

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2006

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. 2005AP3056

Cir. Ct. No. 2005FA21

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

CHARMANE T. BARBER N/K/A CHARMANE T. VANIER,

PETITIONER-RESPONDENT,

V.

KELLY J. BARBER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County:
GUY D. DUTCHER, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Kelly Barber appeals the maintenance component of his divorce judgment from Charmane Vanier. He claims the trial court

erroneously exercised its discretion by allowing one of Vanier's witnesses to appear by telephone and by failing to discuss all of the statutory maintenance factors. We affirm for the reasons discussed below.

BACKGROUND

¶2 The parties were married for nearly ten years. Each had been married before and they had no children together. At the time of the divorce hearing, Barber was forty-nine years old and earning about \$4,233 per month as a truck driver. Vanier was forty-three years old and earning about \$662 per month working twenty-two hours per week as a part time kitchen aid. She was also receiving \$200 per month in back child support payments.

¶3 Vanier testified that she had some back problems which limited her ability to work full time. The trial court also allowed her to present telephonic testimony from her physician to support that claim. The trial court found that Vanier was capable of working thirty hours a week at \$7 per hour, which would translate to about \$910 per month. The court noted that a monthly payment of \$1,662 would be required to equalize the parties' incomes, and concluded that an award of the requested amount of \$750 per month for unlimited duration was appropriate given Vanier's back problems.

DISCUSSION

Telephonic Testimony

¶4 Barber contends that the trial court improperly allowed Vanier's doctor to testify by telephone, impeding his ability to cross-examine the doctor on whether a certain videotape showing Vanier moving about would have undermined his opinion of her mobility. The admissibility of evidence generally

lies within the trial court's discretion. *Martindale v. Ripp*, 2001 WI 113, ¶¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational and legally sound conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶5 WISCONSIN STAT. § 807.13(2) (2003-04)¹ permits the trial court to admit telephonic testimony when the applicable statutes or rules permit, the parties agree, or the proponent shows good cause to the court, which may consider:

1. Whether any undue surprise or prejudice would result;
2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;
3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;
4. Whether the procedure would allow full effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination;
5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;
6. Whether the quality of the communication is sufficient to understand the offered testimony;
7. Whether a physical liberty interest is at stake in the proceeding; and

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

8. Such other factors as the court may, in each individual case, determine to be relevant.

WIS. STAT. § 807.13(2)(c).

¶6 Here, the trial court determined that there would be no prejudice because the doctor had been disclosed as a witness some time before and his opinion would not alter Barber's position. The court further reasoned that the doctor's actual presence would not be critical to credibility, since he was a professional familiar with testifying. The court was not persuaded that the doctor would need to observe exhibits in order to testify. It also noted that there was no liberty interest at stake and concluded that the convenience to the witness weighed against requiring him to appear in person.

¶7 We are satisfied that the trial court's discussion demonstrates a rational consideration of the relevant factors. Since Barber did not specifically mention the videotape in his argument to the trial court,² there was no need for the trial court to specifically address the videotape in its discussion. Moreover, Barber was not barred from describing the videotape to the doctor over the phone to see whether anything depicted on it would have altered his opinion. In short, we see no basis to set aside the trial court's evidentiary decision.

Maintenance

¶8 WISCONSIN STAT. § 767.26 lists a number of factors to be considered when determining the amount and duration of a maintenance award, including the length of the marriage, the age and health of the parties, the property

² Counsel referred only generally to the need to have "the doctor review in person some of the documentation I have with respect to the petitioner's physical capabilities."

division, the parties' respective educational levels and earning capacities, the contributions of one party to the education or earning power of the other, tax consequences, and the standard of living enjoyed during the marriage. These factors "are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective)." *LaRocque v. LaRocque*, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736, 740 (1987). Maintenance determinations lie within the sound discretion of the circuit court. *LaMere v. LaMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789.

¶9 Barber claims that the trial court failed to properly exercise its discretion here by discussing all of the statutory factors. We agree that the trial court's discussion of the factors was incomplete. Nonetheless, the trial court did explain that it was making the award based on Vanier's limited ability to work due to her back problems. A party's health is one of the statutory factors relating to the support objective of maintenance, and there was no reason that the trial court could not consider Vanier's back problems the overriding factor here. While it would have been better for the trial court to address the other factors, explicitly we can infer that it simply did not find them to be as relevant. Indeed, Barber has failed to provide this court with any argument for why the factors not discussed would have weighed in his favor. Moreover, because our own review of the record supports the reasonableness of the trial court's ultimate determination, we conclude that it would be a waste of judicial resources to remand the matter. *See generally Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737 ("Although the proper exercise of discretion contemplates that the circuit

court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision.”). We are satisfied the maintenance award was well within the trial court's discretion.

By the Court.—Judgment affirmed.

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

