COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 8, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2406-FT

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

In re the marriage of

KATHLEEN S. VITALIS,

Petitioner-Respondent-Cross-Appellant,

v.

DANIEL J. VITALIS,

Respondent-Appellant-Cross-Respondent.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Polk County: JAMES R. ERICKSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Daniel Vitalis appeals a judgment of divorce, arguing that the trial court erroneously exercised its discretion with respect to the maintenance award to his former wife, Kathleen.[1] Kathleen cross-appeals,

[1] This is an expedited appeal under RULE 809.17, STATS.

arguing that the trial court erroneously ordered an unequal property division. Because the record supports the trial court's exercise of discretion, we affirm the judgment.

The parties were married in 1978 and have two children, ages seventeen and fourteen. At the time of the divorce, Kathleen was thirty-eight years old and Daniel was forty-five. Both parties have high school educations and are in good health. Both parties are employed and receive profit sharing in addition to hourly wages.

Daniel has been employed at Anderson Corporation as a steam engineer since 1968. With respect to his annual earnings, Daniel testified at trial as follows:

Q.: And you made what $73,000 last year?

A.: I thought it was 71 but I don't know. I didn't see the records.

Daniel filed a financial disclosure statement declaring a gross monthly income of $2,266.26. His claimed deductions for taxes, social security, and insurance totaled $1,384.46, resulting in a claimed net monthly income of $881.80.

In contrast to his financial statement, an exhibit in the form of a computer printout entitled "Earnings History Report - P1R72M ANDERSON CORPORATION," was received without objection and stated Daniel's total earnings for 1994 were $73,510.63. The trial court found Daniel's earning capacity to be approximately $72,000 per year based upon his recent earnings.

Kathleen has been employed as a factory worker at Polaris Industries since 1991 and works third shift earning $7.03 per hour. She testified that her total income for 1994 was just under $20,000 annually.

The trial court considered a $50,000 income disparity between the parties and stated:

> [Kathleen] is still young, healthy, and capable of earning sums of money sufficient to support herself. Despite this, the fairness doctrine of Wisconsin law relating to maintenance seems to this court, under all the circumstances, to mandate at least limited term maintenance.

Kathleen was awarded maintenance in the sum of $1,200 per month for six years.[2]

Based upon the parties' agreement, the trial court awarded joint custody of the two children with primary physical placement with Daniel. No child support was ordered to be paid to Daniel.[3]

For a property division, Daniel was awarded 700 shares of Anderson Corporation stock that he acquired before the marriage, plus assets valued at $27,000. He was also awarded one-half the proceeds from the sale of their residence. Daniel testified that before the parties were married, he owned a house that was appraised at $27,000, and that he had only a $1,600 mortgage on the property. He testified that the proceeds of the house were used as a down payment on the parties' residence owned at the time of the divorce.

Kathleen was awarded assets valued at $17,000 plus one-half the proceeds of the sale of the residence.[4] Other than the Anderson Corporation

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[2] The case was tried in February 1995. The court issued its decision on January 22, 1996. Judgment was entered July 3, 1996 and the notice of appeal was filed in August 1996. In his brief, without citation to the record, Daniel states: "A hearing on the matter was held on October 9, 1996 wherein Mr. Vitalis would have $600.00 withheld for maintenance payments per month from his wages. The remaining $600.00 would be a lien against his deferred compensation which is received sometime after the first of the year." The record has no indication of any postjudgment proceedings.

[3] Daniel does not challenge the child support determination.

[4] Not set forth as a separate argument, Daniel states that the parties sold their home after the trial but before the court issued its decision. Because the proceeds were distributed before the decision was issued, Kathleen was overpaid $2,600. Because Daniel fails to indicate that the issue of

stock, the parties' pension plans, deferred compensation plans and retirement accounts were ordered to be equally distributed.[5] Other personal property was divided according to the parties' agreement.

(..continued)
overpayment was before the trial court, we do not address it on appeal.

[5] In his appellate brief, without citation to the record, Daniel states that as of February 1995, the Anderson Corporation stock had a value of $48 per share. Daniel states that as a result of the property division, Kathleen would receive 2,368.7 shares and Daniel would receive 3,068.69 shares.

MAINTENANCE

A maintenance determination is committed to trial court discretion. ***Forester v. Forester,*** 174 Wis.2d 78, 85, 496 N.W.2d 771, 774 (Ct. App. 1993). We will not reverse a discretionary decision if the record discloses that discretion was in fact exercised and we perceive a reasonable basis for the decision. *See* ***Prahl v. Brosamle,*** 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Underlying discretionary decisions may be factual determinations that we do not upset unless clearly erroneous. *See* ***Hollister v. Hollister,*** 173 Wis.2d 413, 416, 496 N.W.2d 642, 643 (Ct. App. 1992).

The trial court, not the appellate court, is the arbiter of the weight and credibility of testimony. *See* ***Estate of Wolff v. Town Bd.,*** 156 Wis.2d 588, 598, 457 N.W.2d 510, 513-14 (Ct. App. 1990). When the trial court has not made specific factual findings, we may assume that they would have been consistent with the court's decision. *See* ***Sohns v. Jensen,*** 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960). Appellate courts search the record for evidence to support the trial court's findings, not evidence to support findings the court could have but did not make. ***Estate of Becker,*** 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

A maintenance award has two objectives: support and fairness. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 33, 406 N.W.2d 736, 740 (1987). When a couple has been married many years, and achieves increased earnings, a reasonable starting point in determining maintenance is an equal division of the total income. ***Id.*** at 39, 406 N.W.2d at 742. This division may be adjusted based upon consideration of statutory factors, including the earning capacity of the party seeking maintenance, the division of property, and the parties' standard of living before the divorce. Section 767.26, STATS.

Daniel argues that the trial court erroneously exercised its discretion because it did not enumerate the factors in § 767.26, STATS., and failed to provide any rationale and failed to articulate any reasons for the maintenance award. We conclude that the trial court's limited explanation is not reversible error. Generally, we may look to the record for reasons to sustain a discretionary decision. *See* ***Prahl***, 142 Wis.2d at 667, 420 N.W.2d at 376. Here, the record supports the trial court's decision.

The record discloses a reasonable basis for the maintenance award. The parties were married many years and have a wide disparity in earnings. The trial court ordered an unequal property division, awarding Daniel more in property than Kathleen. After paying maintenance, Daniel is left with $57,600 per year. Kathleen's income, with maintenance and her earnings considered together, amounts to $34,400 annually. Because Kathleen was not ordered to pay child support, an order that Daniel does not challenge on appeal, the maintenance award approximates an equal division of the income stream. *See* ***LaRocque,*** 139 Wis.2d at 39, 406 N.W.2d at 742. In view of the length of the marriage, the earning disparity and the property division, it was reasonable for the trial court to conclude that fairness requires maintenance in the sum of $1,200 for a limited term.

Daniel challenges the trial court's finding that Daniel has an earning capacity of $72,000. Without citation to the record, Daniel argues: "In actuality, Mr. Vitalis earns an hourly wage of $25.00 per hour. Any differences in his yearly income is due solely to the deferred compensation program from his employer and that is based on sales of the company. This fluctuates greatly from year to year and may, in the near future, be totally obliterated."[6]

We reject Daniel's argument. The trial court's findings with respect to Daniel's earning capacity are supported by Daniel's testimony and the exhibit of his earnings.[7] Our scope of review requires that we defer to the trial court's assessment of weight and credibility. Section 805.17(2), STATS. In the event Daniel's income significantly drops, he is entitled to seek modification of the maintenance award pursuant to § 767.32, STATS.

Daniel further contends that the maintenance leaves him with a negative cash flow, while Kathleen, who has a positive cash flow, has not been

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[6] Failure to accompany argument with record citation violates RULE 809.19(1), STATS., and risks summary rejection of the appeal. *See* ***Lechner v. Scharrer,*** 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988). Such omission needlessly complicates the review of the issues.

[7] Daniel does not take issue with the trial court's use of the term "earning capacity." *See* ***Van Offeren v. Van Offeren,*** 173 Wis.2d 482, 496, 496 N.W.2d 660, 665 (Ct. App. 1992). Because the court's finding of earning capacity equals Daniel's actual earnings, any error with respect to the use of the term "capacity" would be harmless.

ordered to pay child support. Daniel does not, however, ask us to overturn the child support determination. He also uses the sum of $2,612.88 as his monthly income. This figure was specifically rejected by the trial court when it determined that Daniel's income was approximately $72,000 per year.

Without citation to the record, Daniel also argues that Kathleen's positive cash flow results in part from a projected $500 per month in dividends she is expected to receive from the award of Anderson Corporation stock. As a "working" stockholder, Daniel does not receive dividends. We are unpersuaded. When the maintenance award is considered in light of Daniel's annual earnings and the property division, we are satisfied that it represents a reasonable exercise of discretion.

CROSS-APPEAL

Kathleen cross-appeals, arguing that the trial court erroneously awarded Daniel $27,000 more than she received from the proceeds of the sale of the residence.[8] Property division is addressed to trial court discretion. ***Bahr v. Bahr,*** 107 Wis.2d 72, 77, 318 N.W.2d 391, 395 (1982). Section 767.255(3), STATS., presumes an equal division of property acquired prior to or during the course of the marriage, unless the property was a gift or inherited. *See* § 767.255(2), STATS. The trial court may alter the presumed equal distribution based upon several factors, including the property brought to the marriage, the amount and duration of any maintenance award, and other economic circumstances of the parties. Sections 767.255(3)(b), (i) and (j), STATS.

There is no suggestion that the property of the parties was gifted or inherited. Accordingly, all their property, including the property owned before the marriage, was subject to an equal division. Nonetheless, the trial court considered Daniel's testimony that the equity in the parties' home represented in part the sum of $27,000 that he had brought to the marriage. Considering the parties' economic circumstances, the amount and duration of maintenance awarded, and that Daniel brought this amount of property to the marriage, we conclude that the property division represents a reasonable exercise of discretion.

The parties' briefs, as well as the trial court's decision, discuss concepts of classification of property, mixing, commingling of assets and hardship. Daniel's brief cites ***Brandt v. Brandt,*** 145 Wis.2d 394, 407, 427 N.W.2d 126, 130 (Ct. App. 1988), and ***In re Estate of Lloyd,*** 170 Wis.2d 240, 254, 487 N.W.2d 647, 652 (Ct. App. 1992). Because the record fails to suggest that the parties' property was gifted or inherited as described in § 767.255(2), STATS., these concepts have no application. *See* ***Gardner v. Gardner,*** 190 Wis.2d 216, 236, 527 N.W.2d 701, 707-08 (Ct. App. 1994).

By the Court.—Judgment affirmed.

[8] Kathleen expressly does not, however, challenge the trial court's award of the 700 additional shares of Anderson Corporation stock to Daniel.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.