COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-3118

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

IN RE THE MARRIAGE OF:

THOMAS W. COATES,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

MARGARET G. COATES,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

EICH, J. Thomas W. Coates appeals from a judgment of divorce awarding his former wife, Margaret G. Coates, $496 per month in maintenance.

Margaret cross-appeals, arguing that the trial court erred by limiting maintenance to eighteen months and ordering an equal division of their income thereafter. We conclude that the trial court properly exercised its discretion and affirm the judgment in all respects.

Thomas and Margaret Coates divorced in September 1997, after a forty-six-year marriage. He was sixty-eight, and she was sixty-three, at the time. They have four adult children. Thomas dropped out of school in the eighth grade and, when the divorce action was filed, owned and operated a bulldozing and excavating business, together with a satellite sales and service enterprise, earning an average of $15,433 per year. At the time of the divorce, however, Thomas was no longer employed—having voluntarily retired while the divorce was pending—and his only income was a social security annuity of $495 per month. He claimed living expenses of $1,151 per month.

Margaret graduated from high school and, for forty-three of the couple's forty-six-year marriage, was a homemaker and mother, never working outside the home. In the last three years of the marriage, however, she worked as a seasonal, part-time monogrammer for a catalog clothing merchandiser, earning an average of $3,528 per year. The trial court found that, if Margaret were to work full-time, earning the minimum wage, her earning capacity would be $10,712 per year. Her living expenses are $1,571 per month.

Both parties are in fair health. Thomas has a history of back problems, and testified that he suffered from pains in his right arm. Margaret has high blood pressure, diabetes, and a history of a blood clot in her leg. Her health insurance was canceled due to her high blood pressure, and it would cost her

approximately $250 per month to obtain new health insurance. At the time of the divorce, her prescription medications totaled $160 per month.

In setting maintenance, the trial court found that Thomas's "voluntary" retirement was unreasonable[1] and that he reasonably could be expected to work until Margaret reached age sixty-five. Then, finding that Thomas had an "earning capacity" of approximately $15,000 per year (essentially his average pre-retirement income), ordered him to pay Margaret maintenance of $496 per month for eighteen months (through December 1998), and that after that time, all of their income, including social security payments, should be divided equally between them.

The decision to award maintenance—and the amount and duration thereof—are matters addressed to the sound discretion of the trial court, and we will not reverse absent an erroneous exercise of discretion. ***Brabec v. Brabec***, 181 Wis.2d 270, 277, 510 N.W.2d 762, 764 (Ct. App. 1993). A court erroneously exercises its discretion "if it misapplies or fails to apply any of the statutory factors

[1] Thomas points to inconsistent language in the trial court's findings with respect to the unreasonableness of his retirement. After finding that "[Thomas] voluntarily terminated his employment" and that "[his] retirement was unreasonable," the trial court added a sentence stating: "[Thomas's] voluntarily terminat[tion of] his employment by retiring knowing it would limit or terminate any ability to pay maintenance to [Margaret] was reasonable." Based on the totality of the court's findings, however—including findings that Thomas had not sought work despite the court's seek-work order, that he could have been expected to work until Margaret turned sixty-five, that he specifically instructed Margaret not to work outside the home for virtually their entire forty-three year marriage, and that his ability to pay maintenance should be based on his $15,000 earning capacity, rather than his actual income of $495 per month—we are satisfied that the second quoted sentence was a mistake, and that the court plainly intended a finding that Thomas's retirement was "unreasonable."

set out in § 767.26, STATS.,[2] or if it fails to give full play to the dual objectives of maintenance": support and fairness. ***Id.*** A discretionary determination must reflect a rational, reasoned approach based upon the application of correct legal principles to the facts of record. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). Thus, "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision," we will

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[2] The statute provides as follows:

Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (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. 767.255.

(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, where such 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.

affirm. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987) (citation omitted). Indeed, as we have often said, "we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991).

The trial court ruled that Thomas's decision to "voluntarily terminate[] his employment without having any other employment available ... was unreasonable considering his economic circumstances, and his duty to his wife and maintenance obligations after 46 years of marriage." Shortly after he commenced the divorce action, Thomas voluntarily "retired" from his business, informing Margaret and the court of that fact at the temporary-order hearing. The order issued by the court at the close of the hearing included a provision requiring Thomas to seek work, which he, admittedly, disregarded. Thus, as indicated, his income at the time of the divorce had been reduced to his monthly social security benefits of $495. Thomas knew Margaret had very little means of income—her $250-per-month social security benefits and her part-time income of $3,500 per year—and he also knew she had only nominal assets, no retirement plan, significant medical expenses and no health insurance, and that she had been out of the workforce for forty-three of the past forty-six years, apparently at his request. On that record, we are satisfied that the trial court could properly find, in the exercise of its discretion, that Thomas's decision to retire was unreasonable.

Nor do we see any error in attributing to Thomas an earning capacity of $15,000 per year. In ***Sellers v. Sellers***, we held that if the trial court finds a spouse's voluntary job change to be unreasonable, it may then consider that spouse's earning capacity in determining maintenance. ***Sellers***, 201 Wis.2d 578, 587, 549 N.W.2d 481, 484 (Ct. App. 1996). We said that, in order to hold the spouse to his or her earning capacity, rather than actual income, it is not necessary

to find "that the spouse deliberately reduced his [or her] earnings to avoid support obligations or to gain advantage in the divorce action.... It is sufficient that the court finds the employment decision both voluntary and unreasonable under the circumstances." ***Id.*** In this case, after finding that "[Thomas] has the ability to be self-supporting at a standard of living reasonably comparable to that he [and Margaret] enjoyed during their marriage and [which] he would have expected to maintain after [their] divorce had he continued to work," it based the $15,000 figure on his actual average earnings between 1989 and 1996. Given the court's finding that his retirement was unreasonable under the circumstances—a finding we have upheld—the earning-capacity imputation was appropriate and amply justified by the facts of record.

Thomas disagrees. Citing ***State ex rel. Harvey v. Morgan***, 30 Wis.2d 1, 139 N.W.2d 585 (1966), he maintains that the court cannot require him to work beyond the "threshold" retirement age of sixty-five. ***Harvey*** held no such thing. It was not a divorce case, but one challenging the constitutionality of a statute providing income tax refunds and credits to persons over age sixty-five, and the court observed at one point in its opinion that sixty-five is a "commonly accepted and recognized" retirement age after which people do not generally support themselves from current income. ***Id.*** at 8, 139 N.W.2d at 588. We are satisfied that ***Harvey*** does not stand for the proposition advanced by Thomas in this case.

Thomas also argues that there is no evidence supporting the trial court's finding that he can continue to work at approximately the same income he earned in the past. He claims the trial court ignored his uncontradicted testimony outlining his physical problems, which, he says, render him physically unable to work. He also states that, at Margaret's counsel's request, he sold all his

bulldozing and excavating equipment when he retired, and thus cannot feasibly reopen his business.[3] We are not persuaded. With regard to his medical problems, there is no medical evidence to support his claims, and no testimony as to any medical treatment he has undergone[4]—other than his own acknowledgment that no doctor had ever told him he was unable to work. The trial court thus found that "[t]here was no credible evidence corroborating his claim that he was told not to work and he was working … full-time, but quit work after the divorce started without any apparent reason, except his age … [and] without any known plan to retire." Thomas has not persuaded us that the court's findings and rulings in this respect were erroneous.

With respect to Thomas's argument that it is not feasible for him to re-open his bulldozing business, we note that the court did not order him to do so. The court simply found that Thomas was capable of being "self-supporting" and that it was reasonable to assume—given his skills as a mechanic, technician, farmer and salesperson—that he had the ability to obtain employment with an income reasonably comparable to what he earned prior to the divorce. Here, too, we see no error.

Thomas also objects to the amount of the maintenance award—$496 per month—arguing that the court erred in calculating Margaret's earning

[3] Thomas left Wisconsin during the winter of 1996-97, taking with him all of his and Margaret's liquid funds, in violation of the temporary order. His actions resulted in the court finding him in contempt of the temporary order. While he was gone, however, the loan used to finance the purchase of his business equipment went into default, and the court, in order to prevent the bank from repossessing and selling the equipment at a loss, entered an order permitting Margaret to sell the equipment to repay the loan.

[4] When Thomas failed to comply with an order directing him to produce substantiating medical records, the court barred him from testifying as to any medical treatment he received.

capacity. We agree that the court's explanation in this regard is somewhat contradictory. The court expressly found that "[Margaret] is capable of earning minimum wage, or about $10,712.00 per year, as she has demonstrated her ability to work regular plus overtime hours at Lands' End." Then, however, the court apparently used Margaret's actual part-time income of $3,528 per year in its calculations. While a trial court's statement of the reasons underlying its discretionary decisions are an important consideration on review, ***McCleary v. State***, 49 Wis.2d 263, 280-81, 182 N.W.2d 512, 521 (1971), we have repeatedly recognized that where the trial court fails to adequately explain those reasons, we will independently review the record to determine whether it provides a reasonable basis for the court's decision. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

As we have noted above, the trial court, in awarding maintenance, must consider the statutory factors enumerated in § 767.26, STATS., *see*, note 2, *supra*—including the length of marriage, the age and health of each party, educational background and training, work experience and skills, length of absence from the workforce and the feasibility of the person seeking maintenance to be self-supporting—in order to achieve the twin "support" and "fairness" goals of maintenance. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 32-33, 406 N.W.2d 736, 740 (1987). The support objective is intended to maintain the recipient spouse in accordance with the needs and the earning capacities of the parties; the fairness objective is to ensure a fair and equitable financial arrangement between the parties. ***Id.*** Here, too, we believe the trial court's decision meets the applicable requirements.

We have discussed in some detail the factors considered by the court in awarding maintenance to Margaret: her age, her lack of education, training and

employment skills, her income and expenses, her insurance and medical needs, and her lack of assets and retirement benefits. And while the court said that she had an earning capacity of $10,712, working full-time, her only job experience in at least the past forty-six years is three years of seasonal work; and to us that makes it problematic at best whether she can make the transition to full-time employment at age sixty-three.

Thomas, on the other hand, farmed for twenty years during the marriage, and then started his bulldozing and excavating business—adding sales and service functions a few years later. He had a proven earnings history during all that time—until he voluntarily retired after commencing the divorce proceedings. He supported Margaret financially for forty-six years, and, as the court found, had specifically instructed her not to work outside the home for at least forty-three of those years. And although he no longer has the equipment with which to reopen his former business, he leaves the marriage with a variety of marketable skills. We are satisfied that the record supports the trial court's exercise of discretion in ruling that this is a proper case for maintenance.

Thomas's final argument is that the maintenance award is "beyond his means and ability to pay" because it essentially equals his present social-security income of $495 per month. We have, however, upheld the propriety of the court's imputation of a $15,000 annual income to Thomas—a sum which places the maintenance award well within his means and ability to pay.

Margaret's cross-appeal challenges the trial court's limitation of maintenance to a period of eighteen months and its order equally dividing the parties' incomes after that time. She claims that she is entitled to a longer period of maintenance because of her limited work experience, her meager part-time

income in the preceding three years, and her $1,571 monthly living expenses. She also points out that the portion of the judgment requiring division of the parties' incomes upon the termination of Thomas's maintenance obligation could result in her paying Thomas maintenance if she decides to work to supplement her social security benefits, and Thomas continues not to work—and she says this is not an unlikely result given Thomas's earlier non-compliance with the court's seek-work order.

While the court's determination in this respect is problematic because there is nothing in the record suggesting what the parties' incomes might be in 1999 and thereafter, or if their situation will be any different than it was at the time of the divorce, we do not see this as necessarily requiring reversal. The court found that Thomas could reasonably be required to work at least until Margaret turns sixty-five, and that he should continue supporting her up to that time. And the court reasoned that, because "[Thomas and Margaret] shared their income from every source equally" during the marriage, it would be fair to resume an equal division upon termination of the $496-per-month maintenance. We note in this regard that if, after this maintenance is cut-off, the parties' circumstances are such that such a result is unfair or inequitable to either Margaret or Thomas, either may seek a revision of the judgment at that time.[5]

By the Court.—Judgment affirmed.

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[5] Section 767.32, STATS., provides reads in part:

(1)(a) After a judgment ... providing for ... maintenance payments under s. 767.26 ... the court may, from time to time, on the petition, motion or order to show cause of either of the parties ... revise and alter such judgment or order respecting the amount of such maintenance ... and the payment thereof ... and may make any judgment or order respecting any of the matters that such court might have made in the original action ….