

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 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. 98-1052

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

EDWARD G. STOLZMAN,

PETITIONER-APPELLANT,

v.

MARY A. STOLZMAN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waushara County:
WILLIAM M. McMONIGAL, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Edward Stolzman appeals from the judgment divorcing him from Mary Stolzman. As part of that judgment, the trial court ordered Edward to pay Mary indefinite maintenance of \$1,328 per month. Edward

contends that the award constitutes an erroneous exercise of the trial court's discretion. We disagree and therefore affirm.

Edward and Mary divorced after thirty years of marriage. At the time of the divorce he was fifty-two and she was fifty-one. He was recovering from a kidney stone problem and she was in good health. Both worked full time, with Edward earning \$53,508 per year in a salaried position, and Mary earning approximately \$15,000 per year from a full-time \$6.50 per hour position and part-time cleaning work.

The trial court based maintenance on Edward's present salary, and a potential earning capacity for Mary of \$9.00 per hour. Using those figures, the trial court awarded sufficient maintenance to give each party one-half of the estimated combined net income. The court reasoned

that this is an appropriate case for an equalization of income primarily because of the 30 year marriage and, secondarily, because of the clear disparity of income. An award of maintenance that would do other than equal their respective incomes would require the court to make some findings that one party is entitled to more disposable income than the other, and absent some responsible way of demonstrating Ms. Stolzman has other means to enhance her earnings, the Court would be at a real handicap to make those findings.

Maintenance rests within the trial court's discretion 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 fails to consider proper factors, makes factual errors or awards an excessive or inadequate amount. *DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 582-83, 445 N.W.2d 676, 679 (Ct. App. 1989).

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 “recipient spouse in accordance with the needs and earning capacities of the parties.” *Id.* The fairness objective is meant to “ensure a fair and equitable financial arrangement between the parties 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 in a long marriage, 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 dividing the parties’ actual and potential income. While the analysis begins at that point, the court may adjust the award following a reasoned consideration of the statutory factors set forth in § 767.26, STATS. *Bahr*, 107 Wis.2d at 85, 318 N.W.2d at 398. Here, however, as the trial court noted, no factors existed sufficient to offset the considerations of fairness and support prompted by the length of the marriage and the income disparity.

Edward’s concern is less with an equal division of the income than with its computation. According to Edward, the trial court should have computed his income at a much lower level because he works fifty-five hours per week, and should not have to work overtime to support Mary. However, Edward’s “overtime” is a requirement of the salaried managerial position he holds. He does not receive additional pay for it. The trial court therefore reasonably chose not to credit Edward for overtime pay, because he did not actually receive any.

Edward also contends that the trial court improperly fixed Mary's income at only forty hours per week despite the fact that she occasionally volunteered to work overtime at her \$6.50 per hour position. Whether Mary worked overtime at her \$6.50 per hour job is irrelevant. The trial court computed Mary's income for maintenance purposes at \$9.00 per hour times forty hours per week, an amount greater than she earned even with overtime at her \$6.50/hour position.

Edward also asserts that the trial court considered an equal division of income as mandatory, rather than a starting point. We find nothing in the trial court's decision or remarks at trial suggesting that the trial court misapplied the law on maintenance.

Finally, Edward faults the trial court for improperly warning him not to take a lesser paying position. The trial court reasonably advised both parties concerning the law on modifying maintenance, and the factors the court might consider in exercising its discretion on that question. Those remarks were not improper.¹

By the Court.—Judgment affirmed.

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

¹ Had the trial court not warned Edward that a voluntary reduction of hours or wages would not automatically lower his maintenance payments, Edward might have assumed that if he lowered his income, he would be entitled to reduced maintenance. Edward should not complain that he was forewarned that lessened income may not result in a reduction in maintenance.

