COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

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.

Appeal No. 2017AP1281 **Cir. Ct. No. 2016FA85**

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

IN RE THE MARRIAGE OF:

DAVID L. STUDER,

PETITIONER-RESPONDENT,

V.

CHARLENE K. STUDER,

RESPONDENT-APPELLANT.

APPEAL from judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Modified and as modified, affirmed; cause remanded with directions*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Charlene Studer appeals from a circuit court judgment of divorce requiring her former spouse, David Studer, to pay her maintenance of $1,000 per month until she is sixty-two years old. Charlene argues that the circuit court erroneously exercised its discretion by not sufficiently articulating the basis for the amount or duration of its maintenance award. We reject Charlene's arguments and affirm the circuit court's judgment, though we remand so that the circuit court can fix a clerical error in the judgment regarding Charlene's birthdate.

BACKGROUND

¶2 David filed for divorce from Charlene after twenty-one years of marriage. The couple had two adult children, one of whom lived with Charlene. The parties stipulated to most financial issues, including an equitable division of marital property in which each party received assets worth over $750,000. However, the parties did not agree on the issue of maintenance. In her pretrial submission, Charlene argued that an indefinite maintenance award of between $2,530 and $2,968 per month would leave both spouses with the same net disposable dollars after health insurance premiums each month, depending on whether David received tax-free payments to cover his health care expenses. In his pretrial submission, David argued that the court should deny maintenance because Charlene had already received an unfair $275,000 windfall when she

received half of David's proceeds from the sale of his family business as part of the marital property division.[1]

¶3 The circuit court conducted a bench trial on Charlene's claim for maintenance. The testimony at trial established the following facts, which are relevant to this appeal. David was fifty-six years old and earned $6,250 per month working fifty hours per week as a manager of the business previously owned by his family. Prior to the sale of the business in 2015, David had taxable earnings of $182,000 per year. David testified that he planned to cut back his hours or retire at age sixty-two.

¶4 Charlene was fifty-two years old and reported that she had income of approximately $1,700 per month working approximately twenty hours per week as a licensed massage therapist. Charlene obtained her massage license in 2011. Charlene also has a cosmetology license and had been earning additional cash during the marriage doing cosmetology work on the side. Charlene had been working as a massage therapist for approximately three and a half years. Charlene testified that she did not have a plan for retirement but was considering working until she was fifty-five or sixty years old.

¶5 David introduced evidence from the Department of Workforce Development showing that entry level massage therapists earn approximately $21,000 per year, average massage therapists earn approximately $36,000, and

[1] David's family business was sold in 2015, and David's proceeds from that sale were converted to marital property two years before the divorce and then divided as part of the equitable property division. At trial, David testified that he thought it was reasonable to pay maintenance of $500 per month. David's attorney argued that the maintenance be limited to six years.

experienced massage therapists earn close to $44,000 per year. On cross-examination, Charlene agreed that she would currently be considered an average massage therapist and that her earning capacity could double as she gained experience.

¶6 The circuit court determined Charlene had an earning capacity in excess of the entry level. The court further determined that with hard work and effort, Charlene could increase her income. The court ordered David to pay Charlene $1,000 per month in maintenance until she reached age sixty-two and became eligible for Social Security benefits. Charlene appeals.

DISCUSSION

¶7 "It is well-settled law in this state and elsewhere that the trial court maintains broad discretion in determining maintenance awards." ***Vander Perren v. Vander Perren***, 105 Wis. 2d 219, 226-27, 313 N.W.2d 813 (1982). Wisconsin law sets forth ten statutory factors to evaluate in deciding whether to award maintenance. *See* WIS. STAT. § 767.56 (2015-16).[2] The circuit court need only

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. The factors set forth in WIS. STAT. § 767.56 are:

> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.
>
> (c) The division of property made under s. 767.61.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.

(continued)

consider the relevant factors and does not need to consider every factor. *See* ***Trattles v. Trattles***, 126 Wis. 2d 219, 228, 376 N.W.2d 379 (Ct. App. 1985). The weight to be given each factor is committed to the circuit court's discretion. ***Metz v. Keener***, 215 Wis. 2d 626, 640, 573 N.W.2d 865 (Ct. App. 1997). We review the circuit court's award for erroneous exercise of discretion and will uphold it "as long as the court '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.'" ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 (2003) (quoted source omitted).

¶8 Here, the circuit court addressed the following factors:

> (e) 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.
>
> (f) 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.
>
> (g) The tax consequences to each party.
>
> (h) 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, if the 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.
>
> (i) The contribution by one party to the education, training or increased earning power of the other.
>
> (j) Such other factors as the court may in each individual case determine to be relevant.

- the length of the marriage, which it determined was intermediate;
- the age of the parties, noting that David was four years older than Charlene;
- each spouse's respective physical health, and specifically the fact that David faced ongoing medical monitoring as a result of a prior bout with cancer, in contrast to Charlene, who appeared healthy;
- the parties' emotional health, with the court noting that there were some emotional issues which would likely take some time for the parties to work through;
- the division of substantial marital assets;
- the education levels of the parties, with the court noting that Charlene received additional education during the marriage while David did not;
- the parties' respective earning capacities, with the court determining that Charlene could increase her income with hard work, whereas David was an at-will employee earning substantially less than he had earned from the family business;
- the fact that maintenance would result in a tax deduction for David and would be included in Charlene's taxable income;
- the parties' respective budgets, and particularly the fact that both parties had included unnecessary expenses that the court did not consider in determining maintenance, such as support for adult children, charitable donations, and contributions to David's retirement; and
- the fact that the maintenance award would likely require David to work past his planned retirement age of sixty-two.

¶9 Having considered all of these factors, the court determined that the appropriate amount of maintenance was $1,000 per month, and that maintenance should terminate on Charlene's sixty-second birthday, once she was eligible to receive Social Security benefits. The circuit court noted that if the factors changed in the future, the maintenance decision could be revisited.

¶10 Charlene contends that there was "no evident analysis of the statutory factors." We can reject this contention outright, as it is evident from the transcript that the circuit court's discussion of the relevant facts closely tracked the statutory factors. In addition, Charlene does not point to any relevant statutory factor that the circuit court failed to consider. *See* ***Trattles***, 126 Wis. 2d at 228 (the circuit court's only "obligation is to consider those factors that are relevant").

¶11 Charlene also argues that the circuit court failed to sufficiently consider the dual objectives of maintenance, namely fairness and support. *See* ***Hacker v. Hacker***, 2005 WI App 211, ¶11, 287 Wis. 2d 180, 704 N.W.2d 371. ("A circuit court errs if it misapplies or fails to apply [the relevant statutory] factors, or if it fails to 'give full play' to maintenance's dual objectives." (quoted source omitted)). Although the circuit court's discussion of these two objectives could have been clearer, we think the circuit court implicitly addressed these objectives when it placed particular emphasis on the substantial assets received as a result of the property division. The size of a property division can be highly relevant to the support and fairness objectives. *See* ***LeMere***, 262 Wis. 2d at 446 (concluding that the circuit court's award satisfied the dual objectives of maintenance based on the fact that the appellant had received "substantial liquid assets" in the property division); ***Metz***, 215 Wis. 2d at 639-40 (dual objectives were satisfied by denying maintenance to former spouse who had already received a substantial property division).

¶12 In addition, shortly before the court's oral decision, David argued that the dual objectives of fairness and support favored a lower maintenance award, given the fact that Charlene was working as few as twenty hours per week (as compared to David's fifty hour weeks) and was using her income to give gifts to others, make charitable donations, and support her adult son. The circuit court's discussion of the relevant factors corresponds to David's argument,[3] which indicates to us that the court did consider both of these objectives in exercising its discretion. We can therefore conclude that the circuit court exercised its discretion, even in the absence of a more explicit analysis. *See* ***Finley v. Finley***, 2002 WI App 144, 256 Wis. 2d 508, 648 N.W.2d 536 ("[I]n order to affirm as a proper exercise of discretion, a reviewing court must be able to discern the reason [for the circuit court's discretionary decision] … and there must be support for that reasoning in the record.").

¶13 Charlene contends we would be usurping the circuit court's function if we affirmed based on the record facts, as opposed to express statements of the circuit court that show how the court balanced the dual objectives of fairness and support. *See* ***Kennedy v. Kennedy***, 145 Wis. 2d 219, 224, 426 N.W.2d 85 (Ct. App. 1988) (while an appellate court may search the record to supply a missing fact, it may not exercise the circuit court's discretion to set an appropriate maintenance award). We disagree. *See* ***Finley***, 256 Wis. 2d 508, ¶19. ("When the circuit court does not explain its reason for a discretionary decision [regarding

[3] Charlene contends that the circuit court "largely ignored" David's attacks on her budget and only addressed both parties' charitable contributions. We disagree that this is an accurate characterization of the record, because the circuit court also discussed the financial support that was being provided to the couple's adult children and concluded that these and other contributions were "one of the easiest things to cut."

maintenance], we may search the record to determine whether it supports a circuit court's decision, and we do so here."). In ***Finley***, we ultimately rejected the appellee's argument about the court's likely rationale because its "connection [to] the objectives of maintenance is not readily apparent to us, and we therefore decline to assume that is the basis for the court's decision without some reasoned explanation by the court." ***Id.***, ¶22. Accordingly, we remanded the matter for a proper exercise of discretion. ***Id.***, ¶¶26-27. We see no such problem here, given the circuit court's detailed discussion of the statutory factors, which are designed to further the dual objectives of fairness and support.

¶14 Charlene further argues that it is not clear from the court's analysis why it determined that $1,000 per month was an appropriate award. Charlene relies heavily on her evidentiary submissions purporting to calculate how to equalize the parties' incomes. She argues that the circuit court was required to start from the amount she proposed, then examine the factors that support a decreased award. *See* ***McReath v. McReath***, 2011 WI 66, ¶45, 335 Wis. 2d 643, 800 N.W.2d 399 ("When determining the appropriate maintenance award, we have instructed courts to start with 'the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties' and then make any needed adjustments after considering the [relevant statutory] factors." (quoted source omitted)). A threshold problem with this argument is that the circuit court determined that Charlene's total income was not entirely clear and did not reflect her full earning capacity.

¶15 Moreover, there is no "mathematical formula or [] bright-line rule" for awarding maintenance. ***Olson v. Olson***, 186 Wis. 2d 287, 295, 520 N.W.2d 284 (Ct. App. 1994); *see also* ***Gerth v. Gerth***, 159 Wis. 2d 678, 682-84, 465 N.W.2d 507 (Ct. App. 1990) (rejecting "a hard and fast rule" that "maintenance is

required in every case where there is disparate earnings between parties to a long-term marriage"). Instead, a proper exercise of discretion requires "the reasoned application of the proper principles of law to the facts that are properly found." ***Id.*** at 683-84. Here, the circuit court discussed the facts that it considered and determined that an award of $1,000 per month was appropriate in light of these facts. Charlene, relying on ***King v. King***, 224 Wis. 2d 235, 590 N.W.2d 480 (1999), argues that the circuit court needed to do more to explain why this particular amount was appropriate. *See* ***id.*** at 252 (vacating a maintenance award because the circuit court "neglected to provide a rational explanation of how its findings as to the statutory factors squared with its award of maintenance"). However, ***King*** is readily distinguishable because the supreme court determined that most of the factors that the circuit court considered "would seem to argue against awarding maintenance." ***Id.*** at 252. Thus, our supreme court determined that an award of maintenance of $450,000 over three years was not supported by a "rational explanation." In contrast, as set forth above, the statutory factors identified by the circuit court in this case are consistent with a significant downward adjustment of Charlene's proposed equalization payment.

¶16 The remaining cases that Charlene relies on are also inapposite. For example, in ***Olson***, we rejected the circuit court's determination that an equalization of income was "self-evidently fair" because the circuit court failed to consider the specific facts of the case. *See* ***Olson***, 186 Wis. 2d at 294-95; *see also* ***Kennedy***, 145 Wis. 2d at 222 (reversing an award of maintenance where the circuit court did not consider the statutory factors or objectives and instead based its award "solely on the post-divorce disparity of income"). Here, the circuit court gave detailed consideration to the parties' specific facts. Likewise, in ***Vander Perren***, our supreme court concluded that the circuit court lacked a factual basis

for its determinations that the petitioner could earn more money and reduce her necessary household expenses. *See* ***Vander Perren***, 105 Wis. 2d at 228; *see also* ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 585-86, 445 N.W.2d 676 (Ct. App. 1989) (reversing a maintenance award because the circuit court lacked a factual basis for determining that the respondent's alcoholism prevented her from working). Here, Charlene does not dispute that the circuit court had a factual basis for determining that she was not sufficiently maximizing her income or minimizing her expenses.

¶17 The last two cases cited by Charlene are also readily distinguishable. In ***LaRocque***, the husband's income was increasing, and the court determined that a higher maintenance award was necessary in order for the parties to continue in the lifestyle they could anticipate enjoying if they were to stay married. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 36, 406 N.W.2d 736 (1987). In contrast, David's annual income had declined following the sale of his business, and Charlene had already benefitted from that sale through the property division. ***Hartung*** is also distinguishable in that it involved a custodial mother of young children with no cash assets, and it was undisputed that her total maintenance and child support award fell well short of her household expenses of $1,062 per month. ***Hartung v. Hartung***, 102 Wis. 2d 58, 62, 306 N.W.2d 16 (1981). Our supreme court concluded that a maintenance award of $200 per month for eighteen months was an erroneous exercise of discretion. ***Id.*** at 67-68. We see no parallels between ***Hartung*** and Charlene's situation.

¶18 Charlene further argues that the circuit court erroneously exercised its discretion when it determined that maintenance would terminate once she

became eligible for Social Security benefits at age sixty-two.[4] Charlene points out that there was no evidence in the record to show what her future benefits will be, or how her benefits would be reduced if she begins taking them immediately at age sixty-two. Accordingly, Charlene argues that we must remand this matter to the circuit court so that she can have an opportunity to present evidence about the parties' future Social Security benefits.

¶19 We disagree that the circuit court erroneously exercised its discretion in designating age sixty-two as an appropriate termination point for maintenance. It was reasonable for the circuit court to choose age sixty-two as the termination point based on the fact that Charlene testified that she planned to retire between ages fifty-five and sixty, so she would have the option of receiving benefits at age sixty-two. Given the substantial marital property settlement coupled with the circuit court's determination that Charlene would be able to increase her income significantly with hard work over time, it makes sense to choose age sixty-two as at least a rough proxy for the point at which Charlene may become self-sufficient. Moreover, current projections of Charlene's Social Security benefits are not helpful to the determination, because Charlene may choose to increase her earnings, retire at a later age, or both.

¶20 Finally, Charlene points out that her birthdate is incorrect in the judgment. Charlene's birthdate is significant because it determines the date on which maintenance will terminate. David does not dispute that the date listed is

[4] Charlene argues that the court made this determination sua sponte, without any basis on the record. However, David's trial brief noted that Charlene would be entitled to half of his Social Security benefits at her retirement age.

incorrect. We therefore remand this matter so that the circuit court can modify its judgment.

CONCLUSION

¶21 Because we conclude that the circuit court properly exercised its discretion in determining the amount and duration of its maintenance award, we affirm its judgment, with the modification of Charlene's birthdate noted above, and direct the circuit court to modify the judgment.

By the Court.—Judgment modified and as modified, affirmed; cause remanded with directions.

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