

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2001

Cornelia G. Clark
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. 00-3249

Cir. Ct. No. 97-FA-661

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

MARLA BILIACK,

PETITIONER-RESPONDENT,

V.

MARK BILIACK,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
S. MICHAEL WILK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mark Biliack has appealed from a judgment of divorce which awarded the respondent, Marla Biliack, maintenance of \$2812 per month for a period of five years. Mark contends that the trial court erroneously

exercised its discretion in awarding maintenance. He also contends that the trial court inequitably allocated the parties' debts and property. We affirm the judgment in its entirety.

¶2 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. *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. *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. *King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

¶3 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 *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 ensure a fair and equitable financial arrangement between the parties in each individual case. *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

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

feasible. *Id.* at 223. What will satisfy the fairness objective must be determined on a case-by-case basis, considering the statutory factors. *Id.*

¶4 Mark contends that the trial court misapplied the statutory factors pertinent to maintenance, and ignored the fairness objective. He contends that the trial court failed to give adequate consideration to his emotional health and earning capacity, and based both the maintenance and child support awards on disability payments, the duration of which are unknown. He contends that the maintenance award leaves him with less income than is needed to meet his budget, and forces him to live at a lower standard of living than is reasonable. He further contends that the trial court ignored the tax consequences of the maintenance award, and that the property division, which allocated most of the unsecured marital debt to him, was inequitable.

¶5 We reject all of Mark's arguments. In awarding maintenance, the trial court considered the relevant factors under WIS. STAT. § 767.26. It considered that the parties had been married twelve years at the time of the divorce, a marriage described by the trial court as of relatively short duration. It considered that the parties were still in their thirties, and that both were in good physical health. It acknowledged the parties' stipulation that Mark had become disabled from working as an anesthesiologist as a result of depression arising after the divorce proceedings were commenced. However, it also considered the testimony of Mark's treating psychiatrist, who opined to a reasonable degree of medical certainty that Mark would recover from the depression. It considered the psychiatrist's testimony that the time required for recovery was unknown, but that he would expect Mark to recover and be able to return to work within a matter of months. It also noted that Mark was receiving nontaxable monthly disability payments of \$10,198, and that while there had been some interruption in the

payments by Mark's disability insurer, Mark was receiving the payments at the time of trial. In considering Mark's earning capacity, it considered both the disability payments, and his average annual earnings of \$232,000 in the three years preceding the onset of his disability. Based upon his prior earnings, it found that he had an earning capacity of \$232,000, although possibly diminished somewhat by his mental health history.

¶6 The trial court also considered Marla's earning capacity, concluding that she would never be able to attain the standard of living enjoyed during the marriage. It noted that she had been out of the job market since the birth of the parties' first child, but was pursuing a nursing degree, which she would complete in approximately two and one-half years. It found that she would then enter the job market with earnings of approximately \$32,000 per year. It found that each party had pursued his or her own education in the early years of the parties' marriage, and that Marla had not been socially or economically handicapped as a result of the marriage. However, in considering the parties' respective contributions to the marriage, it concluded that Marla had made a substantial contribution in terms of homemaking and child care, and that fairness required that her contribution be acknowledged. It therefore awarded her maintenance of \$2812 per month for a period of five years, concluding that this would allow her to complete her education, get a job, and resolve the difficulties inherent in juggling a job while having primary placement of the parties' young school-age children. In making this award, the trial court also considered the property division, including the parties' substantial assets and debts.

¶7 The weight to be given to the relevant factors under WIS. STAT. § 767.26 falls within the trial court's discretion. *Metz v. Keener*, 215 Wis. 2d 626, 640, 573 N.W.2d 865 (Ct. App. 1997). Because the trial court considered all

relevant factors in making the maintenance award, and because the weight afforded the various factors was reasonable, no basis exists to disturb its decision.

¶8 In affirming the trial court's maintenance award, we reject Mark's argument that the award should be set aside because it leaves him with less money than he needs to meet his budget, and forces him to live at a lower standard of living than is reasonable. In making the award, the trial court recognized that both parties would have to lower their standards of living in the future. Moreover, the maintenance and child support awards combined totaled \$5361 per month, leaving Mark with \$4837 of his \$10,198 monthly disability payment.² Since Marla's household included primary placement of the parties' two children, it cannot reasonably be argued that the distribution was unfair, or that it failed to meet Mark's reasonable financial needs, particularly in light of the limited duration of the maintenance award.

¶9 Mark argues that because the duration of the disability payments is unknown, and because payments have been interrupted in the past, the trial court should not have relied on them. In conjunction with this argument, he also objects to the trial court's statement that maintenance and child support payments would continue to accrue even if Mark's disability insurer ceased making payments.

¶10 The trial court expressly stated that because Mark was disabled, it was presuming for purposes of its decision that the disability payments were being made or should be made. We infer from this statement and the remainder of the

² Even after payment of \$1744 per month for his student loans, Mark was left with \$3093 from his monthly disability payment. Contrary to Mark's contention, this is not an unreasonably harsh result.

trial court's decision that in making the maintenance and child support awards, the trial court anticipated that Mark would be receiving nontaxable disability payments of \$10,198 per month or, if not, would have recovered from his depression and returned to work as an anesthesiologist, earning a comparable after-tax income. The trial court could reasonably reach these conclusions based upon Mark's receipt of disability payments at the time of the divorce, his psychiatrist's testimony regarding his future recovery from his disability, and his pre-disability earnings.³

¶11 Mark also argues that the trial court ignored the tax consequences of the maintenance award by failing to consider that he will eventually return to the work force with a taxable gross income and a reduced net income. We reject this argument because at the time of the divorce Mark's income was nontaxable, a factor properly considered by the trial court. If Mark eventually returns to the work force and has a net income substantially less than the income he is currently receiving, his remedy would be to file a motion for modification of maintenance. In rendering the divorce judgment, the trial court was not reasonably required to speculate that Mark's future net income would be less than his current nontaxable income.

¶12 We also reject Mark's argument that the trial court ignored the fairness objective when it awarded maintenance to Marla. Mark focuses on the trial court's statement that Marla was not socially or economically handicapped by the marriage. However, the trial court also reasonably considered that Marla had

³ If disability payments cease and Mark is unable to find employment paying a comparable income, he will be entitled to move for modification of the divorce judgment based upon a substantial change in circumstances. *See* WIS. STAT. § 767.32(1)(a).

not worked outside the home since the birth of the parties' first child, and that her contributions to homemaking and child rearing were substantial, and assisted Mark in pursuing his career and establishing himself as an anesthesiologist. As in the case where one spouse supports the other in pursuing an advanced degree or a professional license, maintenance may be awarded to fairly compensate the supporting spouse for his or her contributions to the increased earning power of the other spouse. *Meyer v. Meyer*, 2000 WI 132, ¶¶39-41, 239 Wis. 2d 731, 620 N.W.2d 382. Because Marla's contributions to the parties' home and family assisted Mark in pursuing his career and were made in lieu of pursuing her own career, the trial court reasonably concluded that fairness required a limited term maintenance award. Because the five-year award allowed Marla a reasonable amount of time to finish her degree and establish herself in a nursing career, it cannot be deemed unfair to Mark.

¶13 Mark's final argument is that because he is required to pay more than \$5000 per month in child support and maintenance, the trial court's assignment to him of most of the parties' unsecured debt was inequitable. However, most assets of the parties were divided equally, with debts to be paid from the sale of the corresponding assets, and a \$6000 payment to be made by Marla to Mark. Most of the remaining unsecured debt which was assigned to Mark derived from his student loans.

¶14 As noted by the trial court, Mark's professional credentials and his increased earning power derived from these student loans. As also noted by the trial court, when the five-year maintenance award terminates, Mark will be the beneficiary of the increased earning power attributable to the investment in his education. Because Mark is the primary beneficiary of his education, the trial

court reasonably allotted the cost of that education to him personally. No basis therefore exists to disturb the property division.

By the Court.—Judgment affirmed.

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

