

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 15, 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. 00-3297**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**MICHAEL L. WELLE,**

**PETITIONER-APPELLANT,**

**V.**

**DWANA D. WELLE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Marathon County:  
VINCENT K. HOWARD, Judge. *Affirmed in part; reversed in part and cause  
remanded with directions.*

Before Cane, C.J., Peterson and Vergeront, JJ.

¶1 PER CURIAM. Michael Welle appeals an order modifying a previous maintenance order and reducing his maintenance obligation to his former

wife, Dwana Welle, to \$1,100 per month. Michael also appeals an order requiring him to pay Dwana \$1,000 as a contribution toward her attorney fees. Michael argues that the circuit court erroneously exercised its discretion: (1) by concluding that Michael's decision to change his employment was unreasonable; and (2) by ordering Michael to pay Dwana \$1,000 in attorney fees.

¶2 We conclude that the circuit court properly exercised its discretion when it determined that Michael's change of employment was unreasonable. However, the circuit court failed to make proper findings regarding Dwana's need for attorney fees, Michael's ability to pay, and the reasonableness of the total fees. Therefore, we affirm in part, reverse in part and remand.

### BACKGROUND

¶3 Michael and Dwana Welle were divorced on November 12, 1997, after a twenty-five year marriage. At the time of the divorce, Michael was earning \$72,000 a year from his private veterinary practice. The practice was valued at \$109,847. Michael was ordered to pay \$1,390 per month to Dwana for maintenance.

¶4 In February 2000, Michael sold his private practice for \$223,000 and purchased a one-third interest in Miltrim Farms, Inc. Michael became the dairy manager and in-house veterinarian for Miltrim. His income dropped to \$36,000 per year.

¶5 Michael moved the circuit court to terminate or reduce the maintenance obligation ordered in the divorce judgment. Dr. Victor Cortese testified on Michael's behalf and stated that Michael's decision to sell his practice

was reasonable considering the long-term projections of the dairy industry and its effects on veterinary medicine.

¶6 Dwana presented the testimony of Karen Bohem, a vocational consultant. Bohem evaluated Michael's earning capacity at \$50,541 to \$54,911.

¶7 The circuit court concluded that Michael's change of employment was unreasonable and ordered him to pay \$1,100 per month for maintenance based upon his earning capacity of \$55,000 per year rather than his actual earnings of \$36,000 per year. Michael was also ordered to pay \$1,000 as a contribution toward Dwana's attorney fees. This appeal followed.

## DISCUSSION

### I. Earning Capacity v. Actual Earnings

¶8 Michael argues that the circuit court erred by concluding that his career move from private veterinary practice to an in-house veterinarian at Miltrim was unreasonable. He contends that the court should have used his actual earnings rather than his earning capacity to determine his maintenance obligation.

¶9 Determinations of maintenance awards are committed to the circuit court's discretion. *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). The court properly exercises its discretion if it makes a reasoned decision and applies the correct legal standards to the facts of record. *Id.* A court may consider a spouse's earning capacity rather than actual earnings if the court determines that the spouse's employment choice was voluntary and unreasonable. *See id.* at 586-87.

¶10 “The legal standard of reasonableness presents a question of law.” *Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). However, because the circuit court’s legal conclusion as to reasonableness is so intertwined with the factual findings supporting that conclusion, we may defer to the circuit court’s conclusion. *Id.* at 492-93.

¶11 Michael relies on *Van Offeren* to argue that his decision to change jobs was a prudent career decision over the long term, despite the immediate disadvantage. *See id.* at 498. In *Van Offeren*, we concluded that a father’s voluntary decision to quit his job at Johnson Wax was unreasonable in light of his child support obligation. He had a well-paying position at Johnson Wax that enabled him to meet his child support obligation. Then he quit and pursued a video business venture that he knew would take five to six years to produce income comparable to what he earned at Johnson Wax.

¶12 We noted that the father could have stayed at Johnson Wax, started the video business and then left Johnson Wax when the business was producing an income sufficient to allow him to continue his support payments. *Id.* at 497. However, we stated:

Our decision here should not be overread. The law recognizes the right of an obligor to make career decisions which, in some instances, will diminish the income available to meet the obligor's support or maintenance duty. Indeed, in the appropriate case, such a decision may be the more prudent career decision over the long term, despite its immediate disadvantage to both the obligor and the obligee.

*Id.* at 498.

¶13 Michael argues that his move from private veterinary practice to Miltrim was a prudent career decision because he will potentially be making at

least as much as he was before. He further contends that had he remained in private practice, his long-term income would have diminished and he would have had to change his practice from dairy cattle to small animals. According to Michael, unlike the father in *Van Offeren*, Michael could not have remained in private veterinary practice while at the same time investing in Miltrim. He needed the money from the sale of his practice to finance his investment.

¶14 Despite Michael's assertions, the right of a spouse who has maintenance obligations to make career decisions is a qualified right, not an absolute right. *Id.* In *Sellers*, we noted that any deference given to a spouse's preferred employment must also be tempered with the circumstances and facts surrounding any outstanding maintenance obligations. *Sellers*, 201 Wis. 2d at 588.

¶15 Here, the circuit court took into consideration the changing economic circumstances surrounding Michael's employment decision to sell his veterinary practice and purchase a share in Miltrim.<sup>1</sup> The circuit court acknowledged that the incomes of private veterinarians may dip or plateau in the long run because of industry trends in family dairy farms. However, the court reasonably concluded that this was a long-term and not an immediate trend. The fact that veterinary practices like Michael's doubled in value between the divorce and the sale of his business indicates that Michael's practice was growing. There is nothing in the record to suggest that Michael's practice was shrinking or had plateaued.

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<sup>1</sup> Michael concedes that he voluntarily left his private veterinary practice. His only argument is that the career move was reasonable.

¶16 The circuit court chose to disregard Cortese's opinion supporting Michael's career move because Cortese was unfamiliar with the specifics of Michael's income and the facts surrounding his practice. His opinion was based on the national and global changes he perceived in veterinary practices like Michael's. Instead, the court relied on Boehm's evaluation of Michael's earning capacity.<sup>2</sup> Credibility is uniquely a circuit court function. WIS. STAT. § 805.17(2).

¶17 Additionally, the circuit court acknowledged that Michael's projected income from Miltrim could reach \$60,000 within five years. However, the high debt load on the farm placed that projection at risk. Income projections beyond five years are difficult because of the additional capital and investment costs that could be necessary. Michael admitted that his income could drop if these additional growth expenses were necessary beyond the five-year projection.

¶18 The circuit court stated that Michael's change in careers would have the effect of asking Dwana to help finance his business. As partners in marriage for twenty-five years, Michael and Dwana achieved an increase in earnings. As marital partners, both contributed to the stream of income. Both should share in the rewards. *Wikel v Wikel*, 168 Wis. 2d 278, 284, 483 N.W.2d 292 (Ct. App. 1992). Dwana is under no obligation to help Michael start a new business.

¶19 Michael further contends that the circuit court erred by stating that Dwana is entitled to maintenance.<sup>3</sup> In *King v. King*, 224 Wis. 2d 235, ¶35, 590

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<sup>2</sup> Michael does not challenge Boehm's opinion regarding his earning capacity.

<sup>3</sup> The circuit court stated that:

After 25 years of marriage and after the contributions that she has made to the marriage and all the other factors the Court considered previously, it would indicate that she is certainly

(continued)

N.W.2d 480 (1999), our supreme court held that a spouse does not have a legal entitlement to maintenance.

¶20 We conclude the circuit court did not err when it stated that Dwana was entitled to maintenance. The record establishes that the court's comment was made in the context of considering the substantial contributions that Dwana had made to both the marriage and Michael's veterinary practice. The circuit court here was not under the erroneous assumption as was the circuit court in *King*, that a spouse has a legal entitlement to maintenance. *Id.*

¶21 The evidence amply supports the circuit court's findings. Therefore, we conclude the circuit court properly exercised its discretion by determining that Michael's career change was unreasonable.

## II. Attorney Fees

¶22 Michael argues that the circuit court erred by ordering Michael to pay Dwana \$1,000 as a contribution toward her attorney fees. He contends that the court did not consider Dwana's need, Michael's ability to pay, or the reasonableness of the total fee.

¶23 We will not upset a circuit court's decision to award attorney fees under WIS. STAT. § 767.262<sup>4</sup> absent an erroneous exercise of discretion. *Kastelic v. Kastelic*, 119 Wis. 2d 280, 290, 350 N.W.2d 714 (Ct. App. 1984). In exercising its discretion, the circuit court must make findings regarding "the need of the

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entitled to maintenance – some maintenance, over the 15 years  
the Court previously ordered.

<sup>4</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

spouse seeking contribution, the ability to pay of the spouse ordered to pay, and the reasonableness of the total fees." *Id.*

¶24 The record is void of any discussion regarding Dwana's need of attorney fees, Michael's ability to pay the fees, or the reasonableness of the total fees. We conclude that the circuit court did not make the appropriate findings and therefore erroneously exercised its discretion by making the attorney fee award. As a result, we reverse and remand with instructions that the circuit court make appropriate findings as to attorney fees.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions. No costs awarded to either party.

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



