COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2651 **Cir. Ct. No. 00-FA-308**

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

IN RE THE MARRIAGE OF:

ELLEN C. VOIE,

PETITIONER-APPELLANT,

V.

THOMAS M. PLISKA,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Dykman, Roggensack and Deininger, JJ.

¶1 DEININGER, J. Ellen Voie appeals a judgment granting her a divorce from Thomas Pliska. She claims the trial court erred (1) in awarding

Thomas an investment account containing the residue of a personal injury settlement received during the marriage, and (2) in holding maintenance for both parties open indefinitely. We conclude that the court did not erroneously exercise its discretion in either regard, but that the court should have specified in the judgment the circumstances under which maintenance might be awarded in the future. We therefore reverse the maintenance provision in the appealed judgment and remand for the entry of an amended maintenance order. We affirm the judgment in all other respects.

BACKGROUND

¶2 The material facts are largely undisputed. The parties had been married for eighteen years when Ellen petitioned for divorce and for twenty when the court granted it. The parties agreed on custody, physical placement and support of their fifteen-year-old daughter. Their son turned eighteen shortly after the granting of the divorce and the parties agreed that his custody, placement and support were not at issue. Property division and maintenance issues were tried to the court.

¶3 Ellen was forty-three years old at the time of the divorce and employed as the executive director of "Trucker Buddy International," a non-profit organization, of which she was the sole employee. She earned a base salary of $50,000 annually, with the only employer-provided benefit being health insurance for herself. In addition to her salary, Ellen had the opportunity to earn a bonus for fundraising, as well as additional income for writing articles and giving talks. During the marriage she acquired both a bachelor's and a master's degree in communications, while also working for the family trucking business and later for an accounting firm. The record suggests that Ellen shouldered the majority of the

household and childcare responsibilities during the marriage. She testified to being in good health except for a high cholesterol level and noted that she had a family history of heart disease.

¶4 Thomas was forty-eight years old at the time of the divorce and employed by Wal-Mart as a truck driver. He earned approximately $47,000 annually for driving every other week. Both Thomas and a vocational expert testified that the alternating-week schedule was the most he could tolerate due to a back injury sustained in a 1991 accident, and that he was earning at his maximum capacity. In addition to his base income, Thomas was eligible for annual "safety bonuses," and he had a comprehensive package of benefits which included life, health and dental insurance, stock option and retirement plans and a 10% discount at Wal-Mart. He had been driving for Wal-Mart since 1998, and prior to that, for the parties' trucking business. He testified that he incurs employment expenses of $130 per week when on the road and that he was subject to being let go by Wal-Mart if involved in a "chargeable accident."

¶5 Exhibits introduced at trial show that in 1993 the parties received a settlement of $175,000 from a third-party's insurer for "the liability of the tort feasor [sic] for injury" sustained in Thomas's 1991 truck accident. Of this amount, $58,901 went to attorneys as costs of collection; one-third of the balance, $38,700, went to the "employe[e]"; $30,000 went to the worker's compensation insurance carrier that had paid Thomas benefits for his injuries; and the balance of $47,399 was paid to the "employe[e] which shall constitute a cushion or credit against any additional claim under worker's compensation." *See* WIS. STAT.

§ 102.29 (2001-02).[1] The check for the employee's proceeds, totaling just over $86,000, was made payable to both Thomas and Ellen, and both were required to sign a release in favor of the third party.

¶6 The parties testified that with the settlement proceeds they purchased vehicles, made some home improvements, set aside $5,000 for each of their children's education, and invested $15,000 in an annuity account established in Thomas's name. No other deposits were made to the account nor withdrawals taken from it during the marriage, and its value grew to $21,443 at the time of the divorce. The court allocated the annuity account solely to Thomas and divided the balance of the parties' property between them. The division resulted in an equalization payment of some $90,000 from Ellen to Thomas, chiefly owing to Ellen's being awarded the marital residence.

¶7 Thomas did not request a current award of maintenance but asked the court to order maintenance for him held open given his back injury and its present and potential future impact on his ability to work. Ellen did not request maintenance from Thomas and asked the court to permanently deny Thomas maintenance from her. The court ruled in Thomas's favor, saying, "I think that the length of the marriage, the health of the parties, and the fact that he is somewhat at risk at the present time leads the Court to conclude that it should be held open." The court opted to hold maintenance open for Ellen as well.

¶8 The court entered a judgment of divorce which included the property division ordered at trial and which provided that "[m]aintenance to both parties

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

shall be held open until further order of the Court." Ellen appeals, challenging the award of the annuity account solely to Thomas and the court's order regarding maintenance.

ANALYSIS

¶9 The parties agree, and so do we, that we review both the trial court's property division and its order regarding maintenance for an erroneous exercise of discretion. *See* ***Weberg v. Weberg***, 158 Wis. 2d 540, 546, 548, 463 N.W.2d 382 (Ct. App. 1990). This means that we will look for reasons to sustain the trial court's decisions, even if we do not agree with them. ***Id***. at 546. More specifically:

> A court exercises discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion. It is "a process of reasoning" in which the facts and applicable law are considered in arriving at "a conclusion based on logic and founded on proper legal standards." Thus, to determine whether the trial court properly exercised its discretion in a particular matter, we look first to the court's on-the-record explanation of the reasons underlying its decision. And where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree.
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> It need not be a lengthy process. While reasons must be stated, they need not be exhaustive. It is enough that they indicate to the reviewing court that the trial court "undert[ook] a reasonable inquiry and examination of the facts" and "the record shows that there is a reasonable basis for the ... court's determination." Indeed, "[b]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions."

Burkes v. Hales, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991) (citations and footnote omitted).

¶10 Ellen claims that the trial court erroneously exercised its discretion in awarding Thomas the annuity account containing proceeds of the 1991 settlement instead of dividing the account equally between them. She acknowledges that under ***Richardson v. Richardson,*** 139 Wis. 2d 778, 407 N.W.2d 231 (1987), the court was required to begin with a presumption "that the injured party is entitled to all of the compensation for pain, suffering, bodily injury and [post-divorce] future earnings." ***Id***. at 786; *see* ***Weberg***, 158 Wis. 2d at 548-49. She contends, however, that the 1991 settlement included compensation for items in addition to Thomas's pain, suffering, bodily injury and future lost earnings. In support of her contention, Ellen points to the facts that she was a part-owner of the family trucking business that suffered property damage in the accident and lost income on account of it, and that she was required to sign the release and endorse the settlement check along with Thomas.

¶11 Ellen concedes that "there was no testimony as to how the portions of the claim were divided, i.e., what portion was pain and suffering and what portion made up the economic losses." We conclude that this omission is fatal to her claim to an entitlement to share in the annuity account, which undisputedly contained only the residue of the settlement proceeds after the parties had applied the bulk of the proceeds for family purposes.[2] The exhibits in the record relating to the settlement consist of correspondence from attorneys, copies of disbursement checks, a release of liability, and a worker's compensation "Agreement for

[2] As we have noted, the account grew as a result of investment returns from an initial deposit of $15,000 to over $21,000 at the time of the divorce. The parties made no other deposits to the account during the marriage. Ellen does not argue that the court should have treated the increase in the account's value during the marriage differently than the original $15,000 in settlement proceeds, and thus we do not address the question.

Distribution of Third Party Proceeds." Nothing in the exhibits suggests a breakdown of the gross settlement amount into specific items of damages.

¶12 The trial court reviewed the testimony and exhibits in its oral decision and noted the lack of itemization ("[T]here's nothing … that expressly says this settlement is for pain and suffering and is not for … any business loss or is not for any property damage."). The court concluded that, in the absence of evidence to the contrary, the settlement was "the product of [a] personal injury lawsuit which was intended to make him whole, make his body whole, and as the case law says, that if that is the case, then that is not a marital asset." The court's statement is not entirely correct, in that the settlement is indeed a "marital asset" subject to division by the court, but one that is presumed to be allocable solely to the injured spouse absent reasons to allocate it differently. *See* ***Weberg***, 158 Wis. 2d at 548. Nonetheless, we conclude that the court did not err in finding the account in question to be the proceeds of a settlement obtained on account of bodily injuries sustained by Thomas, and it did not erroneously exercise its discretion in allocating it solely to Thomas.

¶13 The settlement before us in ***Weberg*** also did "not disclose any division or separation based on type of damage." ***Id***. at 549 n.3. We concluded that the "***Richardson*** presumption" that the injured spouse is entitled to the proceeds of a settlement of a personal injury claim should nonetheless be applied in the absence of an itemization of the damages comprising the settlement. ***Id***. (citing ***Krebs v. Krebs***, 148 Wis. 2d 51, 57, 435 N.W.2d 240 (1989)). Put another way, if a settlement is received by divorcing parties on account of personal injuries sustained by one of them, in order to establish that the presumption that the settlement proceeds should be allocated to the injured spouse does not apply, the non-injured spouse bears the burden of establishing that all or part of the

settlement was received for other than pain, suffering and bodily injury. Because there is no dispute that the investment account in question derives entirely from the proceeds of a settlement the parties received on account of bodily injuries sustained by Thomas, and because Ellen has not established that any part of the settlement was compensation for other than Thomas's bodily injury, we conclude that, as in ***Weberg***, "the presumption that the settlement remains the property of the injured person [Thomas] is fully applicable." ***Id***. at 549-50 n.3.

¶14 The question remains, of course, whether it was a proper exercise of discretion for the trial court to refuse to deviate from the ***Richardson*** presumption. We conclude it was. Again as in ***Weberg***, the disputed account did not represent the entire settlement the parties received. *See* ***Weberg***, 158 Wis. 2d at 550-51. The trial court noted that much of the settlement was spent during the marriage on a truck and "various other things," and that the only amount in dispute was the residue placed in the annuity account in Thomas's name. We conclude the court did not erroneously exercise its discretion in awarding this account solely to Thomas instead of dividing it between the parties because it was, in the court's words, "the product of [a] personal injury lawsuit which was intended to make him whole, make his body whole." *See* ***id***. at 550-52 (concluding that awarding an account containing "proceeds of [husband]'s worker's compensation settlement" solely to husband "was appropriate," "consistent with the applicable law as developed in ***Richardson*** [and] ***Krebs***," and a result which "a reasonable court could reach").

¶15 We next address the court's decision to hold maintenance open for Thomas. "A court is not precluded from holding open a determination on maintenance." ***Preiss v. Preiss***, 2000 WI App 185, ¶22, 238 Wis. 2d 368, 617 N.W.2d 514. In doing so, however, it must "consider the maintenance factors

detailed in WIS. STAT. § 767.26," ***id***., and it must provide "appropriate and legally sound reasons, based on the facts of record, for holding open a final maintenance decision until a future date," ***Grace v. Grace***, 195 Wis. 2d 153, 158, 536 N.W.2d 109 (Ct. App. 1995). We thus turn to the trial court's explanation of its decision to hold maintenance open, which follows in its entirety:

> With respect to maintenance, the parties were married in 1982. They're getting divorced in 2002. They've been separated since November of 2000. It's a lengthy marriage; two children, present ages 17 and 14. He is 47. She is 43. He is employed as a truck driver at Walmart. She is employed as an executive director for Trucker Buddy International, a company with one employee but a board that she reports to.… According to his financial disclosure, he has a … gross current monthly income of $3912.33. According to Exhibit No. 1, her gross annual income is $50,000.
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> During the marriage she obtained two degrees. She got a Bachelor of Science Degree in communication and a Masters degree. She did that when she could during the marriage, and has enhanced her earning capacity.
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> With respect to his earning capacity, he's got a good job at Walmart. Because he … suffered an injury in 1991, he does have a continuing disability, but his employer has permitted him to work what amounts to a part-time job. He works – [h]e's on a week and he's off a week. He's got good pay. He's got good benefits. He's got company-provided benefits, including pension, stock option, discount at Walmart stores, paid holidays. So he's got a pretty good position.
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> I heard the testimony of [the vocational expert], and I'm convinced that he's working at his … capacity at the present time. I don't think he's shirking. I think that he's got a disability which resulted from his, from the problems that he had which include the motor vehicle accident in 1992 [sic] resulting in cervical fusion in 1993 at C5 and 6; that he has pain while he performs his job. His testimony supports that when he sits for a long time and rides in the truck and sleeps in the truck and is on the road for a week, he does have pain. He takes Ibuprofen to reduce the pain. After he's home and not out on the road working as a truck driver, which has been his occupation for a long time, he --

> the pain subsides to the point where at the end of the week that he's home he does not necessarily have to use the Ibuprofen.
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> I'm satisfied that he is currently employed at his highest earning capacity at this time. I think he's at risk, given the fact that he's had an injury. I think he's at risk, and I think that because of that fact, I think that maintenance should be held open. There's a difference -- There's a disparity of income. It don't think we're going to see a situation where he's going to be working twice the hours he is now, and it might very well be that he maintains his present position and doesn't need any maintenance. He seems to be able to work, to live within his budget. She is living within her budget, and I think that as for now, the Court is not going to order maintenance payments. No maintenance payments are being asked for, but I'm being asked to hold open maintenance, and I think that the length of the marriage, the health of the parties, and the fact that he is somewhat at risk at the present time leads the Court to conclude that it should be held open.
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> … Ms. Voie has not asked for maintenance, so maintenance is denied.… Actually, she didn't waive maintenance, so I'm going to leave it open for both parties. So we'll leave it at that. Maintenance is held open for both parties given the length of that marriage.

¶16 It is apparent from the above explanation that the court gave consideration to relevant maintenance factors set forth in WIS. STAT. § 767.26, such as "(1) [t]he length of the marriage"; "(2) [t]he age and physical and emotional health of the parties"; "(4) [t]he educational level of each party at the time of marriage and at the time the action is commenced"; "(5) [t]he earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience …"; and "(9) [t]he contribution by one party to the education, training or increased earning power of the other." The facts and our disposition in ***Grace*** are instructive. There, as here, the trial court, after concluding that "'maintenance is not appropriate and not necessary at this time,'" opted to hold maintenance open because of "'potential health problems

that [the wife] … may have in the future.'" ***Grace***, 195 Wis. 2d at 157. The parties had been married sixteen years, and at the time of the divorce, the husband earned $68,287 annually and the wife $46,760. ***Id***. at 155. The husband challenged as "wholly speculative" the trial court's decision to hold maintenance open based on the possibility that the wife's potential future health problems might reduce her earning capacity. ***Id***. at 159. We disagreed, concluding that the trial court had appropriately exercised its discretion to leave maintenance open "on the strength of the record before it." ***Id***. at 160.

¶17 We conclude that the record before the trial court in this case is at least as strong in support of holding maintenance for Thomas open as was the record in ***Grace***, if not more so. Although the income disparity between the present parties is less, Ellen and Thomas were married for twenty years and Ellen left the marriage with bachelor's and master's degrees she acquired during the marriage, together with the increased earning capacity they afforded her. Unlike in ***Grace***, where the wife testified that, at the time of the divorce, she was "'in good health and [reports] that the kidney transplant has not affected her ability to work,'" ***id***. at 156, Thomas testified, and the trial court found, that his back injury impacted his current ability to work, and thus, his present and future earning capacity. Moreover, also unlike in ***Grace***, Thomas presented expert testimony to support his claim of reduced earning capacity. Although no expert medical testimony was provided, Thomas's vocational expert relied in part on medical reports and evaluations in reaching her conclusions, which the trial court implicitly found credible.

¶18 In short, we conclude that the court's decision to hold maintenance open for Thomas did not constitute an erroneous exercise of discretion. The court applied the correct law by focusing on statutory maintenance factors, and it gave a

reasoned and reasonable explanation of why it chose to hold maintenance open for Thomas. Unfortunately, although the trial court's decision is affirmable, as in ***Grace***, the maintenance order as set forth in the appealed judgment is not.

¶19 We noted in ***Grace*** that "the trial court left maintenance open for any and all purposes, despite the limited nature of the basis for its decision," and we concluded that "[a]s a result, the judgment leaves the door open to an award of future maintenance to [the wife] for conditions or circumstances wholly unrelated to her health problems, such as a diminution in income or an increase in needs caused by factors not suggested in this record or in the court's decision." ***Id***. at 160. Accordingly, we reversed the maintenance order in the judgment and remanded with directions to the trial court "to amend the maintenance provision so as to limit its applicability to the specific health concerns discussed in the court's decision and in this opinion." ***Id***.

¶20 We do likewise here. The divorce judgment currently provides simply that "[m]aintenance to both parties shall be held open until further order of the Court." It appears from the trial court's oral decision that its purpose in holding maintenance open for Thomas was to allow him to seek an award of maintenance should the back injury he sustained during the marriage significantly diminish his earning capacity below the level of his earnings at the time of the divorce. On remand, the trial court should enter an amended judgment of divorce specifying the circumstances under which Thomas may apply to the court for the entry of an award of maintenance in his favor, including any durational or other limitations the court deems appropriate given its rationale in holding maintenance for Thomas open. By the same token, even though Thomas has not cross-appealed the holding open of maintenance for Ellen, the court should similarly specify the

circumstances under which it would entertain a future request from Ellen to award maintenance in her favor.[3]

¶21 Our concern in ***Grace***, as here, is that when a court deems it appropriate to forgo a current maintenance award but to hold the issue open to address future events that are rendered likely, or at least possible, by circumstances shown to exist at the time of the divorce, the court's order must specify the parameters of the future consideration of the maintenance issue. In general, for the benefit of both parties, a divorce judgment should be as final and definite as possible in order to avoid spawning future litigation. If maintenance is to be held open, the opening should usually be quite narrow so as not to leave "the door open to an award of future maintenance … for conditions or circumstances … such as a diminution in income or an increase in needs caused by factors not suggested in [the] record or in the court's decision." ***Grace***, 195 Wis. 2d at 160.

CONCLUSION

¶22 For the reasons discussed above, we affirm the property division ordered in the appealed judgment, and we affirm the trial court's decision to hold maintenance open for Thomas (see footnote 3). We set aside the maintenance provision in the judgment, however, and direct the trial court on remand to enter

[3] As we have noted, Ellen did not seek a maintenance award, and she opposed Thomas's request that maintenance for him be held open. On appeal, she frames her claim of error as the court's erroneous exercise of discretion "in holding open maintenance to both parties without limitation," and we do not consider it unfair to her to have the trial court specify what limitations apply to her future ability to obtain maintenance from Thomas. Because Thomas did not cross appeal the court's decision to hold maintenance open for Ellen as well as for him, however, we do not address whether the trial court's decision to hold maintenance open for Ellen constituted an erroneous exercise of discretion.

an amended judgment which addresses the maintenance issue in a manner consistent with this opinion. No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.