

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2002

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. 01-2827
STATE OF WISCONSIN**

Cir. Ct. No. 00-FA-87

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DOROTHY ELLEN ERICKSON,

PETITIONER-APPELLANT,

V.

MICHAEL JEROME ERICKSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Dorothy Erickson appeals a judgment of divorce that awarded her \$1,000 per month maintenance for twelve months from Michael Erickson. Dorothy argues that the maintenance award was an erroneous exercise

of the circuit court's discretion. We agree and reverse, remanding for further proceedings in accord with this opinion.

¶2 The following facts are not in dispute. Dorothy and Michael were married for thirty-four years and both were in their mid-fifties at the time of the divorce. They had no children. Throughout her life, Dorothy has had health problems, rendering her largely unable to work. Michael worked as an automobile windshield installer, eventually buying the installation company with a partner and later buying out the partner. The year before the divorce, Michael's adjusted gross income was \$206,476, which included rents from buildings he owned that housed the glass company. At the time of the divorce, the net estate available for division totaled just over two million dollars.

¶3 The parties reached a stipulation on property division. After hearing two days of testimony, the court ruled on the remaining matters. Pertinent to this appeal, the circuit court awarded Dorothy one thousand dollars of maintenance per month for one year. The court reasoned that Dorothy would be able to live at the marital standard of living from the income earned on her share of the marital estate, but that she should have "some minimal maintenance for the next year to get her settled down and get her started."

¶4 Dorothy argues that the circuit court abused its discretion in awarding maintenance because the court: (1) did not consider the savings, investments and charitable contributions made by the couple during the marriage as part of their standard of living; (2) overestimated the income available to Dorothy from the marital property division; and (3) erred in imputing income to Dorothy from non-income-producing recreational land awarded to Dorothy in the property division. Furthermore, Dorothy argues that the circuit court did not fully

consider all the applicable statutory factors in awarding maintenance. Michael disputes each of these contentions.

¶5 The amount and duration of maintenance are within the discretion of the circuit court and this court will not disturb the circuit court's determination absent an erroneous exercise of discretion. *Wolski v. Wolski*, 210 Wis. 2d 183, 188, 565 N.W.2d 196 (Ct. App. 1997). In exercising its discretion, the circuit court must consider the facts, apply the relevant law and employ a process of logical reasoning. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). In making its maintenance determination, the circuit court must state the factors listed in WIS. STAT. § 767.26 (1999-2000)¹ on which it has relied. *Steinke v. Steinke*, 126 Wis. 2d 372, 388-89, 376 N.W.2d 839 (1985). Upon review, this court must consider whether the circuit court's application of the factors achieves both the fairness and support goals of maintenance. *Forester v. Forester*, 174 Wis. 2d 78, 85, 496 N.W.2d 771 (Ct. App. 1993).

¶6 The circuit court first went through the factors listed in WIS. STAT. § 767.26. The circuit court noted that this was a “long, long-term marriage,” that the parties were both middle-aged, and that “Mrs. Erickson has some physical difficulties that have made it impossible for her to earn any kind of living.” See WIS. STAT. § 767.26(1), (2) and (5). The circuit court observed that the “educational level of each party was minimal at the time of the marriage, and neither has added much to it since then. Nobody has contributed to the education, training, or increased earning power of the other party.” See *id.* at subsecs. (4) and

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

(9). The circuit court noted that the tax consequences had been discussed based on the property division and that there was no mutual agreement regarding maintenance. *See id.* at subsecs. (7) and (8). The circuit court concluded that the “primary factors that come into effect here are the length of the marriage, her physical condition, her earning capacity ... and the feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.” *See id.* at subsecs. (1), (2), (5) and (6).

¶7 In assessing the fairness objective of maintenance, the circuit court concluded, “all of the equities are on the side of Mr. Erickson.” The circuit court noted that Michael had worked his way up from a windshield installer to a business owner, going from “having nothing at the time of the marriage to dividing over \$2 million in property and assets.” The circuit court went on to note that Michael “had subordinated virtually all of his life to taking care of [Dorothy],” and that she had done “little in the way of cooking, cleaning, household maintenance” and had not been involved in running Michael’s business. The court concluded: “If you are talking about who made a substantial contribution to the other, the equities are all on his side.”

¶8 Regarding the support objective, the circuit court concluded that Dorothy could maintain the marital lifestyle by living off the income from her share of the marital estate, “without her ever having to dip into the principal for one dime.” The circuit court made estimates of Dorothy’s probable investment income under various scenarios, and concluded that an annual income of \$33,000 was the lowest possibility. The circuit court concluded that this amount was sufficient to support Dorothy at the lifestyle she was accustomed to at the time of the divorce.

¶9 Although the circuit court noted Dorothy's medical condition, we conclude that the court erroneously exercised its discretion by not sufficiently taking Dorothy's disability into account in determining the maintenance award. Although Michael disputes that Dorothy was unable to work due to her medical condition, the record supports the circuit court's finding that Dorothy's "physical difficulties ... made it impossible for her to earn any kind of a living." After making this finding, the circuit court lauded Michael's hard work and determination in improving the couple's economic status and his devoted care of Dorothy, while noting Dorothy's minimal financial contribution to the marriage. The circuit court failed to consider that a major reason the parties' economic contributions to the marriage were so unequal was no doubt because of Dorothy's disabilities. We thus conclude that the circuit court erred in its assessment of the fairness objective of maintenance.

¶10 We remand this case to the circuit court for a reconsideration of the maintenance award, both its amount and duration. In so doing, we observe that the unequal contributions of the parties to the marriage may justify a deviation from an equal division of post-divorce income, which is the "starting point" for a maintenance determination in a long-term marriage. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 39, 406 N.W.2d 736 (1987). The court must, however, consider the findings it made regarding Dorothy's health and earning capacity, as well as the length of the marriage, in assessing the support and fairness objectives of maintenance. Given that the marital estate was equally divided, Michael can expect to derive roughly the same investment income as Dorothy from his post-divorce assets. In addition, however, he is expected to receive substantial earned income in the ensuing years.

By the Court.—Judgment reversed and cause remanded with directions.

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

