

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2001

**Cornelia G. Clark
Clerk of Court of Appeals**

NOTICE

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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. 00-2017

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

VIRGINIA STRELICK,

PETITIONER-APPELLANT,

v.

RICHARD STRELICK,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Virginia Strelick has appealed from a judgment of divorce from the respondent, Richard Strelick. In the divorce judgment, Virginia was awarded maintenance of \$900 per month for a period of ten years. Because the trial court erroneously exercised its discretion by considering Virginia's

earning capacity rather than her actual earnings, we reverse the judgment and remand the matter for further proceedings.

¶2 The material facts are undisputed. Virginia and Richard divorced after almost thirty years of marriage, when Virginia was forty-seven years old and Richard was fifty-one. At the time of the divorce, Virginia was employed in an ophthalmology office earning \$10 per hour, with a gross monthly income of \$1820. Richard's gross monthly income was \$5708.

¶3 The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of discretion. *See Wolski v. Wolski*, 210 Wis. 2d 183, 188, 565 N.W.2d 196 (Ct. App. 1997). The exercise of discretion must be the product of a rational mental process by which the facts of record and the law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable result. *See Kennedy v. Kennedy*, 145 Wis. 2d 219, 222, 426 N.W.2d 85 (Ct. App. 1988). An erroneous exercise of discretion occurs if a trial court makes an error of law or neglects to base its decision on facts in the record. *See King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

¶4 The touchstone of analysis in determining or reviewing a maintenance award is the list of statutory factors set forth in WIS. STAT. § 767.26 (1999-2000).¹ *See Kennedy*, 145 Wis. 2d at 222. These factors reflect and are designed to further two distinct but related objectives: to support the recipient spouse in accordance with the needs and earning capacities of the parties and to

¹ All statutory references are to the 1999-2000 version unless otherwise noted.

ensure a fair and equitable financial arrangement between the parties in each individual case. *See id.* The support objective is fulfilled when the trial court considers the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal, if the goal is feasible. *See id.* at 223. What will satisfy the fairness objective must be determined on a case-by-case basis, considering the statutory factors. *See id.*

¶5 Virginia contends that the trial court erroneously exercised its discretion when it considered her earning capacity rather than her actual earnings, limited maintenance to ten years, and awarded her \$900 per month rather than the \$1944 per month requested by her. If the only issue before us were the duration of the award, we would not reverse the trial court's judgment. Given the age of the parties, the trial court reasonably considered that Richard would likely be retiring in ten years. Because Richard's military pension and 401K retirement account were divided by qualified domestic relations orders, a ten-year maintenance award terminating at the time Richard was expected to retire was reasonable. However, because the trial court erroneously exercised its discretion by failing to consider Virginia's actual earnings, the maintenance award must be reversed. On remand, the trial court must reconsider the amount of the award, and may reconsider its duration, if it so chooses.

¶6 In making its maintenance award, the trial court found that Virginia was currently earning \$10 per hour. However, it noted that she had secretarial skills and had been making \$15 per hour before moving to Wisconsin in 1992. While acknowledging that Virginia had not earned \$15 per hour since moving to Wisconsin, the trial court found that she had an earning capacity of \$15 per hour. At the hearing on Virginia's request for reconsideration of the maintenance award,

the trial court found that Virginia's vocational history demonstrated that she had some fairly sophisticated skills. While specifically stating that it did not find that she was shirking, it concluded that based upon her work experience, her earning capacity varied from her actual earnings.

¶7 "The trial court may consider earning capacity when determining a support or maintenance obligation if it finds a spouse's job choice voluntary and unreasonable." *Sellers v. Sellers*, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). A trial court need not find that the spouse deliberately reduced his or her earnings to avoid support obligations or to gain an advantage in a divorce action. *See id.* "It is sufficient that the court finds the employment decision both voluntary and unreasonable under the circumstances." *Id.*

¶8 The issue of whether a job choice is unreasonable presents a question of law. *See id.* However, this court gives deference to a trial court's conclusion that a job choice is unreasonable because it is intertwined with the trial court's factual findings. *See id.* A trial court's findings of fact will not be disturbed unless they are clearly erroneous. *See id.* at 586.

¶9 Based upon these standards, the trial court's consideration of Virginia's earning capacity constituted an erroneous exercise of discretion. The record indicates that Virginia was employed from 1977 to 1992 at Penn State University as a patient care secretary. In 1992, she was earning approximately \$15 per hour. Virginia left her employment with Penn State in 1992 when the parties moved to West Bend, Wisconsin, because of Richard's job transfer.

¶10 The trial court did not determine that Virginia's decision to leave her employment at Penn State to move to Wisconsin with Richard was unreasonable, nor does anything in the record support such a determination. Moreover,

Virginia's undisputed testimony indicated that West Bend did not provide comparable work and wages, and that the nearest comparable employer, Froedtert Hospital, was too far away. However, she worked other jobs and in 1999 moved to Appleton, where she obtained her current position in an ophthalmology office earning \$10 per hour.

¶11 The trial court did not find that other employment paying \$15 per hour was available to Virginia while living in either West Bend or Appleton, nor is there any evidence in the record to support such a finding. Nothing in the record indicates that Virginia has not fully and diligently pursued her best employment opportunities. Under these circumstances, nothing in the record supports a conclusion that Virginia's present employment paying \$10 per hour is unreasonable. The trial court was therefore required to consider her actual earnings of \$10 per hour, rather than \$15 per hour, in determining her financial need and making its maintenance award.

¶12 We therefore reverse the judgment and remand the matter for reconsideration of the maintenance award. Because maintenance must be reconsidered using Virginia's actual earnings, the trial court may also reconsider the duration of the award, if it believes it appropriate. In addition, on remand the trial court may want to bear in mind the principle that "when a couple has been married many years and achieves increased earnings, it is reasonable to consider an equal division of total income as a starting point in determining maintenance."

LaRocque v. LaRocque, 139 Wis. 2d 23, 39, 406 N.W.2d 736 (1987). However, we also emphasize that the starting point, while important, is not determinative, and may be adjusted following reasoned consideration of the factors set forth in WIS. STAT. § 767.26. See *Bahr v. Bahr*, 107 Wis. 2d 72, 85, 318 N.W.2d 391 (1982).

By the Court.—Judgment reversed and cause remanded.

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

