

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 14, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 99-0369
99-1578**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DIANE MARIE BIEVER,

PETITIONER-RESPONDENT,

V.

NICHOLAS JOSEPH BIEVER,

RESPONDENT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. In appeal no. 99-0369, Nicholas Joseph Biever (Nick) appeals from an August 1998 order determining maintenance, property division and attorney's fees and from a January 1999 order relating to maintenance he must pay to Diane Marie Biever. In appeal no. 99-1578, Nick appeals from the May 1999 amended judgment of divorce (which incorporated the August 1998 order) and from an April 1999 order disposing of his request for reconsideration of the court's August 1998 order. The appeals were consolidated for briefing and disposition. We affirm the maintenance award but reverse and remand for further proceedings relating to the property division and the award of attorney's fees.

¶2 Nick challenges the indefinite maintenance awarded to Diane. The court considered the length of the marriage (twenty-four years) and the dictates of *LaRocque v. LaRocque*, 139 Wis. 2d 23, 39, 406 N.W.2d 736 (1987), that a maintenance award should roughly equalize the income available to each party so that each party can reasonably expect to enjoy a standard of living similar to the marital standard of living. The court found the family's annual income in the years prior to the divorce to be approximately \$40,000. Nick had reasonably stable income and good health. Diane's health was questionable and her work history spotty. The court noted Diane's efforts to further her education and her previous workplace injuries. In light of the parties' relative incomes and their ability to earn income in the future, the court awarded Diane indefinite maintenance of \$600 per month.¹

¹ In a subsequent order on reconsideration, the circuit court reduced Diane's maintenance to \$498 per month to reflect her child support obligation for the minor child. In a further order, the court suspended Diane's child support obligation on the parties' stipulation and ordered Nick to pay Diane \$500 per month in indefinite maintenance. We construe Nick's challenge to the maintenance award to be to the \$500 per month award. However, because the circuit court, in reducing maintenance to \$500, referred to its original reasons for awarding indefinite maintenance, we consider those reasons as well.

¶3 Determination of the amount and duration of maintenance is discretionary with the circuit court, and the award will be upheld unless that court misused its discretion. *See Bisone v. Bisone*, 165 Wis. 2d 114, 118, 477 N.W.2d 59 (Ct. App. 1991). Discretion is properly exercised when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. *See LaRocque*, 139 Wis. 2d at 27. We will not reverse the circuit court's factual findings unless those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98).²

¶4 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 of *LaRocque*, 139 Wis. 2d at 33.

¶5 On appeal, Nick argues that the court did not set out its reasons for awarding maintenance to Diane. Nick complains that the court did not consider his ability to pay maintenance and that his financial disclosure revealed that he had insufficient funds to support himself and the minor child of whom he initially had primary placement. Diane argues that the court considered the relevant maintenance factors.

¶6 Although the court's reasoning on maintenance is sparse, we conclude that it is sufficient to demonstrate the required exercise of discretion. The court's reference to *LaRocque* indicates that the court was cognizant of the fairness and support objectives of maintenance. The support objective is intended

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

to maintain the recipient spouse in accordance with the needs and the earning capacities of the parties. See *LaRocque*, 139 Wis. 2d at 33. The fairness objective is meant to ensure a fair and equitable financial arrangement in each case. See *id.* The starting point for a maintenance award following a long-term marriage is to award the dependent spouse half of the total combined earnings of both parties. See *Bahr v. Bahr*, 107 Wis. 2d 72, 85, 318 N.W.2d 391 (1982). The court properly employed this starting point.

¶7 On the question of whether the court considered Nick's ability to pay, we note that at the time of the divorce Nick was earning approximately \$24,000 per year and Diane had no significant income because she was a student. When, several months later, the court reduced maintenance to \$500 per month, it found that Nick was earning \$31,000 per year and Diane was earning \$19,000 per year (having finished her education) and that the parties' incomes would stay relatively the same. The court calculated that to equalize the income available to each party, Nick should pay \$500 per month in maintenance. There is a basis in the record for this maintenance award which has this effect.

¶8 Nick also challenges the August 1998 property division. The court awarded the parties the property in their possession at the time of trial. Having so divided the property, the court stated that there was an imbalance in the property division of \$12,000 in favor of Diane. The court then reduced this amount to \$7,000 after the court found that Nick bore greater responsibility for the overtrial of the parties' divorce and should bear \$5,000 of Diane's attorney's fees. The court found that Diane's \$15,000 in attorney's fees was reasonable given the overtrial in the case and that Nick "caused a long and protracted attempt to locate and value his assets" by "either an intentional or careless disregard for the seriousness of the proceedings."

¶9 Nick sought reconsideration of the property division because the court did not offer any findings relating to the valuation of the parties' assets or the calculation of the \$12,000 property division imbalance. At the December 1998 hearing on Nick's reconsideration motion, the court clarified that because Nick had stored property in numerous places, the court awarded property off the homestead to Nick and property on the homestead to Diane. The court observed:

[This case was an] awful mess. There is nobody who is going to dispute that. I never saw a case where so much stuff was spread over so many places. Now, [Diane] didn't move all this stuff around; [Nick] did. So what I'm left with when making an award, am I going to award [Diane a tractor somewhere in a field and give Nick a car at homestead]. Not likely. That's just inviting more trouble.... [Nick] can have everything except what's at the homestead. [Diane gets all the property at the homestead.] Now we don't have any contempt later on with people having – claiming that there was something someplace that is no longer there. It simplifies the matter, and it makes it easier for the parties to know what their rights are by simply making a geographic determination of who gets what.... It's a division of property based upon its location.... The fact of the matter is this property is spread out all over this county like somebody dropped it from an airplane. And the only way I could come up with some reasonable way to divide it was to simply say this is here, and the rest of it is there.

¶10 Nick then complained that the court did not state its findings and calculations relating to the \$12,000 imbalance in the property division. More specifically, he complained that the court did not make any findings regarding the property items awarded to each party and the value of those items. The court responded:

Do you want to ask me if I have any notes of how I did that? I don't, all right? I rendered this decision in August. I went through everything, and that's what I determined it to be. I don't have any notes or anything else more than my own memory of the reasoning process I engaged in. I can't answer you any further than that.... After I

considered all of it, I considered there to be a \$12,000 imbalance.... I don't think I'm required to do any more than this.

¶11 At an April 1999 hearing concerning objections to the original judgment of divorce, Nick complained that the judgment stated that the asset values were as set forth in the parties' financial declarations even though the court never made findings regarding the value of the assets. The court agreed:

But frankly it gets back ... to what I was saying about the financial statements as it related to income. I mean these were no longer of any value to me. I can tell you that nobody's financial statement assisted this Court one wit in its decision because there was such a gross discrepancy between what the items even consisted of, let alone what they were worth, that I had to make my determination based upon all the testimony and evidence taken at trial.

Those financial statements were of almost no weight or value as far as I'm concerned. There was so much discrepancy between the two of them that you might as well have listed property on another planet as far as what the values of those were. I will say that of all the cases that have been tried in this court in the last 19 years, that was the most unmanageable mishmash that I've ever had to deal with in a divorce case. And I don't think you are telling a true story that the values are as what was stated in the testimony or in the financial statements.

¶12 The division of the marital estate is within the discretion of the circuit court. See *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We will sustain the court's decision if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. See *id.*

¶13 On appeal, Nick argues that the court did not make findings regarding the value of the parties' assets. Property division normally consists of determining the total value of the marital estate, determining the percentage of that

value distributable to each spouse, and assigning enough property to each spouse to satisfy that percentage. *See Pelot v. Pelot*, 116 Wis. 2d 339, 346, 342 N.W.2d 64 (Ct. App. 1983). Despite the court's statements at the reconsideration hearing that it considered "everything" in dividing the parties' property, the record does not reflect the court's reasoning or contain any findings relating to the division and the \$12,000 imbalance. We reverse and remand this aspect of the property division to the circuit court to make the necessary findings and explain its reasoning on the property division. That the property division was hotly contested and complex did not relieve the court of its duty to explain the basis for its resolution of the disputes. The court was presented with conflicting evidence regarding valuation and was required to make findings and reach a decision based on the evidence.

¶14 Diane argues that the circuit court is not required to make a finding of fact regarding every asset in a divorce case. We note that the court found the parties' financial disclosure materials unhelpful and relied on the trial evidence and testimony. While the circuit court is free to determine upon which evidence it will rely, the court must, at a minimum, explain how it arrived at the property division and imbalance calculation. The court must demonstrate to the parties and the reviewing court that it "undert[ook] a reasonable inquiry and examination of the facts' and 'the record shows that there is a reasonable basis for the ... court's determination.'" *Gerrits v. Gerrits*, 167 Wis. 2d 429, 441, 482 N.W.2d 134 (Ct. App. 1992) (quoted source omitted; alteration in original). Here, the court's decision and comments at subsequent hearings do not demonstrate the basis for its property division decision, and the court could not tell the parties the facts upon which it relied.

¶15 Although we reverse that portion of the property division relating to valuation and the imbalance in the division, we affirm the court's decision to rely on

the location of the property as the basis for assigning property to the parties. The record reveals that the appraisers did not see the same property at the same locations. The court found that the property was spread all over the county. It is apparent that the court distributed property based upon the realities of this case and with an eye toward avoiding future contempt proceedings relating to difficulties in locating or transferring property. The court gave its reasons for taking this approach and, under the circumstances of this case, the approach is not a misuse of discretion. *See* WIS. STAT. §767.255(3)(m) (among the factors relevant to property division is any other factor the court may determine to be relevant in the individual case).

¶16 We turn to Nick’s complaint regarding the award of attorney’s fees to Diane. He argues that the record does not reveal any conduct which justified an award of attorney’s fees for overtrial.

¶17 The 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). When attorney fees are awarded in an overtrial situation, there is no need to make findings of need and ability to pay. *See Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985). The policy underpinning an award of attorney fees is to compensate the overtrial victim for fees unnecessarily incurred because of the other party’s litigious actions. *See id.*

¶18 Here, the record contains sufficient reasons for the circuit court’s decision to award Diane attorney’s fees for overtrial. In its August 1998 decision on maintenance, property division and attorney’s fees, the court found that Nick “caused a long and protracted attempt to locate and value his assets” by “either an intentional or careless disregard for the seriousness of the proceedings.” At the December 1998 reconsideration hearing, the court made a finding that the case

was overtried and that the overtrial was largely caused by Nick's conduct vis-à-vis the valuation of assets. These findings are sufficient under *Ondrasek*.

¶19 While we uphold the court's overtrial determination, we conclude that the court did not give sufficient reasons for assessing \$5,000 in attorney's fees against Nick.³ Therefore, we reverse and remand for the circuit court to give its reasons for requiring Nick to bear this particular amount of Diane's attorney's fees.

¶20 In conclusion, we affirm the circuit court's decision on maintenance. We reverse and remand that portion of the property division addressing valuation and the imbalance in favor of Diane. We affirm all other aspects of the property division. We also reverse and remand for an explanation of the reasons Nick must bear \$5,000 of Diane's attorney's fees.

¶21 No costs to either party on appeal.

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

³ We do not see any inconsistency between the court's statement that Diane's \$15,000 in attorney's fees was reasonable and its decision to assess part of those fees against Nick for overtrial. Diane was required to respond to Nick's conduct in this case, thereby incurring attorney's fees which the court found to be reasonable. Nick does not dispute the determination that Diane's \$15,000 in attorney's fees was reasonable.

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

