous. These findings are dependent on the circuit court's credibility determinations and are not clearly erroneous. We do not read the circuit court's acknowledgment that Deborah's parents obtained a restraining order against Victor as reflecting negativism against her parents. Rather, the court was assessing the reality of the situation—that Deborah's parents could not be genuine in their claimed desire to foster a relationship between Victor and the children. It was a factor in assessing the credibility of the witnesses.

Deborah also claims that the circuit court ignored the experts' opinions that separating the children would traumatize them. Deborah does not provide a single record citation in support of her contention that all of the experts testified that it would be traumatic to separate the children. The guardian ad litem points out that only one of the several mental health experts called to testify expressed concerns about separating the children. In his recommendation that custody of all three children be granted to Deborah, Dr. Itzhak Matusiak indicated that the parties' young son was strongly bonded with his sisters and that splitting up the children would be traumatic to all three of them. However, Matusiak acknowledged that if Deborah engages in conduct to undermine the son's relationship with Victor, and if the son grows up in an environment that compels a negative attitude toward Victor, the son will not have a very substantial relationship with Victor. Matusiak indicated that the girls' relationship with Victor was more severely impaired than that of the parties' son. Dr. Marc Ackerman also recommended placement of all three children with Deborah. He did, however, suggest that a change of the son's placement from Deborah to

Victor should be considered if Deborah's behavior "escalates to the level of parental alienation syndrome" or if the son "begins to alienate his father, as a result of living in a household with his two older sisters and mother who are already engaging in that behavior."¹ The experts were not as absolute as Deborah suggests in their opinion that separating the children would be traumatic.

The circuit court was not obligated to abdicate its decisionmaking responsibility and accept the expert opinion evidence. *See Schorer v. Schorer*, 177 Wis.2d 387, 396, 501 N.W.2d 916, 919 (Ct. App. 1993) (weight and credibility given to the opinions of expert witnesses are uniquely within the province of the fact finder). Moreover, the circuit court did not ignore expert opinion. It acknowledged that separating the children would be traumatic to some degree but explained that the trauma would be reduced because the girls' school and social activities occupy their time. It found that the son's placement with Deborah would result in his having no meaningful relationship with his father. The guardian ad litem recommended primary placement with Victor. The decision to award custody of the parties' son to Victor is a proper exercise of discretion.²

Deborah claims that the circuit court erroneously exercised its discretion in requiring her to pay seventeen percent of her gross income as child support when her only source of income is social security disability (SSD)

¹ Ackerman's report was written on February 8, 1996. The four-day court trial concluded on September 27, 1996. Additional evidence was taken on February 27, 1997. The significance of these dates is that the circuit court had an opportunity to assess whether the condition described in Ackerman's report had developed since the report was authored.

² The thrust of Deborah's argument is that the custody result is not reasonable. Yet the circuit court's written decision regarding custody of the children is a model example of consideration of the relevant factors and decisionmaking in light of competing interests. The decision demonstrates a proper exercise of discretion in the face of the allegations hurled between the parties.

payments. The claim that Deborah develops in her brief is that it is not clear what amount of income is subject to the child support order—whether it is just her SSD income or that income plus the SSD and social security income (SSI) payments the children receive. Even if we were to agree that the judgment is somewhat ambiguous as to the “gross income” the child support order is applied against,³ Deborah cannot raise this issue on appeal without first seeking clarification in the circuit court. See *Schinner v. Schinner*, 143 Wis.2d 81, 93, 420 N.W.2d 381, 386 (Ct. App. 1988) (failure to bring a motion before the circuit court to correct such manifest error constitutes a waiver of the right to have such an issue considered on appeal). Moreover, Victor concedes that the SSI benefits the children receive should not be counted as income to Deborah against which the percentage standard is applied.

Deborah also argues that the SSD payment that her son receives because of her disability should be credited dollar for dollar against her child support obligation. She raises this claim for the first time on appeal and we will not consider it when the circuit court has not been given the opportunity to rule on it. See *Evjen v. Evjen*, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992) (it is the party’s responsibility to direct the family court’s attention to issues that are being submitted for determination); *Schinner*, 143 Wis.2d at 93, 420 N.W.2d at 386. The same is true with respect to Deborah’s undeveloped claim that application of the percentage standard is unfair to her because her income is

³ The circuit court found that Deborah’s SSD income was \$625 a month but in a footnote mentioned the SSI and SSD payments Deborah receives on behalf of the children.

below the poverty level. Deborah did not litigate whether the percentage standard would be unfair to her.⁴

Deborah was denied maintenance and she contends that the circuit court should have held maintenance open because she is totally disabled and there is a great disparity in the parties' incomes. Maintenance determinations are discretionary with the circuit court and are not reversed absent an erroneous exercise of that discretion. *See Grace v. Grace*, 195 Wis.2d 153, 157, 536 N.W.2d 109, 110 (Ct. App. 1995). We look to the court's explanation of the reasons underlying its decision, and where it appears that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is one a reasonable judge could reach and is consistent with applicable law, we will affirm the decision as a proper exercise of discretion. *See id.* at 157-58, 536 N.W.2d at 110-11.

Deborah's only specific argument is that the circuit court underestimated Victor's income and overestimated her income. There is no basis to conclude that the circuit court's findings regarding the parties' incomes are clearly erroneous.⁵ The finding regarding Deborah's income did include a

⁴ It appears that child support was not a contested issue before the circuit court. Perhaps Deborah never considered the possibility that she would not be awarded placement of all three children. Regardless, she is not relieved of her obligation to ask the circuit court to first rule on the issues she argues on appeal. *See Evjen v. Evjen*, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992) (we generally will not review an issue which is raised for the first time on appeal).

⁵ The exhibits at trial, including the parties' financial disclosure statements, are not part of the record on appeal. Appellants have the burden to provide an appellate record sufficient to review the issues they raise on appeal. *See Fiumefreddo v. McLean*, 174 Wis.2d 10, 26, 496 N.W.2d 226, 232 (Ct. App. 1993). Given an incomplete record, we will assume that it supports every fact essential to sustain a circuit court's exercise of discretion. *See id.* at 27, 496 N.W.2d at 232.

footnote referencing the SSI and SSD payments received on behalf of the children and indicating the total disposal income available to Deborah. However, that information was not incorrect and Deborah's disposal income did not provide the basis for denying maintenance.

Three significant factors support the circuit court's decision to close maintenance to Deborah. First, neither party was going to have a change in his or her income or earning capacity. The circuit court found that Deborah is permanently disabled and not capable of reentering the job market because of her latex allergy. Victor's income as a pastor was found to be "stablized" at the \$20,000 range. Second, Victor is unable to pay maintenance because his monthly expenses exceed his monthly income.⁶ This counterbalances the circuit court's finding that Deborah would have difficulty supporting herself due to her disability. Finally, this was a short-term marriage—from April 27, 1990, to a separation in September 1994.⁷

We conclude that both the support and fairness objectives of maintenance were considered by the circuit court. The support objective of maintenance ensures that the payee spouse is supported in accordance with the needs and earning capacities of the parties. See *LaRocque v. LaRocque*, 139 Wis.2d 23, 33, 406 N.W.2d 736, 740 (1987). Deborah did not claim a present need for support and the circuit court found that nothing would change in the

⁶ Deborah does not take issue with this finding. While she claims that the circuit court failed to acknowledge that Victor's salary included his housing and utilities, there is no suggestion that these items were double counted by inclusion in Victor's expenses.

⁷ Deborah argues that the marriage lasted more than the four and one-half years stated by the trial court. She points out that the duration was actually seven years up to the date the divorce was granted. By either calculation, the marriage was properly found to be short term.

future, including Victor's inability to pay maintenance. The fairness objective of maintenance ensures a fair and equitable financial arrangement between the parties in the individual case. *See id.* The short-term nature of the marriage was a proper consideration with respect to the equities between the parties. *See Metz v. Keener*, 215 Wis.2d 620, 633, 573 N.W.2d 865, 871 (Ct. App. 1997) (length of the marriage is a factor bearing on maintenance and the weight to be given to the relevant factors under the maintenance statute is committed to the circuit court's discretion). The circuit court could reasonably rule that the factors that may have been in favor of holding maintenance open failed to counterbalance the marriage's relatively short duration, a factor which was not going to be altered by future developments.

The judgment provides that: "The parties are required to comply with the 1986 Wisconsin Marital Property Law in respect to reporting their incomes for the period in 1997 prior to the date the divorce is granted." As a result, Deborah was ordered to pay income taxes attributable to that part of her income which Victor was required by the Marital Property Law to report on his 1997 income tax return. Deborah argues that she is not governed by the Wisconsin Marital Property Law because she is a resident of Indiana. Victor concedes that this is correct. We modify the judgment to vacate this provision requiring Deborah's compliance with the Wisconsin Marital Property Law.

By the Court.—Judgment modified and, as modified, affirmed.

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

