

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 10, 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. 01-0150-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

LAURIE ANN FERRY,

PETITIONER-RESPONDENT,

v.

THOMAS PHILIP FERRY,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
MARK A. WARPINSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas Ferry appeals his divorce judgment, challenging the amount and duration of maintenance awarded to his former wife,

Laurie Ann Ferry.¹ He argues that the trial court erroneously exercised its discretion in setting maintenance. We disagree and affirm the judgment.

BACKGROUND

¶2 The parties were married in 1986. At the time of the divorce, Laurie earned \$17,300 per year employed at a clinic in the customer service department. Thomas was self-employed as the owner and operator of Tom Ferry's Pro Shop and Impact Trophy, and earned \$51,618 per year.

¶3 The court awarded joint legal custody and equal placement of the parties' two children. The court ordered that Thomas pay \$211.32 per month as child support. It awarded Laurie \$700 per month maintenance for nine years.

¶4 The court stated:

The difficulty here with respect to both the amount of maintenance and its duration is predicated upon the fact that these parties attempted to blend their employment careers under one roof, so-to-speak, by having the trophy shop and the bowling alley business or the pro shop business run together. It's not likely to be expected that they would continue to work together.

So we have [Laurie] starting out a different career, and it was not a career that from the testimony was likely to lead to some other job. This wasn't an instance where [Laurie] said I would like to go back to school and I would like to obtain skills so that I could work at a different higher paying job.

The parties had agreed during the period of the marriage, for the most part, [Laurie] would remain home and care for the children. So I was left with a situation where I couldn't

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1999-2000 edition unless otherwise noted.

point to some trigger event in the future that would lead me to the conclusion that [Laurie] should get to that level²

¶5 In its written decision, the trial court made comprehensive findings relative to the WIS. STAT. § 767.26 statutory factors.³ The court then stated that as a starting point, it performed a “Mac Davis”⁴ calculation to determine income

² The court made these findings at the hearing on a motion for reconsideration.

³ The court stated:

- A. The length of the marriage is 13 years. I find this to be a long term marriage under those circumstance[s].
- B. The age and physical and emotional health of the parties has not been described as an issue in this matter.
- C. The division of property made under § 767.255, Wis. Stats. The marital worksheet provided by [counsel for Thomas] shows that there is a net marital estate of \$6,816 over and above the residence. It is anticipated that once the residence is sold, various debts will be paid and the parties’ net equity will be divided equally. I do not believe that that division of net equity will result in an income stream to either of the parties such that maintenance would be affected at this time.
- D. The educational levels of both parties was the same at the time of the marriage as it was at the time the action was commenced.
- E. The Respondent’s earning capacity has been set at \$51,617. The Petitioner earns approximately \$8.40 per hour now and believes that in the not too distant future she is capable of earning \$10 per hour. No indication was given to this Court that the Petitioner intends to go back to school to obtain skills in order to procure a better paying job. The children are also of sufficient age so that it is not necessary for the Petitioner to work anything less than full-time presently.
- F. The tax consequences to both parties are nominal based upon the information that has been provided to the Court.
- G. There were no mutual agreements between the parties before or during the marriage with respect to maintenance.
- H. There was no testimony to indicate that either party contributed to the education, training or increased earning capacity of the other party.
- I.

⁴ A “Mac Davis” calculation refers to a computer program that does

nothing more than make the necessary calculations, such as after-tax income and the effect of tax exemptions, faster and more accurate. ... The computer results are not evidence outside

(continued)

available for maintenance exclusive of any child support obligation and applied a *LaRocque* analysis.⁵ The court determined that its results called for a monthly maintenance obligation of \$628.69.

¶6 The court found that a \$628.69 payment left Laurie with a total disposable monthly income of \$1,956. It concluded that this sum was insufficient under the circumstances: “I believe that [Laurie] will need at least \$2,000 per month, this takes into consideration the fact that she will not in all likelihood be paying any real estate taxes and that she should be able to find suitable housing for herself and the children.” The court also considered that the cost of the children’s food and clothing will be reduced as a result of the shared placement arrangement. The court determined that \$700 per month would be needed to meet her budget.

¶7 Additionally, the court considered the duration of maintenance. It stated:

Given the fact that [Laurie] is employed making approximately \$8.40 per hour, it would take her approximately nine years, if I assume that [her] wages will increase by approximately 4 to 4-1/2% per year, to earn as much as she would be entitled to receive by way of maintenance at this time. Therefore, maintenance shall be for a period of nine years.

DISCUSSION

of the record any more than results from a trial court's use of a calculator, pencil and paper, or a mental calculation. ... The fact that the trial court used a computer program as an aid is not an abuse of discretion.

Bisone v. Bisone, 165 Wis.2d 114, 122-23, 477 N.W.2d 59 (Ct. App. 1991).

⁵ See *LaRocque v. LaRocque*, 139 Wis. 2d 23, 406 N.W.2d 736 (1987).

¶8 Thomas argues that the trial court erroneously determined maintenance. He complains that the trial court failed to give appropriate consideration to the fact that he is paying a portion of the children's health insurance costs. Also, he claims that he needs to replace certain business equipment and must assume additional business debt. He also argues that he must run two full-time businesses himself and, due to increased time spent with his children, he contends that he would likely not be able to earn at the same rate as in the past. Thomas further argues that Laurie's budget demonstrates that she only needs \$397.84 per month in maintenance.

¶9 The trial court is vested with broad discretion in ordering maintenance. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Judicial discretion is the reasoned application of the proper principles of law to the facts that are properly found. *See id.* 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).

¶10 In deciding whether to award maintenance, the trial court must consider the factors in WIS. STAT. § 767.26. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 40, 406 N.W.2d 736 (1987). They include: the length of the marriage, the parties' age and emotional health, their educational levels, the contribution of one party to the education or earning capacity of the other, and property division. WIS. STAT. § 767.26.

¶11 On review, we must consider whether a circuit court's application of the factors achieves both the fairness and support objectives of maintenance. *Forester v. Forester*, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993). A

trial court misuses its discretion if it misapplies or fails to apply the statutory factors, or if it fails to fully consider the dual objectives of maintenance. *Id.* at 86.

¶12 Limited maintenance can serve many purposes, including an opportunity for the recipient spouse to become self-supporting within that period of time, as well as an incentive to seek employment. *LaRocque*, 139 Wis. 2d at 40-41. The supreme court has stated:

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.

Id. at 41.

¶13 Here, the circuit court's decision reflects a consideration of proper factors. It considered the length of the marriage, the parties' incomes, financial needs and Laurie's limited job skills due to responsibilities for the household and children during the marriage. It is not disputed that Laurie lacks vocational skills and that her childcare responsibilities played a significant role in her lack of additional employment history. There was no evidence presented as to how Laurie might increase her earning potential. Thomas points to no evidence to suggest that Laurie could become self-supporting at a level consistent with that maintained during the marriage in less than nine years. "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." *Id.* It must "not prematurely relieve a payor spouse of a support obligation lest a needy

former spouse become the obligation of the taxpayers." *Id.* We conclude that Thomas fails to establish that the trial court unreasonably exercised its discretion in awarding Laurie maintenance for nine years.

¶14 Thomas complains that the maintenance award is more than 50% of the parties' incomes, that he barely has enough income while working two jobs to meet his own expenses and that unreasonable hardship results to him if he must pay the maintenance ordered. We reject Thomas's contention that the monthly maintenance amount is excessive.

¶15 We are unconvinced that the maintenance award violates the fairness principle enunciated in *LaRocque*. Here, the trial court considered appropriate factors under WIS. STAT. § 767.26, to determine that Laurie was entitled to maintenance. In view of the parties' respective incomes, maintenance of \$700 per month is reasonable. It is evident from the court's discussion that it relied on the factors it considered most important. Because any factual challenges to the court's findings of fact cannot be supported due to the lack of the trial transcript, we accept the court's determination that Laurie's needs and Thomas's ability to pay are commensurate with the award. *See State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993).⁶ The method used by the trial court is within the court's discretion because it was a reasoned analysis resulting in a fair conclusion. "As long as the analysis is reasonable and the result is fair, we will uphold such an

⁶ The record lacks a transcript of the trial. It contains only transcripts of the court's decision and counsel's argument. The burden is on the appellant to create an adequate record and, when the record is incomplete, we will assume that the missing material supports the circuit court's ruling. *See State v. Holmgren*, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999).

exercise of discretion.” *Enders v. Enders*, 147 Wis. 2d 138, 145, 432 N.W.2d 638 (Ct. App. 1988).

¶16 Thomas argues, nonetheless, that the court erred in applying a *LaRocque* analysis because his marriage was not long term. We are unconvinced that any error occurred. While it is true that the length of a marriage is a factor in setting maintenance under WIS. STAT. § 767.26(1), the mere tallying of years married is not the sole criterion to determine whether a marriage was a long one, at least as that term has significance under *LaRocque*, 139 Wis. 2d at 39. There, our supreme court stated: “This court has said 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.” *Id.* *LaRocque* applies to a marriage “of many years” with parties each contributing to the stream of income as marital partners, entitling each to share the rewards of that income stream. *Fowler v. Fowler*, 158 Wis. 2d 508, 519, 463 N.W.2d 370 (Ct. App. 1990).

¶17 Here, the circuit court stated that thirteen years was a long marriage, under the circumstances. Implicit in this determination is the finding that Laurie’s contributions to the marriage and its financial situation were significant to offset the thirteen-year term. As suggested in *Fowler*, 158 Wis. 2d at 519, both the length of the marriage and the contribution of the participants as marital partners are proper considerations in determining whether to apply the principle of equal division of total income as a starting point in determining maintenance as described in *LaRocque*, 139 Wis. 2d at 39. Because the circuit court’s ruling reflects a rational basis, we do not overturn it on appeal.

By the Court.—Judgment affirmed.

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

