COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2938

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

IN RE THE MARRIAGE OF:

WENDY S. ZEKA,

PETITIONER-RESPONDENT,

V.

GARY R. ZEKA,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: DOROTHY BAIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gary Zeka appeals his judgment of divorce, challenging the trial court's decisions with respect to property division and the term of maintenance awarded to his former wife, Wendy Zeka. He also contends that the record fails to support the trial court's determinations with respect to a

child custody and placement stipulation. Because the record supports the trial court's findings of fact and exercise of discretion, we affirm the judgment.

BACKGROUND

¶2 The Zekas were married in 1979 and had two children, one of whom was a minor at the time of the divorce. Wendy, age thirty-eight, was a medical technician at the time of trial, earning approximately $20,288 annually. Gary, age forty-four, worked as a millwright supervisor and earned approximately $66,000 annually.

¶3 The trial court accepted the parties' stipulation and awarded joint custody of the minor child, with primary placement to Wendy. Child support was set at 17% of Gary's income. The court awarded Wendy maintenance of $700 per month, to be increased to $1,350 per month when Gary's child support obligation ceases. Maintenance is to terminate in June 2010.

STANDARD OF REVIEW

¶4 Property division, custody and maintenance determinations require the exercise of discretion. *See* ***Evenson v. Evenson***, 228 Wis. 2d 676, 687, 598 N.W.2d 232 (Ct. App. 1999); ***Sharon v. Sharon***, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). Discretion is the reasoned application of the proper principles of law to the facts that are properly found. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶5 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). We are

to 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).

¶6 The trial court's determination of the value of an asset presents a question of fact. ***Preuss v. Preuss***, 195 Wis. 2d 95, 107, 536 N.W.2d 101 (Ct. App. 1995). We apply the "clearly erroneous" standard to factual findings. WIS. STAT. § 805.17(2). The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. ***Id.***

¶7 Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe the demeanor of witnesses and gauges the persuasiveness of their testimony. ***Id.*** at 151-52.

DISCUSSION

1. Property division

¶8 Gary launches a variety of challenges to the court's valuations of numerous items of property. He begins with the valuation of several of his vehicles. He claims that the court erroneously relied on Wendy's expert witnesses' 1998 appraisals to determine the value of his 1960 Corvette, 1984 Corvette, 1988 Harley Davidson motorcycle, and 1965 Chevy Chevelle.

¶9 Gary contends that the court should have accepted his own testimony, which was more current, rather than that of Wendy's appraiser, Paul Bunczak. At trial, Bunczak valued the vehicles according to his May 1998 appraisal. However, he explained that because the divorce action had been

pending so long, he reappraised the parties' 1996 Jeep Grand Cherokee as of January 2000. He did not reappraise the older vehicles, which were eventually awarded to Gary.

¶10 We must reject Gary's assignment of error. The trial court's determination of the value of an asset presents a question of fact. ***Preuss***, 195 Wis. 2d at 107. Here, the expert's appraisal conflicted with Gary's more recent opinion of value. However, it is the trial court's function, not this court's, to assess the weight and credibility of the testimony. WIS. STAT. § 805.17(2). The trial court's credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶11 The trial court explained that Paul Bunczak was a certified appraiser and that his appraisals appeared to be fair and accurate. The trial court reviewed Gary's testimony as to the value of the vehicles, but determined that Bunczak's testimony should be accorded greater weight. Because Bunczak's testimony is not patently incredible, we do not overturn the trial court's findings.

¶12 Gary further argues that the trial court erroneously permitted Bunczak to rely on hearsay in forming his opinion of value. The record defeats this claim of error. Bunczak did not testify as to hearsay. He stated that he used a combination of "NADA bluebooks" as well as consultation with car dealers to determine value.

¶13 WISCONSIN STAT. § 907.03 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those

> perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence.* (Emphasis added.)

Because Bunczak did not testify to hearsay, but based his opinion on the facts or data reasonably relied upon by experts in the field of auto appraisals, the trial court properly admitted his testimony.

¶14 Next, Gary argues that the trial court erroneously excluded hearsay testimony that he offered in support of value. We disagree. Testifying to value as the owner of the vehicles, Gary attempted to state what a car dealer told him. Hearsay is not admissible except as provided by the rules of evidence. WIS. STAT. § 908.02. While Gary is competent to testify as to his opinion of the value as an owner of the property, *see* ***Wilberscheid v. Wilberscheid***, 77 Wis. 2d 40, 48, 252 N.W.2d 76 (1977), he may not testify to hearsay. Gary cites no exception to the hearsay prohibition. Consequently, Gary fails to demonstrate error.

¶15 Next, Gary argues that the trial court erroneously awarded a $1,500 motorcycle to him. He complains that it was not his cycle in the first place and, in any event, it was not worth $1,500.[1] Again, Gary's argument challenges the court's assessment of weight and credibility of the evidence. In her property division proposal, Wendy included the motorcycle, with a value of $1,500, as an item of the parties' marital estate. Gary, however, testified as follows:

> Q. Last one on this part; $1,500 motorcycle. What kind of motorcycle is this?

[1] While Gary's statement of facts contains record citations, we remind counsel that WIS. STAT. RULE 809.19(1)(e) requires that argument also must refer to record citation for facts upon which it relies.

> A. Adam's motorcycle. I guess we need to talk to him about it.
>
> Q. It's not yours?
>
> A. No, it's not.

¶16 Gary's testimony that the motorcycle belonged to the parties' son conflicted with Wendy's exhibit and statement to the effect that the motorcycle belonged to the parties. It was for the trial court, not this court, to resolve the conflict. The court was entitled to reject Gary's testimony. Additionally, because Gary's testimony did not refute Wendy's valuation, the value of $1,500 is not clearly erroneous.

¶17 Gary further contends that the court erroneously adopted Wendy's valuations with respect to the 1992 GMC truck and 1984 Corvette because they had not been appraised. He claims, in essence, that the court should have adopted his opinion instead of Wendy's. As an owner, however, Wendy was competent to testify as to her opinion as to the value of personalty. *See* ***Wilberscheid***, 77 Wis. 2d at 48. When faced with conflicting testimony, the court was entitled to resolve the issue on credibility grounds. WIS. STAT. § 805.17(2).

¶18 Gary also claims that the trial court erroneously valued the Carpenter and Millwright annuity and awarded it to him. He argues that because the annuity was invested in another account, the court in effect counted it twice. Again, Gary's argument rests on a challenge to the court's assessments of weight and credibility of the testimony. Wendy testified at trial that Gary had a Carpenter and Millwright annuity in the sum of $2,618 in 1996. She explained that she requested Gary to update that information, but that she never received any response to that request. Gary, on the other hand, testified that it was rolled over into an individual

retirement account and no longer exists. Gary, however, offered no documentary evidence to support his position. Because the resolution of this issue rests on purely a credibility assessment, we do not overturn it on appeal. *See* ***Chapman***, 69 Wis. 2d at 583-84.

¶19 Next, Gary argues that the trial court erroneously exercised its discretion when it valued the parties' residence at $90,000 and awarded it to Wendy. We are unpersuaded. Bunczak testified that based upon his comparable sales approach, he appraised the house at $90,000. Although Gary produced a real estate expert who testified that the house should have been valued at $122,000, the trial court was not required to accept this testimony. The trial court explained that it found Bunczak's appraisal more persuasive because Bunczak was a certified appraiser, in contrast to Gary's expert, who was an experienced real estate salesperson but not a certified appraiser. Also, the court observed that Bunczak had examined the property in question, but that Gary's expert had not visited the property in thirteen years. In addition, the court noted that the comparisons used by Bunczak were sold properties, but that Gary's expert relied on the asking prices of properties that had not been sold.

¶20 "[I]f a finder of fact accepts the testimony of one expert over that of another expert, who testified differently, and the first expert's testimony is sufficient to support the fact finder's conclusion, it must be sustained." ***Schorer v. Schorer***, 177 Wis. 2d 387, 396-97, 501 N.W.2d 916 (Ct. App. 1993). Because Bunczak's testimony supports the trial court's finding of $90,000, it is sustained on appeal.

¶21 We further conclude that the record supports the trial court's determination that Wendy should be awarded the residence. Gary does not claim

that the award to Wendy results in an unequal division of property. Rather, he simply argues that there is no rational basis to award her the marital residence. We disagree. Wendy has primary placement of the parties' minor child. Under WIS. STAT. § 767.255(3)(h), the court may consider "[t]he desirability of awarding the family home … to the party having physical placement for the greater period of time." This is a proper factor to consider and provides a rational basis for the court's determination.

2. Custody and placement

¶22 Gary argues that the trial court erroneously accepted the parties' child custody and placement stipulation. He contends that the record demonstrates that the parties never entered into a stipulation and that there is none. He further claims that the court's custody and placement determination was "unequivocally contested" and should therefore be reversed.

¶23 The record fails to support Gary's claim of error. Wendy testified that she understood that there probably was an agreement that the parties share joint legal custody and that she have primary physical placement. Gary testified as follows:

> [COUNSEL:] For brevity, do you agree with the proposed child placement and child custody provisions?
>
> [WITNESS:] Absolutely not. I think it's ridiculous. I know we are limited on time today. I have some reservations on the entire system. I'm going to leave that go.
>
> THE COURT: [T]his is the final hearing. I would not suggest that you conduct this in a manner of brevity, because we are not going to have another hearing on this. You had better get it all out now, otherwise I'm not going to hear it. So I suggest you go into all the details that you want this Court to hear because I'm going to make a decision based on what I hear today.

> [COUNSEL:] Do you accept what has been proposed today?
>
> [GARY:] I wrote down … what I thought would be a fair and reasonable placement for Alex which would be 50/50 placement of Alex, no restrictions applied. I was attempting to buy a house on Rib Mountain. At that point, Alex could stay with me half the time, with Wendy half the time.
>
> THE COURT: But you're agreeing to what has been proposed here, even though you'd prefer it to be another way. Is that what you are saying?
>
> [GARY:] Yes, ma'am.

¶24 At closing statements, Gary's counsel stated that the parties had a contentious relationship but have "politely come to a conclusion. … The respondent accepts and agrees to joint legal custody, primary placement being with Wendy Zeka." This record shows that Gary specifically agreed to the custody and placement stipulation. Consequently, we conclude that the record fails to support Gary's claim of error.

¶25 Gary argues, nonetheless, that he objected to the custody and placement stipulation between the April trial and the court's June 8 decision. He points to his May 26 motion seeking the appointment of a guardian ad litem and the opportunity to present more evidence. We are unpersuaded. At trial, the court carefully explained to Gary that the day of trial was the time to voice his objections.

¶26 At the June hearing, the court determined that Gary failed to disclose any basis to reopen the testimony. The court noted that the case had been pending for two years. It explained that if it allowed him to come back weeks after the trial, "we would never have any resolution in the court system. We would try cases continuously. They would never end," because then the opposing counsel

would want to present more evidence. The court explained that in the event Gary believed that a modification of the custody stipulation was necessary, he would have to comply with statutory procedures. The record demonstrates a rational basis for the court's decision to reject Gary's post-trial motion. We conclude that Gary has failed to demonstrate that the court erroneously exercised its discretion.

3. Maintenance

¶27 Finally, Gary argues that the trial court erroneously awarded an excessive term of maintenance. We disagree. In awarding maintenance, the trial court must consider the factors in § 767.26, STATS.[2] On review, the question is

[2] 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 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.

(continued)

whether the trial court's 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 needs and earning capacities of the parties.

¶28 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, the parties each contribute to the income stream as marital partners and should share in the rewards. ***Fowler v. Fowler***, 158 Wis. 2d 508, 463 N.W.2d 370 (Ct. App. 1990). "Sharing the rewards of the stream of income produced in a long marriage is encompassed in the fairness objective of maintenance." ***Id.*** A trial court misuses its discretion if it fails to fully consider the dual objectives of maintenance. ***Forester***, 174 Wis. 2d at 86.

¶29 Maintenance, however, is not a permanent annuity but is designed to maintain a party at a standard of living until the party, exercising reasonable

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(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.

diligence, has reached a level of income where maintenance is no longer necessary. ***Vander Perren v. Vander Perren***, 105 Wis. 2d 219, 230, 406 N.W.2d 813 (1982). Nonetheless, we are satisfied that the record provides a rational basis for the ten-year maintenance term.

> In determining whether to grant limited-term maintenance, the circuit court must take several considerations into account, for example, the ability of the recipient spouse to become self-supporting by the end of the maintenance period at a standard of living reasonably similar to that enjoyed before divorce; the ability of the payor spouse to continue the obligation of support for an indefinite time; and the need for the court to continue jurisdiction regarding maintenance.
>
> Because limited-term maintenance is relatively inflexible and final, the circuit court must take particular care to be realistic about the recipient spouse's future earning capacity

LaRocque v. LaRocque, 139 Wis. 2d 23, 38-41, 406 N.W.2d 736 (1987).

¶30 We conclude that the record reflects a rational basis for the court's decision. The nearly twenty-one-year marriage was long term. *See* WIS. STAT. § 767.26(1). Wendy was not employed during the first years of marriage so that she could care for the children. *See* WIS. STAT. § 767.26(5). She was in good health, but at age thirty-eight her earnings are limited due to her high school education and home responsibilities. *See* ***id.*** As a result, her earnings lag behind Gary's. The record indicated that in four to five years, she may be able to become a registered nurse, which would increase her earnings. Nonetheless, it would be reasonable for the trial court to find that it would require some years of work experience before she would be able to support herself at a level near to what the parties enjoyed during the marriage. WIS. STAT. § 767.26(6).

¶31 As a result, the trial court could reasonably conclude that Wendy's earnings would be insufficient to provide her with adequate support for approximately ten years. Because the record reflects a rational basis for the maintenance award, Gary fails to establish an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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