

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 16, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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No. 99-0673

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DAWN D. WILSON,

PETITIONER-APPELLANT,

V.

PATRICK A. WILSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Dawn D. Wilson appeals from the property division, maintenance and attorney's fees provisions of the judgment divorcing her from Patrick A. Wilson. Although we affirm the circuit court's decisions on

maintenance, attorney's fees and most of the property division, we reverse that portion of the property division decision relating to the treatment of credit card cash advances and remand for further proceedings.

¶2 The division of the marital estate and the decision whether to award maintenance, and if so, how much, are within the circuit court's discretion. *See Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). We will affirm a circuit court's discretionary decision if the court made a rational, reasoned decision and applied the correct legal standard to the facts of record. *See id.* We will accept the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98).¹ Whether the circuit court applied the correct legal standard is a question of law which we review de novo. *See Cook v. Cook*, 208 Wis. 2d 166, 172, 560 N.W.2d 246 (1997).

¶3 Dawn and Patrick married in 1980 at the age of nineteen. In 1997, Dawn commenced this divorce action. The parties have two minor children.

¶4 The circuit court found that Dawn had an earning capacity of \$15,000 and held maintenance open for two years. The court based this decision on the fact that Dawn and Patrick were the same age, that Dawn has the ability to work and that her health does not prevent her from working. The court noted that Dawn could work more hours if she eliminated some of her volunteer work.

¶5 Dawn contends that the court erred in setting her earning capacity at \$15,000 because she presented evidence that her health prevents her from working

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

more than thirty hours per week.² Although she testified that she could not work more than thirty hours per week due to her health, the medical reports she submitted do not restrict her to working less than full time. Dawn testified that she worked forty hours per week for several months after her health problems were diagnosed and until a few months before the divorce action began.³

¶6 In reaching its finding that Dawn could work more hours, the circuit court apparently discounted Dawn's health problems and her contention that they prevent her from working forty hours per week. It is the trier of fact, not the appellate court, that has the opportunity to hear and observe testimony. *See Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). Thus, when a finding of fact is premised on the circuit court's assessment of credibility, we must give due regard to the court's opportunity to make this assessment. *See Jacquart v. Jacquart*, 183 Wis. 2d 372, 386, 515 N.W.2d 539 (Ct. App. 1994). Based on the record before us, we cannot conclude that the circuit court erred in finding that Dawn's health does not preclude her from substituting paid employment for her volunteer hours.

¶7 Dawn contends that the court could not consider her earning capacity unless it determined that she was shirking.⁴ We disagree. WISCONSIN

² Dawn earns \$7.50 per hour or approximately \$11,000 per year.

³ Dawn recanted this testimony during the second day of the hearing and reiterated that since her health problems started she had not worked full time.

⁴ Shirking is established when the person obligated to pay support: (1) intentionally avoids the duty to support; and (2) unreasonably diminishes his or her income in light of the support obligation, *see Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992), or put another way, decreases his or her ability to pay by a voluntary failure to exercise the full capacity to earn, *see Roellig v. Roellig*, 146 Wis. 2d 652, 658-59, 431 N.W.2d 759 (Ct. App. 1988).

STAT. § 767.26(5)⁵ requires the court to consider the earning capacity of the party seeking maintenance. The court need not have undertaken a shirking analysis to make a finding regarding Dawn's earning capacity.

¶8 Dawn argues that the court did not explain why it denied maintenance. We agree that the circuit court did not fully explicate its decision to deny current maintenance. However, we may independently review the record to determine whether it provides a basis for the court's exercise of discretion. *See Town of Seymour v. City of Eau Claire*, 112 Wis. 2d 313, 322, 332 N.W.2d 821 (Ct. App. 1983). We are obliged to uphold the court's discretionary decision on maintenance if we can conclude that there are facts of record which would support the court's decision had discretion been exercised on the basis of those facts. *See Liddle v. Liddle*, 140 Wis. 2d 132, 150-51, 410 N.W.2d 196 (Ct. App. 1987).

¶9 In addressing maintenance, a court is to be guided by the relevant WIS. STAT. § 767.26 factors, *see Trattles v. Trattles*, 126 Wis. 2d 219, 228, 376 N.W.2d 379 (Ct. App. 1985), and the support and fairness objectives set forth in *LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987).

¶10 The record contains the following facts. Patrick earns approximately \$28,000 in gross income per year, which is reduced to \$21,000 due to his 25% child

⁵ WISCONSIN STAT. § 767.26 provides in pertinent part:

Upon every judgment of ... divorce ..., the court may grant an order requiring maintenance payments to either party for a limited or indefinite period of time after considering:

(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.

support obligation. Patrick testified that after deducting child support, his \$1700 in monthly expenses meets or exceeds his net monthly income. The court found that Dawn could earn \$15,000, and the record indicates that she will receive \$7000 as child support, for a gross income of \$22,000. Dawn's monthly income of \$1833 is less than her monthly expenses of \$2061. However, during cross-examination, Dawn was unable to substantiate a \$200 budget line for "household items" and conceded that her budget shortfall could be met by eliminating the children's private school tuition and the household items, and by working an extra ten hours per week. Based on this evidence, the parties' incomes can be deemed roughly equal and their financial resources are indisputably limited.

¶11 In deciding to hold open maintenance, the court assessed the credibility of the parties' financial information and their testimony and considered that Dawn and Patrick were the same age, that Dawn has the ability to work and that her health does not prevent her from working. The record described above permits a finding that Patrick's budget and child support obligation cannot accommodate an award of maintenance, and that Dawn could eliminate her budget shortfall if she modified her expenses and increased her paid work hours. Because the parties' overall financial circumstances were marginal, the court did not misuse its discretion in holding maintenance open for two years. The maintenance decision meets the fairness and support objectives of *LaRocque* under the circumstances of this case.

¶12 The court also declined to grant Dawn relief because Patrick did not pay his portion of her mortgage and tax payments as required by a November 14, 1997 family court commissioner temporary order. The temporary order required Dawn and Patrick to pay equal shares of the mortgage and taxes on Dawn's home and to pay equally on credit card debt. Patrick did not pay his share of the mortgage and tax payments, and Dawn did not pay her share of the credit card

debt. Dawn testified that one-half of the mortgage payment was \$201.50 per month for the one-year term of the temporary order, or approximately \$2450. Dawn offered an exhibit at trial indicating that Patrick had paid \$6731 in credit card debt since the divorce began, half of which would have been Dawn's obligation under the temporary order.⁶ Because neither party complied with the temporary order and Dawn's failure under the temporary order exceeded Patrick's, the court did not misuse its discretion in declining to require Patrick to reimburse Dawn or otherwise account in the property division for Patrick's half of the mortgage and tax payments.⁷

¶13 We turn to the issue on which we reverse the circuit court. The circuit court declined to include Patrick's credit card cash advances in the parties' marital estate, yet assigned half of that debt to Dawn.⁸ Dawn argued that Patrick did not sufficiently account for the cash advances and therefore did not rebut the presumption of WIS. STAT. § 767.275 that unaccounted-for marital assets are included in the marital estate for division at divorce. The court rejected Dawn's contention that Patrick secured \$29,000 in cash advances and found that Patrick did not commit fraud with regard to these cash advances. Because the court did not find fraud, it did not include the cash advances in the marital estate or make

⁶ We note that Dawn testified that of the \$6731 in credit card debt Patrick paid, some of that debt was incurred during the pendency of the divorce in violation of the temporary order which precluded acquiring new credit. We do not conclude that this precluded the circuit court's discretionary decision not to hold Patrick liable for a portion of Dawn's mortgage and taxes.

⁷ This holding is not inconsistent with our subsequent holding that the circuit court erred in holding Dawn liable for one-half of the credit card debt. Dawn was under an obligation to comply with the temporary order until further order of the circuit court.

⁸ Our decision regarding the cash advances does not affect the other credit card debt. Dawn did not argue at trial that she should be relieved of credit card debt generally. She limits her appellate argument to the credit card cash advances.

any findings regarding the cash advances. The court deemed all of the credit card debt marital debt and held Dawn equally responsible for that debt.⁹

¶14 WISCONSIN STAT. § 767.275 provides:

In any action affecting the family, except an action to affirm marriage under s. 767.02 (1) (a), any asset with a fair market value of \$500 or more which would be considered part of the estate of either or both of the parties if owned by either or both of them at the time of the action, but which was transferred for inadequate consideration, wasted, given away or otherwise unaccounted for by one of the parties within one year prior to the filing of the petition or the length of the marriage, whichever is shorter, shall be rebuttably presumed to be part of the estate for the purposes of s. 767.255 and shall be subject to the disclosure requirement of s. 767.27. Transfers which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth.

¶15 A court misuses its discretion when it misapplies the law. *See Midwest Developers v. Goma Corp.*, 121 Wis. 2d 632, 650, 360 N.W.2d 554 (Ct. App. 1984). Here, the court held that the cash advances need not be included in the marital estate because the court did not find fraud by Patrick. However, fraud is not the standard under WIS. STAT. § 767.275. The standard is whether an asset “was transferred for inadequate consideration, wasted, given away or otherwise unaccounted for ... within one year prior to the filing of the petition” *Id.*

¶16 Because the court did not make any findings regarding the amount of cash advances and whether the advances were accounted for pursuant to the statute,

⁹ At the filing of the divorce petition, Dawn and Patrick had approximately \$50,744 in credit card debt. As of the hearing date, the debt had increased to approximately \$65,000. Dawn and Patrick agreed at trial that she did not know about the majority of the credit cards and balances prior to the divorce.

we must reverse and remand for the court to apply the correct legal standard to the parties' dispute regarding the cash advances. The court may apply the correct legal standard to the record previously created or, if the court believes further proceedings are necessary, the court may conduct such proceedings as it deems necessary to comply with our opinion. Because we have directed the court to address the cash advances on remand, the court may revisit other aspects of the property division in order to divide the marital estate consistent with the requirements of WIS. STAT. § 767.255.

¶17 Dawn also complains that the court erred in the property division when it awarded equity in a property purchased by Patrick during the pendency of the divorce to Patrick's mother, in whom the property was titled. Patrick used \$6500 of a previously divided marital asset to purchase a property on Mt. Vernon Street for no more than \$14,000. Patrick titled the property in his mother's name. The court ordered Patrick to sell the property and ordered the proceeds divided as follows: the first \$6500 to Patrick and the next \$7500 to be divided equally between Patrick and Dawn, with the balance to be paid to Patrick's mother as record titleholder. The court retained jurisdiction to address future issues relating to the Mt. Vernon property.

¶18 On appeal, Dawn concedes that the court's retention of jurisdiction may be sufficient to address whatever problems arise from the disposition of the Mt. Vernon property. We agree. Moreover, because the court did not anticipate that there would be additional proceeds beyond the purchase price, we discern no misuse of discretion in the court's treatment of the Mt. Vernon property.

¶19 Finally, Dawn claims that the court erred in declining to award her attorney's fees. The court held Dawn largely responsible for the protracted

litigation. Consequently, the court declined to require Patrick to make a contribution to Dawn's attorney's fees.

¶20 An award of attorney fees is within the discretion of the circuit court. *See Ably v. Ably*, 155 Wis. 2d 286, 293, 455 N.W.2d 632 (Ct. App. 1990). The court must normally address three factors when awarding attorney fees: (1) the spouse receiving the award needs the contribution; (2) the spouse ordered to pay has the ability to contribute to the fees; and (3) the reasonableness of the fees. *See id.*

¶21 Because the court faulted Dawn for the protracted litigation, the court did not consider these factors. We are obliged to uphold the discretionary decision to deny attorney fees if we can conclude that there are facts of record which would support this decision. *See Liddle*, 140 Wis. 2d at 150-51.

¶22 We question the circuit court's finding that Dawn engaged in overtrial. Dawn needed to create a record relating to the credit card cash advances in order to meet the requirements of WIS. STAT. § 767.275. In fact, our reversal relates to the treatment of the cash advances. Nevertheless, we affirm the circuit court's refusal to award attorney's fees because our independent review reveals that Patrick does not have the ability to contribute to Dawn's attorney's fees. In so holding, we rely upon our earlier determination that Patrick does not have the ability to pay current maintenance.

¶23 No costs on appeal to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

