

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 13, 1999

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. 98-2869

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MARY L. BRICE,

PETITIONER-RESPONDENT,

V.

**ROGER GARFIELD DALE MILLER,
A/K/A ROGER BRICE, SR.,**

RESPONDENT-APPELLANT.

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

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Roger Miller appeals the portion of his divorce judgment awarding \$1,200 per month maintenance to his former wife, Mary Brice. He argues that the trial court erroneously exercised its discretion in three ways.

First, he argues that it relied upon a mistaken view of the law when failing to limit the maintenance award to a specific term. Second, he contends that the trial court permitted expert opinion testimony without requiring a showing of the expert's qualifications. Third, he argues that the trial court erroneously permitted Brice to testify to hearsay. We reject Miller's arguments and affirm the judgment.

Brice and Miller were married in 1969 and had three children during their marriage, only one of whom was still a minor at the divorce. They agreed to joint legal custody of the child, with Miller having primary physical placement. He did not request child support from Brice, and none was ordered.

Miller, a disabled veteran, is not currently employed. He receives approximately \$3,500 per month in social security and veteran's benefits. He also receives approximately \$317 per month social security benefits for his child. He testified that the parties had lived apart for several years. He further testified that during their separation, he had paid Brice approximately \$800 to \$1,200 per month.

Brice is not employed. After graduating from high school, she worked for one month at a canning factory. She had no other employment. During their marriage, Brice stayed home with the children. She had no income at the time of the divorce. The record indicates that she suffered from long-term mental health problems, having been hospitalized three times, most recently within three months of the divorce trial. At the time of the trial, Brice was living with a relative.

Brice's case manager, Bernard Kilps, testified that he has a bachelor's and master's degree in psychology and is employed at the community treatment program at the department of human services. He has worked in that

capacity for over twenty years and has managed the cases of thousands of disabled people. His duties include helping mentally ill people find jobs. He testified that his job is to help Brice stay out of the hospital, help her adjust to the community and live independently.

During Brice's last hospitalization, Kilps had psychological testing done to determine her skill levels, which were very poor and raised the question whether she could live independently. Based upon his experience as well as testing and evaluations of Brice, Kilps believed she was not employable outside of the Curative Workshop earning between \$50 and \$100 per month. He set up a "representative payee system" because she needs help managing money.

The trial court found that while both parties were not employable, they were able to live on the government benefits to which they were entitled. The trial court considered that the marriage was long term, and Brice was fifty-one years old with mental health problems. The court also considered Brice's hospitalizations and that her only job in the last thirty years was peeling potatoes for one month. The court concluded that Brice's significant mental health problems made her unemployable. The court stated that on the facts before it, it could not find any legal grounds to limit maintenance to a definite term. Based upon the submitted budgets, the court ordered that Miller pay Brice \$1,200 per month until 2003, at which time his benefits will be reduced because their child turns eighteen. At that time, maintenance would also be reduced to \$950 per month.

The determination of maintenance issues requires the exercise of judicial discretion. *See Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). Judicial discretion is the reasoned application of the proper principles

of law to the facts that are properly found. *See id.* at 66, 306 N.W.2d at 20-21. It is well-established that a trial court, in the exercise of its discretion, may reasonably reach a conclusion which another court would not. ***Liddle v. Liddle***, 140 Wis.2d 132, 156, 410 N.W.2d 196, 206 (Ct. App. 1987).

Miller does not dispute that some maintenance was appropriate, but challenges the amount and duration of the award. In deciding whether to award limited or indefinite maintenance, the trial court must consider the factors in § 767.26, STATS. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 40, 406 N.W.2d 736, 743 (1987). On review, we must consider whether a circuit court's application of the factors achieves both the fairness and support objectives of maintenance. ***Forester v. Forester***, 174 Wis.2d 78, 84-85, 496 N.W.2d 771, 773-74 (Ct. App. 1993). A trial court misuses its discretion if it misapplies or fails to apply the statutory factors, or if it fails to fully consider the dual objectives of maintenance. *Id.* at 86, 496 N.W.2d at 774.

Limited maintenance can serve many purposes, including an opportunity for the recipient spouse to become self-supporting within that period of time, as well as an incentive to seek employment. ***LaRocque***, 139 Wis.2d at 40-41, 406 N.W.2d at 743. The supreme court has stated:

In determining whether to grant limited-term maintenance, the circuit court must take several considerations into account, for example, the ability of the recipient spouse to become self-supporting by the end of the maintenance period at a standard of living reasonably similar to that enjoyed before divorce; the ability of the payor spouse to continue the obligation of support for an indefinite time; and the need for the court to continue jurisdiction regarding maintenance.

Because limited-term maintenance is relatively inflexible and final, the circuit court must take particular care to be realistic about the recipient spouse's future earning

capacity. The circuit court must not prematurely relieve a payor spouse of a support obligation lest a needy former spouse become the obligation of the taxpayers.

Id. at 41, 406 N.W.2d at 743.

Here, the circuit court's decision reflects a consideration of proper factors. It considered the length of the marriage, the parties' incomes, financial needs and Miller's ability to pay, Brice's work experience, age, and mental health history. It is undisputed that Brice is without vocational skills and work experience, and that her mental health problems played a significant role in her lack of employment history. There was no evidence presented as to how Brice might become self-supporting, or increase her earning potential. There is nothing in the record to suggest that Brice could accomplish this within any given time period. Consequently, limited term maintenance would be inconsistent with the facts of record. We conclude the trial court reasonably exercised its discretion in awarding maintenance for an indefinite term.

We reject Miller's contention that the monthly maintenance amount is excessive. In a long term marriage, the starting point for a maintenance award is one half the parties' income. *Id.* at 39, 406 N.W.2d at 742. Here, the court did not award one half Miller's income, but upon consideration of the appropriate factors, awarded less than that. We conclude that \$1,200 per month, to be reduced to \$950 in 2003, reflects a proper consideration of Brice's needs and Miller's ability to pay.

Miller argues, however, that the trial court applied a mistaken view of the law when it stated that it was bound by the case law to set maintenance for an indefinite term, and that limited-term maintenance is without legal ground. We are unpersuaded. The record reveals that the court reached its conclusion based

upon a consideration of the statutory factors. The court stated that it is "bound by existing case law *given the facts of this case* to set maintenance for an indefinite term." (Emphasis added.) Its statement that it was "bound" was based not on the law in isolation from the facts, but rather on the law as applied to the facts. This is a proper exercise of discretion.

Miller further argues that the trial court erred when it failed to articulate how it reached its finding that Brice suffered from a mental illness and was unemployable for life. We reject this argument. The trial court stated that the record before it led it to conclude that Brice had significant mental health problems and that "neither party will be employable during their lives." The context demonstrates that testimony at trial persuaded the court that Brice's history of mental health problems, her age, and her lack of vocational skills prevented her from becoming self-supporting.¹

Next, Miller argues that the trial court erred when it relied upon Kilps' testimony as expert opinion without requiring a foundation showing qualifications. We disagree. The record discloses that throughout the trial, Miller's counsel objected to Kilps' testimony for lack of qualifications. While some of these objections were overruled, the court at one point observed that Brice's counsel had not established adequate foundation. At that point, as well as at other points throughout the trial, Kilps testified to his qualifications.

Opinion testimony is admissible if it can help a fact-finder decide a contested issue of fact. Section 907.02, STATS. The determination whether a

¹ We note that should there be a substantial change in Brice's circumstances, maintenance may be modified. *See* § 767.32, STATS.

witness is qualified to give expert opinion testimony must have a reasonable basis and be made in accordance with the facts of record and acceptable legal standards. *See James v. Heintz*, 165 Wis.2d 572, 578-79, 478 N.W.2d 31, 34 (Ct. App. 1991). If the record does not express the court's reasoning, an appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 501-02 (1983).

Here, the trial court apparently accepted Kilps' testimony that he had an advanced degree in psychology, and for over twenty years he has managed thousands of cases for the human services department, and also was familiar with finding employment for people with mental illnesses. Additionally, he was Brice's case manager, and thereby familiar with her individual case. This testimony was not rebutted by any other evidence. Under the facts of this case, the trial court did not err in permitting Kilps' opinion testimony relating to Brice's mental illness and vocational status.

Next, Miller argues that the trial court erred when it permitted hearsay testimony from Brice regarding her mental illness. Miller objects to Brice's testimony as follow:

Q. Has your doctor supported your claim that you are incapable of working?

A. Yes, the doctor has.

Over Miller's objection, the trial court admitted this testimony for the limited purpose of showing that her doctors agreed that Brice should apply for disability benefits and that she was qualified for them.

Such testimony could be admitted to prove Brice's state of mind that she was unemployable and thus explains her failure to seek employment opportunities. To the extent that this is inadmissible hearsay evidence, any error was harmless. *See* § 805.18(2), STATS. The record reveals ample evidence of Brice's mental health problems and unemployability. The trial court did not commit reversible error in permitting this testimony.

We conclude that the trial court properly applied the statutory factors when it awarded indefinite maintenance. We also conclude that the record discloses a rational basis to permit Kilps' opinion testimony. Finally, we conclude that the admission of hearsay testimony was not prejudicial.

By the Court.—Judgment affirmed.

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

