

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 17, 2001

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.

**No. 00-1645**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**JENNIFER JO MORSE,**

**PETITIONER-RESPONDENT,**

**V.**

**CARL E. MORSE,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Polk County:  
ROBERT H. RASMUSSEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Carl Morse appeals that portion of his divorce judgment regarding maintenance and child support. He contends that the trial court erroneously determined his income and that the record fails to support the

court's maintenance award. He further contends that because his income was miscalculated, the court incorrectly determined child support. We conclude that the record supports the trial court's findings of income. The record also demonstrates the court reasonably exercised its discretion with respect to both maintenance and child support. We affirm the judgment.

¶2 Carl and his former wife, Jennifer Morse, were married approximately twenty-four years. At the time of the divorce, they were both in their mid-forties and in reasonably good health. Of their four children, two were minors at the time of the divorce hearing. During the marriage, Carl was self-employed as a truck driver and Jennifer worked as a homemaker and a laborer. The court found Carl's annual income to be \$44,000 and Jennifer's to be \$26,000.

¶3 The trial court awarded Jennifer maintenance for a twelve-year term. The initial amount was to be \$400 per month through June 30, 2005, and thereafter \$750 per month for the balance of the term. Child support of \$623 was ordered per month.

¶4 Maintenance and child support determinations are addressed to trial court discretion. *Evenson v. Evenson*, 228 Wis. 2d 676, 687, 598 N.W.2d 232 (Ct. App. 1999); *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Whether discretion was properly exercised presents a question of law. *Seep v. State Personnel Comm'n*, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987). Discretion is the reasoned application of the proper principles of law to the facts that are properly found. *Hartung*, 102 Wis. 2d at 66. It is well established that a trial court, in the exercise of its discretion, may reasonably reach a conclusion that another court would not. *Liddle v. Liddle*, 140 Wis. 2d 132, 156, 410 N.W.2d 196 (Ct. App. 1987) (citation omitted). We look to the record for reasons to sustain a

trial court's discretionary decision. See *Brandt v. Witzling*, 98 Wis. 2d 613, 619, 297 N.W.2d 833 (1980). Underlying discretionary decisions may be issues of fact, to which we apply a “clearly erroneous” standard of review. WIS. STAT. § 805.17(2).

¶5 Carl challenges the court’s finding that his annual income was \$44,000. He argues that after all expenses, other than depreciation, he earned about \$50,000 per year. He claims that because his truck depreciated approximately \$12,000 per year, and his non-interest payments on the truck equaled \$5,626, his income is closer to \$32,000 per year. We are unpersuaded.

¶6 Carl’s 1998 federal income tax return supports the court’s finding. It reveals gross income of \$115,626. From this figure, Carl subtracted business expenses of \$77,293, which included an \$18,242 depreciation expense. At trial, Carl agreed that \$12,000 was a realistic figure for depreciation. Consequently, the court effectively disallowed \$6,000 in depreciation, resulting in net income of \$44,106. We conclude that the record supports the finding that Carl’s annual income is \$44,000.

¶7 Carl argues, nonetheless, that he pays a \$1,869 per month loan payment to finance his truck. He contends that only the interest of about \$400 per month is tax deductible and, as a result, the principal payments of \$17,626 annually are not reflected as business expenses on his tax return. Therefore, subtracting depreciation of \$12,000, he claims, still leaves him with \$5,626 of actual loan expense unaccounted for by the court’s analysis. We disagree. The court was entitled to rely on Carl’s tax returns to determine his income. Carl agreed that he was gaining equity in purchasing his truck. The court was not required to subtract the entire loan principal payment to arrive at net income when

Carl did not do so on his tax return. We are satisfied that the court's findings with respect to Carl's income are not clearly erroneous.

¶8 Next, Carl argues that the trial court erroneously based its findings on Carl's "earning capacity" and not his actual income. It is well established that the use of a payor's earning capacity instead of actual earnings is improper in the absence of a finding of "shirking." *Sellers v. Sellers*, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). Here, the court made no finding of shirking and, therefore, the use of earning capacity to determine support instead of actual earnings would have been inappropriate. However, while the court considered what Carl would have earned were he employed by a trucking firm, rather than self-employed, it is evident that the court used the term "earning capacity" synonymously with actual earnings. Because the record supports the court's finding of \$44,000 actual annual income, its use of earning capacity in describing its finding is not reversible error. *See* WIS. STAT. § 805.18.

¶9 Next, Carl contends that the trial court erroneously awarded maintenance to Jennifer. He contends that the court incorrectly applied an equalization of income approach while failing to consider the appropriate statutory factors. We conclude that the record shows that the court exercised its discretion and supports the court's determination.

¶10 In deciding to award maintenance, the trial court must consider the factors in § 767.26, STATS.<sup>1</sup> On review, the question is whether the trial court's

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<sup>1</sup> WISCONSIN STAT. § 767.26 provides:

Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (g) or (j), the court may grant an order requiring maintenance payments

(continued)

application of the factors achieves both the support and fairness objectives of maintenance. *Forester v. Forester*, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993). The support objective is to support the recipient spouse in accordance with the parties' needs and earnings. *Fowler v. Fowler*, 158 Wis. 2d 508, 520-21, 463 N.W.2d 370 (Ct. App. 1990). In a long-term marriage, "It is reasonable to begin maintenance evaluation with proposition that dependent partner may be entitled to fifty percent of the parties' total earnings." *Id.*

¶11 The fairness objective is to ensure a fair and equitable financial arrangement between the parties in each individual case. *King v. King*, 224 Wis. 2d 235, ¶24, 590 N.W.2d 480 (1999). Over a long marriage, each party

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to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (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.
- (6) 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.
- (7) The tax consequences to each party.
- (8) 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, where such 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.
- (9) The contribution by one party to the education, training or increased earning power of the other.
- (10) Such other factors as the court may in each individual case determine to be relevant.

contributes to the income stream as marital partners and should share in the rewards. *Fowler*, 158 Wis. 2d at 519. The court considered statutory factors in deciding that Jennifer was entitled to limited-term maintenance. The record establishes that the court considered the age and health of the parties, the length of the marriage, the custodial responsibilities for the children, the parties' earnings and work experience. The consideration of these factors was proper. WIS. STAT. § 767.26.

¶12 In deciding the amount and term of maintenance, the court considered the parties' incomes, Carl's child support obligations, health insurance expenses and the cost of running two households. The court found that running two households was far more expensive than one and, as a result, both parties would be making financial sacrifices. It considered that in twelve years, Carl would be approaching retirement, while Jennifer would have a few more years to work. It reasoned that at that point, Carl's ability to pay would be diminished, while Jennifer will have gained more work experience and have sufficient earnings to be self-supporting. We conclude that the record reflects a reasonable exercise of discretion.

¶13 Finally, Carl contends that the court erred because it based its child support order on earning capacity, instead of his actual earnings. We disagree. As we previously discussed, the trial court's use of the term earning capacity is not reversible error where it used it synonymously with actual earnings. Consequently, we do not overturn the child support order.

*By the Court.*—Judgment affirmed.

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

