**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 19, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP997** **Cir. Ct. No. 2001FA296**

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

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**IN RE THE MARRIAGE OF:**

**KEITH P. HERLITZKE,**

**PETITIONER-RESPONDENT-CROSS-APPELLANT,**

**V.**

**JOLENE M. HERLITZKE,**

**RESPONDENT-APPELLANT-CROSS-RESPONDENT.**

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

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 DYKMAN, J. Jolene Herlitzke appeals and Keith Herlitzke[1] cross-appeals from a postdivorce order addressing the valuation of Keith's business, a maintenance award, and attorney fees. Jolene claims that: (1) the trial court's valuation of Keith's business was clearly erroneous because it did not use, as a basis, a Stock Purchase Agreement; (2) the trial court erroneously exercised its discretion by not addressing why the step-down maintenance plan provided adequate support and was fair; and (3) the trial court erroneously exercised its discretion by awarding her only $15,000 in attorney fees without adequately considering her ability to pay or Keith's actions leading to overlitigation. Keith argues that the trial court: (1) incorrectly concluded that it was precluded as a matter of law from considering supplemental evidence regarding his income; (2) had a duty to determine his actual income and ability to pay when setting maintenance and contribution to attorney fees; and (3) erred in setting maintenance at $3,500 per month without considering his actual ability to pay. We conclude that the trial court properly exercised its discretion in valuing Keith's business. However, we remand the maintenance award because the trial court did not sufficiently explain its reasons for deviating from a starting fifty-fifty division. We also remand the issue of attorney fees because the court did not address Jolene's need for contribution, Keith's ability to pay, or the reasonableness of the total fees. Finally, we affirm all issues on Keith's cross-appeal.

## FACTS

¶2 The record is long and complex. Unfortunately, the parties' briefs are artfully nuanced and take different views of relevant facts, making it difficult

[1] For clarity, we will refer to the parties by their first names.

to ascertain the correct facts. On remand, the parties might find it less costly to stipulate to the facts they do not dispute and identify more clearly the contested issues.

¶3 Keith and Jolene Herlitzke were married in November 1982. Keith has worked for the family business, Potato King, Inc., since he graduated from high school. In the beginning of the marriage, Jolene worked as a part-time store clerk. After the birth of their two children, Jolene left her job and remained at home with the children throughout most of the marriage.

¶4 Keith's parents started the Potato King business in their home in 1958. By 1984, their three sons were running the company and doing approximately $1 to $3 million in annual sales. In 1989, Keith's parents began to gift Potato King stock to their sons, Scott, Keith, and Rodney, by annually transferring two shares of stock to each son. When the transfer was complete, each son owned 16 2/3 shares. According to the company accountant, at the time of the final transfer in May 1990, each share was worth $7,508.70. Thus, the total value of Keith's gift from his parents was $125,145. The parties do not seem to directly dispute this value.

¶5 In the mid-1990s, the Herlitzke brothers started Potato King Transportation, Inc. (Transportation), which provides transportation services for Potato King's business. A few years later, the brothers started RSK of Wisconsin, LLC (RSK), which owns tractors that are leased to Transportation. Potato King and Transportation were originally IRS Subchapter C corporations. In 2000, the shareholders elected Subchapter S corporation status under Internal Revenue Code, 26 U.S.C. § 1361-1379. Since then, Keith, Scott, and Rodney have been

required to claim all business profits on their individual income taxes. *See* 26 U.S.C. § 1366(a)(1)(A).

¶6 Since the brothers added Transportation and RSK, there has been a dramatic growth in revenues. The trial court found Keith's one-third interest to be worth $554,855. Keith and Jolene enjoyed a "very good" lifestyle during their marriage. They had a large home, took many luxurious trips, and frequented the most expensive restaurants. As the companies continued to grow, so did Keith's income. According to tax returns, in 2002 Keith's income was over $450,000, and he paid over $160,000 in federal and state income taxes.

¶7 In April 2003, Keith and Jolene were divorced. The parties agreed to joint legal custody and shared physical placement of their two minor daughters. They stipulated that Keith's income was $348,000 per year. Keith agreed to pay $7,275 per month in child support. At the conclusion of the trial, the circuit court found that Keith's business interest was individual property because the appreciation was due to the efforts of Keith's parents, his brother Scott, and general economic conditions. The circuit court awarded Jolene limited-term maintenance of $3,500 per month for the first three years, $2,500 per month for the following three years, and $1,500 per month for an additional six years. The court also ordered each party to pay their own attorney fees.

¶8 Jolene appealed the property division, maintenance award, and contribution to her attorney fees. ***Herlitzke v. Herlitzke***, No. 2003AP2115, unpublished slip op. at ¶1 (WI App Aug. 12, 2004). We reversed and remanded for new rulings on all three issues. ***Id.***, ¶16. We ordered the circuit court to (1) include the appreciated value of Keith's business in the marital estate; (2) base maintenance on Keith's income of $348,000 per year and explain how the award

meets the support and fairness objectives of maintenance; and (3) reconsider the attorney fee contribution in light of the maintenance award and new property division. ***Id.***, ¶¶11, 14, 16. On remand, the trial court evaluated Keith's interest in the business and awarded Jolene $277,428, left its maintenance award unchanged and ordered Keith to pay a $15,000 contribution toward Jolene's attorney fees.

## DISCUSSION

### *A. Valuation of the Business*

¶9 When valuing marital assets, courts are not required to accept one valuation method over another, but must ensure that a fair market value is placed on the property. ***Schorer v. Schorer***, 177 Wis. 2d 387, 399, 501 N.W.2d 916 (Ct. App. 1993). "Fair market value is the price that property will bring when offered for sale by one who desires but is not obligated to sell and bought by one who is willing but not obligated to buy." ***Liddle v. Liddle***, 140 Wis. 2d 132, 138, 410 N.W.2d 196 (Ct. App. 1987). The valuation of a closely held business in a divorce action is a finding of fact. ***Schorer***, 177 Wis. 2d at 396. We will not overturn the trial court's decision on the business valuation unless it is clearly erroneous. ***Siker v. Siker***, 225 Wis. 2d 522, 532, 593 N.W.2d 830 (Ct. App. 1999).

¶10 Shortly after the stock transfers were complete, the Herlitzke brothers entered into a Stock Purchase Agreement, which governed the transfer of Potato King stock. Jolene maintains that the Stock Purchase Agreement provides the best indication of the fair market value. The valuation method under the Stock Purchase Agreement uses business assets less business debt to determine value. Keith and Jolene's experts initially concluded that the Stock Purchase Agreement did not control the valuation of Keith's business. In his January 2003 report, Jolene's expert, Reginald Emshoff, used a discounted cash flow method under an

income approach to value the business. Emshoff's report stated that because Potato King was an ongoing business with no plans to liquidate and Keith was a minority shareholder who could not unilaterally force liquidation, "we did not consider an asset approach to value appropriate for determining the fair market value of a minority interest." Likewise, Keith's expert, Kevin Janke, used a capitalized earnings or discounted cash approach, and found that the Stock Purchase Agreement method was not applicable for similar reasons.

¶11 Jolene asserts that the trial court should have used Emshoff's second or amended report, which used an asset approach as outlined by the Stock Purchase Agreement. Emshoff calculated the value of each business under the Stock Purchase Agreement as follows: Potato King, Inc.—$1,339,008; Transportation—$1,488,058; and RSK—$620,105, for a total value of $3,447,171. When divided by three, Keith's share was $1,149,057. To account for the original gift Keith received from his parents, Jolene subtracted $125,145.[2] Thus, her value of the total marital asset was $1,023,912.

¶12 In rejecting Jolene's proposed value, the circuit court found Janke's opinion more credible and accepted his calculations. One reason the court relied on Janke's conclusion was that it took into account Keith's tax consequences as a minority shareholder in a Subchapter S corporation and Emshoff did not.[3] According to Janke, the fair market value of Keith's share in his business was:

[2] Jolene uses $125,140 as the value of the gifted stock from Keith's parents in this portion of her brief. However, earlier in her brief and according to the record, the undisputed value of the gift was $125,145. Therefore, we use $125,145 in determining the martial share under the Stock Purchase Agreement.

[3] Jolene has not challenged this reason.

$320,000 in Potato King Inc.; $240,000 in Potato King Transportation Inc.; and $120,000 in RSK, for a total value of $680,000.[4] After subtracting the value of the gifted stock, Keith's interest was $554,855.

¶13 Establishing the fair market value of Keith's business was a battle of the experts. The circuit court acted within its discretion in rejecting Jolene's valuation based on the Stock Purchase Agreement. A trial court is free to assess expert opinion and determine fair market value after considering "the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net worth, the marketability of the shares, past earnings or losses and future earning potential." ***Dean v. Dean***, 87 Wis. 2d 854, 876, 275 N.W.2d 902 (1979). In ***Estate of Gooding v. Krueger***, 269 Wis. 496, 517, 69 N.W.2d 586 (1955), the court held that "[a] determination of fair market value cannot be based upon the liquidating value where the owner is in no position to force a liquidation." (Citations omitted.) In addition, we held in ***Sharon v. Sharon***, 178 Wis. 2d 481, 489, 504 N.W.2d 415 (Ct. App. 1993), that a buy-sell agreement may provide a method to determine the fair market value of a partnership interest, but such an agreement does not establish the value as a matter of law. Janke testified that while he typically considers a Stock Purchase Agreement, in this case he did not give it much weight because Keith could not force liquidation as a minority shareholder. We conclude that the record supports the trial court's decision to accept Janke's opinion.

[4] Though Jolene challenges Janke's appraisal of RSK as based on outdated information, she does not respond to Keith's rejoinder that a scheduling deadline made the more recent information unusable, and that Emshoff's second report was submitted after the deadline for submitting reports. We therefore take Keith's assertions as confessed. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

### *B. Maintenance*

¶14 The issue of spousal maintenance rests within the trial court's discretion. ***King v. King***, 224 Wis. 2d 235, 247, 590 N.W.2d 480 (1999). We will not disturb a maintenance award unless the trial court erroneously exercised its discretion. ***Id.*** at 248. The circuit court's discretion is not without limits. ***Poindexter v. Poindexter***, 142 Wis. 2d 517, 531, 419 N.W.2d 223 (1988). The decision must be based on facts in the record, applicable law, and be the product of a rational mental process. ***Id.*** (citing ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981)).

¶15 Under WIS. STAT. § 767.26 (2003-04)[5] the court may order maintenance for either party for a limited or indefinite length of time after considering several statutory factors.[6] According to ***LaRocque v. LaRocque***, 139

[5] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[6] WISCONSIN STAT. § 767.26 provides:

> Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:
>
> (1) The length of the marriage.
>
> (2) The age and physical and emotional health of the parties.
>
> (3) The division of property made under s. 767.255.
>
> (4) The educational level of each party at the time of marriage and at the time the action is commenced.

(continued)

Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987), the statutory factors are designed to cover the two objectives of maintenance: support and fairness. The support objective ensures that the recipient spouse receives adequate support in terms of the parties' needs and earning capacities. ***Id.*** at 33. The fairness objective ensures a fair and equitable financial arrangement. ***Id.*** In ***Bahr v. Bahr***, 107 Wis. 2d 72, 84-85, 318 N.W.2d 391 (1982), the supreme court held that it is reasonable for a court to calculate maintenance by starting with a presumption of an equal division of income.[7] ***Id.*** at 84-85. To ensure that the award is fair and provides adequate

> (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (7) The tax consequences to each party.
>
> (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (9) The contribution by one party to the education, training or increased earning power of the other.
>
> (10) Such other factors as the court may in each individual case determine to be relevant.

[7] In ***Bahr v. Bahr***, 107 Wis. 2d 72, 78 N.2, 318 N.W.2d 319 (1982), the court interpreted WIS. STAT. § 247.26 (1977), which is substantially similar to the current version, WIS. STAT. § 767.26. The previous version did not contain current provision (9): "The contribution by one party to the education, training or increased earning power of the other."

support, the court can adjust this fifty-fifty starting point by applying the factors in WIS. STAT. § 767.26. ***Id.***

¶16 On remand, the circuit court did not revise the original step-down child-support and maintenance plan. Under this plan, for the first three years, Jolene would receive $3,500 per month in maintenance plus $7,275 per month in child support, giving her a yearly gross income of $129,300 for her three-person household. Keith would retain $218,700 of his $348,000 annual income.[8] When their first child is emancipated in 2006, the court would reduce Jolene's maintenance to $2,500 per month for three years and eliminate child support for one child. Three years later, the maintenance would drop to $1,500 per month, and a year after that, when the second child is emancipated, child-support payments would end. By this time, if Jolene earns $25,000 per year, which the trial court found was her highest potential income, Jolene would maintain a gross annual income of $43,000. During these last five years, Keith would retain an annual $330,000 if his income remained unchanged.

¶17 Jolene argues that the trial court did not consider the presumption of a fifty-fifty division and failed to address how the plan meets the support and fairness objectives. She asserts that the maintenance amount is insufficient when compared to Keith's annual income.

¶18 Keith asserts that this court's mandate did not require the circuit court to revise its maintenance award, but rather to adequately explain its decision.

[8] Keith disputes the amount of his annual income on cross-appeal. Because we affirm the trial court's decision on Keith's cross-appeal, we will use $348,000 as Keith's annual income for this opinion. *See* cross-appeal discussion, below.

*See* ***Herlitzke v. Herlitzke***, No. 2003AP2115, unpublished slip op. at ¶14 (WI App Aug. 12, 2004). Keith argues that on remand the circuit court did just that. Keith points to the Memorandum Decision, in which the court discussed Jolene's income-generating assets as a result of the property division, her vastly over-inflated budget, and the tax consequences of Keith's income. In addition, Keith argues that the court sufficiently addressed the support and fairness objectives by referencing Jolene's potential annual income, her liquid assets, and the fact that the business appraisers used a cash flow approach, which already included a portion of Keith's income in the business value.

¶19 We conclude that the circuit court's maintenance award satisfies the support objective. The trial court articulated Jolene's future earning capacity, considered Keith's ability to pay, and found that Jolene's budget was over-inflated. Based on Keith and Jolene's financial circumstances, the court considered the proper factors and reached a conclusion that is reasonable under the support prong. *See* ***LaRocque***, 139 Wis. 2d at 33. Jolene's needs are met, at least for the twelve years for which maintenance has been awarded.

¶20 While the record sustains the trial court's decision on the support objective, Jolene's fairness argument is more convincing. When deciding if a maintenance plan is fair, the court should consider whether the plan compensates the recipient spouse for contributions made during the marriage, provides for the parties' financial arrangements, and prevents unjust enrichment. ***LaRocque***, 139 Wis. 2d at 33. In its original findings, the circuit court made the following statement:

> She's asking for $5,000 per month over and above the child support, which would give her a gross income of about $12,275 per month, or almost $150,000 per year ….

> He's asking for something substantially less, about $1,400 per month, which leaves him with a lot more disposable income obviously than hers. And while that doesn't exactly put her at the poverty line, to me that doesn't meet the fairness test.
>
> I'm going to order maintenance which will hopefully give her an opportunity to get the education that she will need, put her back on her feet, get her a reasonably good lifestyle, and still make it something that he can afford. And I'm going to graduate it, because I think she needs more of the money now and will need less later as she gets her education ….

¶21 In Jolene's first appeal, we questioned why the award "during the three years of the highest payments, is about ten percent of Keith's income of $348,000 and from there is reduced to even a smaller fraction of his income." ***Herlitzke***, No. 2003AP215, unpublished slip op. at ¶14 (WI App. Aug. 12, 2004). On remand, the court did little to expand upon its reasoning as to why Jolene's maintenance award was fair. The court incorporated its original findings of fact and provided four additional reasons to support its decision: (1) Jolene has liquid assets resulting from the property division while Keith's assets cannot be sold and will generate more taxable income; (2) Jolene's budget proposal was vastly over-inflated; (3) Keith's status as a shareholder in a Subchapter S corporation requires him to pay taxes on the reported income, not the actual cash he receives; and (4) neither party can enjoy their previous marital standard of living.

¶22 The court's decisions lack a methodology as to how it arrived at the maintenance award. The common methodology begins with an equal division of the parties' combined incomes and then modifies this amount based on WIS. STAT. §767.26. ***Bahr***, 107 Wis. 2d at 84-85. In deciding whether to uphold a maintenance award, the ***Bahr*** court concluded that the trial court fell short of providing a well-reasoned basis for why the maintenance award was equitable. ***Id.*** at 82. In reaching this conclusion, the court stated, "[w]e are left with a nagging

question: *Why* is $1,500 per month a proper maintenance award under the facts and circumstances of this case …?" ***Id.*** Likewise, here the trial court's decision leaves us to question why $3,500 per month is fair when it is approximately ten percent of Keith's annual income. None of the court's reasons address why the dollar amounts are fair to both parties. Jolene is not required to invade her property award to support herself. ***Kennedy v. Kennedy***, 145 Wis. 2d 219, 226-27, 426 N.W.2d 85 (Ct. App. 1988) (citing ***LaRocque***, 139 Wis. 2d at 34-35). Therefore, we remand the maintenance issue so that the trial court can explain its methodology and address why its award is fair. Of course, the trial court may also change Jolene's maintenance award in the proper exercise of its discretion.

¶23 The dissent quotes the trial court's decision on remand, and, without explanation, concludes that the reasons the trial court gave for retaining its original maintenance award are adequate. The problem with this sort of appellate review is that it counts words, not reasons. If we counted words alone, we would agree with the dissent. To adequately review a discretionary decision, we must analyze reasons. ***Goberville v. Goberville***, 2005 WI App 58, ¶7, 280 Wis. 2d 405, 694 N.W.2d 503. What are the reasons that the trial court would initially divide Keith's stipulated $348,000 in income between Keith and Jolene as $42,000 to Jolene and $306,000 to Keith, and then reduce Jolene's share in upcoming years?[1] We address each in turn.

¶24 **Decreased lifestyle**. Accepting the trial court's finding that the parties' lifestyles will no longer be lavish, we see no logical reason why their joint

[1] The parties' stipulation avoided protracted litigation about Keith and his brothers' Subchapter S corporations' retained earnings—a gnarly question with no easy answer.

reduction in lifestyle would make it fair that Keith retain ninety percent of his earnings and Jolene receive about ten percent. Perhaps there is a logical reason but the dissent does not tell us what it is.

¶25 **Jolene's substantial assets which are capable of generating additional income.** Initially, this reason appears logical. If a former spouse has assets that generate income bringing his or her total income up to a level within some reasonable percentage of predivorce living standards and an ex-spouse's living standards, it could be fair to reduce maintenance from a presumptive equal division. What are the facts here? Both parties' briefs refer to a "marital balance sheet," called "Exhibit "D," a part of the trial court's 2003 findings and conclusions. From that exhibit, we see that Jolene received a house with $267,288 of equity, $47,778 of household furniture, $9,730 of life insurance, an equalization payment of $65,951.50 and IRAs valued at $33,733. After subtracting $4,300 in real estate taxes, she received a total of $420,180.50. On remand, she received an additional $277,427.50, for a total of $697,608. The parties' partial marital settlement agreement provides: "The parties have agreed that the American funds IRAs will be awarded to [Jolene] to the extent necessary to equalize the property division." Keith does not challenge Jolene's assertion that Jolene received equalization IRAs and will have no cash reserves after she pays her attorney.

¶26 The trial court did not directly suggest that Jolene could invade her property settlement for her support. That would have contravened ***Kennedy***, 145 Wis. 2d at 226-27, where we said: "Jackie should not be obliged to invade or exhaust her property division to support herself if John's income is sufficient to provide her with maintenance meeting the ***LaRocque*** objectives of support and fairness." The trial court concluded that Jolene would have assets capable of generating additional income. The dissent does not examine or review that

conclusion. We must do so, if review is to be meaningful, and if we are to follow the teachings of ***Bahr***. The only assets that could realistically be considered as capable of generating income are Jolene's IRAs.

¶27 If income or principal of IRAs is tapped before age 59-½, the amount withdrawn is not only subject to federal and state income tax, but a federal penalty of ten percent. 26 U.S.C. § 72(t)(2)(A)(i). Jolene was about forty-two years old at the time of her divorce, eighteen years away from unpenalized use of the IRAs. The purpose of an IRA is to provide retirement income when earned income ceases, not to provide for present support. Though the parties discounted their IRAs thirty percent for taxes, the IRAs were not discounted for penalties. The trial court did not suggest that Jolene should sell the house she and the children lived in and use the proceeds to generate income, nor did it suggest the same for Jolene's personal property or insurance policies. Accepting the parties' partial marital settlement agreement and Jolene's unchallenged assertion that she has no cash reserves after payment of attorney fees, Jolene's property settlement is her house, her furniture, life insurance and retirement accounts.

¶28 Jolene's IRAs will generate income, but IRAs enable an eligible person to save for retirement when they have no earned income. The trial court terminated Jolene's maintenance when she becomes fifty-four years old. It determined her earning capacity to be between $20,000 and $25,000 annually, once she receives additional education. It made no findings comparing Jolene's expected income to Keith's expected income after the parties' children were emancipated. As we consider later, Keith, who testified that he wants to retire early and rich, owns a one-third interest in corporations which generated profits of $1,176,963 in 2002, and possesses $100,000 of unaccounted-for funds. While Keith may not be able to sell his interest in the corporations today, Keith and his

brothers are all going to reach retirement age sometime, whenever that is. At that time, Keith will have an asset, the proceeds of which will serve the same purpose as Jolene's IRAs. It is not fair to require Jolene to use the income from her IRAs for her present support while Keith is not only earning $348,000 per annum but keeping his interests in significant corporations which he will likely be able to use for his retirement.

¶29 **Keith's unsalable asset that generates more taxable income than cash in pocket.** Why is the salability of Potato King relevant? The trial court found that were Keith to leave Potato King, he would earn perhaps $60,000. Why would Keith sell an asset that for 2002 generated for him a gross of $454,393 taxable income, and which he stipulated provides an income to him of $348,000 so that he could earn a W-2 income of $60,000? Whether or not Keith can sell his business has nothing to do with the income it produces for him. And everyone who pays taxes generates more taxable income than cash in pocket. Keith is no different from the average person who cannot sell his or her employment opportunity and must pay income taxes.

¶30 **Little if no retirement accounts.** If this is a finding that Keith has not provided for his retirement, it is clearly erroneous. Keith is a one-third owner of a business that generated a profit of $1,176,963 in 2002. If Keith wished to retire the day after his divorce, he knew that he and Potato King, Inc., have entered a Stock Purchase Agreement which would in 2002 pay him over a million dollars. In addition, Keith has a separate estate which the trial court described as "this extremely large, separate estate that he has." While Keith may not have IRAs in an amount comparable to Jolene's, his assets, which are significant, can provide for his retirement.

¶31 **Child support.** The trial court added Jolene's request for maintenance to the child support she and Keith had agreed upon, and determined that the amount requested was excessive. But child support is for supporting the parties' children, not Jolene. The trial court did not find that Keith was unable to pay more maintenance due to his stipulated child support payments. Keith and Jolene avoided that question by stipulating to his income and child support payments. The parties' two daughters were fifteen and eleven years old when their parents divorced. If Keith's child support payments negatively affected his ability to pay maintenance, one would think that maintenance would increase when first one, and then the other child was no longer entitled to child support from Keith. Instead, the trial court ordered maintenance decreased over time, and eventually discontinued altogether.

¶32 **Over-inflated budget.** This has nothing to do with the "fairness" component of maintenance. Need and fairness are two different things. ***LaRocque***, 139 Wis. 2d at 35, explained long ago that after a trial court determines need, fairness can require a maintenance award in excess of the need of the recipient for support.

¶33 **Subchapter-S corporate status.** Everyone pays taxes. Generally, Subchapter S corporations treat stockholders like partners. *See, e.g.*, ***Attorney Grievance Comm'n v. O'Toole***, 379 Md. 595, 605, 843 A.2d 50 (Ct. App. Md. 2004). All self-employed persons must decide whether to use earnings to plow back into the business or whether to borrow with the ability to deduct the interest from state and federal income taxes. If business owners do the former, they do so to increase the profitability and hence the value of the business. So, whether Keith and his three brothers operate in partnership or corporate form, the question of retained earnings will inevitably arise if any of the brothers are required to pay

child support or maintenance. We know that a starting place for the division of income for maintenance purposes is fifty/fifty. ***LaRocque***, 139 Wis. 2d at 39. The trial court has the discretion to alter this by giving its reasons for doing so, most of which are contained in WIS. STAT. § 767.26. In this over-litigated case, the parties have stipulated to Keith's income as $348,000 per year. We know that deducting Keith's 2002 federal and state income taxes of over $160,000 from his taxable gross earnings of over $450,000 left him with a net income of close to $300,000. And we know that Keith had $60,000 of non-Subchapter S earnings. Neither the parties nor the dissent explains whether the tax cost of Subchapter S status makes a difference of $5,000 or $150,000 in Keith's income available for maintenance. Thus, the Subchapter S status of Keith's interest in the corporations by itself does not explain why it was fair to divide $348,000 of income by awarding $42,000 to Jolene and the remainder to Keith for three years and then reducing and finally terminating Jolene's share.

¶34 **Cash flow approach to value of corporations.** The trial court noted: "Additionally, both the appraisers used a cash flow approach when evaluating the businesses. Thus, a portion of the petitioner's income is already included in the appreciation of the business, a portion of which the respondent has received." We assume that the trial court meant "value" or "evaluation" not "appreciation," for if it meant "appreciation," the sentence may not be meaningful. But either way, the value of the business is the value as of the date of divorce for property division purposes. While the value of a business usually has a direct relationship to its earnings, valuation is done once for property division purposes and not usually recalculated when a request for modification of child support or maintenance is made. Thus, the fact that Jolene has received a portion of the value of the businesses in her property settlement is not relevant to determining what

income the businesses produce for Keith. It plays no part in determining the amount of maintenance Keith must pay.

¶35 The dissent has fallen into the trap the court warned against in ***Bahr***: "We are left with a nagging question: *Why* is $1500 per month a proper maintenance award under the facts and circumstances of this case …?" ***Bahr***, 107 Wis. 2d at 82. It is not enough to say that the trial court found as a fact that Keith has nothing for retirement. Of course that is what the trial court said. But it said nothing about Keith's valuable interest in the businesses and it did not value Keith's sizable exempt estate. Merely noting that the trial court said something does not amount to a review as contemplated by ***Bahr***. It is only by testing the underpinning of a found fact that we can conduct a meaningful review of a discretionary decision that depends on the found fact. The court explained this requirement in ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981): "[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." If a review shows that a found fact is clearly erroneous, the discretionary decision reached in reliance on that supposed fact is an erroneous exercise of discretion. If a review shows that an important factor was overlooked, that constitutes an erroneous exercise of discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶¶16-22, 262 Wis. 2d 426, 663 N.W.2d 789. It may be tedious to conduct a meaningful review in family law cases, but a "cite the trial court's decision" or a "count the words" review of a discretionary decision is no review at all.

### *C. Attorney Fees*

¶36 Jolene argues that the trial court erred in awarding her only $15,000 in attorney fees. Jolene's total anticipated attorney fees and costs were $106,743.70. Jolene requests that Keith pay at least one-half or $53,500 of her fees. She contends that she will have difficulty paying her attorney fees because she acquired $107,000 in debt in the original property division. She also maintains that a substantial portion of her fees were attributable to Keith's actions. Keith argues that the court's decision was not erroneous because $15,000 is reasonable in light of the new property division awarding Jolene one-half of his business's value.

¶37 The decision to order one party to contribute to the other's attorney fees is within the trial court's discretion. ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996). We review the court's decision and the reasonableness of the fees under an erroneous exercise of discretion standard. ***Zhang v. Yu***, 2001 WI App. 267, ¶12, 248 Wis. 2d 913, 637 N.W.2d 754. When awarding attorney fees, the circuit court must make three factual determinations: (a) that the recipient spouse has a need, (b) that the payor has the ability to pay, and (c) that the fees are reasonable. ***Holbrook v. Holbrook***, 103 Wis. 2d 327, 343, 309 N.W.2d 343 (Ct. App. 1981). The circuit court may also award attorney fees if one party unreasonably "overtried" the case. ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985). When one party seeks attorney fees on the theory of overtrial, the court does not need to make findings of need and ability to pay. ***Id.***

¶38 On remand, the circuit court found that both parties were responsible for any overlitigation, but that Keith's actions "originally triggered the mutually

destructive actions of both parties." The dissent assumes that Jolene's request for attorney fees was based only on her assertion that Keith was guilty of overtrial. But Jolene's circuit court brief on remand shows that Jolene requested attorney fees because Keith had hidden assets and resisted her efforts at discovery, because Keith had more assets than she, and because her assets were liquid or retirement accounts. She wrote:

> It is fair and necessary that Jolene receive a substantial contribution to her attorneys' fees, both because Keith's behavior doubled the size of those fees, but also because of his substantial separate estate and the income he will continue to enjoy after his child support and maintenance obligations end.
>
> There is a clear demonstration of Jolene's present inability to pay her fees, together with Keith's ability to contribute through his substantial separate estate and income stream. The Wisconsin Supreme Court, however, has ruled that need by one spouse and the ability of the other to pay are not the only factors the trial court may consider in awarding fees.

(Citations omitted.) While we interpret Jolene's request differently, to obviate any misunderstanding, we direct the trial court on remand to address Jolene's request for attorney fees on a need and ability to pay basis, and on an overtrial basis, and to explain its reasons for its conclusion.

¶39 In finding that $15,000 was a reasonable contribution, the court considered Jolene's substantial liquid assets and the fact that Keith could not sell his assets, and if he did, he could only sell them as a minority interest. While the court's reasoning touched on each person's ability to pay, the court does not explain Jolene's need for attorney fees, given the nature of her assets, nor does it explain why the total fees were reasonable. As the ***Holbrook*** court stated,

> "[i]n the absence of some indication as to what the total fee is, this court is left to surmise as to whether the proper

> balance was struck between the former wife's needs and the divorced husband's ability to pay." This requirement is not satisfied by the trial court's determination that [the amount ordered] was a *reasonable contribution*. It must first be determined what the total fee actually is and whether it is reasonable. Without this determination, we cannot review the reasonableness of the contribution.

***Holbrook***, 103 Wis. 2d at 344 (quoting ***Anderson v. Anderson***, 72 Wis. 2d 631, 646, 242 N.W.2d 165 (1976)). Similarly, in this case, the court made no finding as to what the total attorney fees were and whether they were reasonable. Its explanation that Jolene's assets were liquid does not consider the fact that liquidating her IRAs carries a significant cost or that her IRAs were to provide for Jolene's retirement. Therefore, we remand the issue of attorney fees and direct the trial court to address Jolene's need for contribution, the nature of her assets, Keith's ability to pay and the reasonableness of the total fees.

¶40 The dissent believes that Jolene's appellate briefing and this analysis do not distinguish between the two types of awards the dissent believes are distinct, and that need and ability to pay are irrelevant here. Jolene's appellate brief consumes about the same number of pages discussing attorney fees as the dissent uses to explain all of its disagreements with our opinion, and it far exceeds the dissent in specificity. The dissent cites nothing for its conclusion that a party may receive a standard contribution to attorney fees or a contribution for overtrial, but not both.[2] Jolene cites Keith's interest in Potato King, his half of the marital property, his debt-free status and his significant income. We have added Keith's substantial separate estate. Jolene contrasts this with her debt, attorney fees, experts' fees, appraisals and costs. She argues that she and the children are three-

[2] We make no determination as to whether Keith, Jolene, both or neither was guilty of overtrial.

fourths of the family and have only received one-third of the family income. She concludes that she cannot pay her attorney fees without liquidating her retirement accounts. She also argues that Keith's overtrial, misappropriation of $100,000, hiding of $34,000 in homestead equity and unsuccessful motions to reduce support increased her fees. She asks us to order Keith to pay one-half of her attorney fees, which we conclude is beyond our usual authority. It is apparent to us that Jolene is asserting that she should receive a greater attorney fee contribution for two reasons, her need and Keith's bad acts and overtrial. If the dissent is aware of some authority holding that a trial court may not award both a standard contribution to attorney fees and an award for overtrial, it is not saying what that authority is. Its cite to ***Johnson v. Johnson***, 199 Wis. 2d at 377-78, only reaffirms what we have held: A trial court must determine the reasonableness of a fee before ordering a contribution to that fee, "whether it be a conventional contribution order or one based on overtrial." The dissent does not explain why, in this case, that was unnecessary.

## CROSS-APPEAL

¶41 Keith argues that the trial court incorrectly concluded that it was precluded as a matter of law from considering additional evidence on remand about his income. Jolene counters that the trial court did not decide this as a matter of law, but rather that our remand was not an opportunity to relitigate the case. We review a trial court's maintenance award for an erroneous exercise of discretion. ***Franke v. Franke***, 2004 WI 8, ¶72, 268 Wis. 2d 360, 674 N.W.2d 832. An erroneous exercise of discretion occurs when the trial court makes an error in computation. *See* ***Bahr***, 107 Wis. 2d at 76 n.1; ***Vander Perren v. Vander Perren***, 105 Wis. 2d 219, 227, 313 N.W.2d 813 (1982); ***Schinner v. Schinner***, 143 Wis. 2d 81, 100-01, 420 N.W.2d 381 (Ct. App. 1988).

¶42 Keith relies on the following comments made by the trial court during a scheduling conference: "I've been directed by the Court of Appeals to review and re-decide the original trial in the major areas that they set forth …. And I believe under the law I'm required to do that on the evidence that was presented at that time." However, Jolene points out that the court added, "I don't think you can necessarily reopen and start trying the case again. A remand isn't a chance for the parties to relitigate …. I will decide based on the evidence presented at the time of the trial and only that evidence under the mandate from the Court of Appeals."

¶43 Each party quotes favorable portions of the trial court's ruling. We are unable to determine whether the trial court decided that it was precluded from taking additional evidence as a matter of law or whether it decided that it was not going to allow the parties to relitigate the case. Regardless of the trial court's reasoning, we did not direct the trial court to take additional evidence on remand. Although Keith is correct that family courts often consider new evidence on remand, there is no authority requiring trial courts to consider new evidence absent a directive from an appellate court. In ***Fullerton Lumber Co. v. Torborg***, 274 Wis. 478, 483, 80 N.W.2d 461 (1957), the court said,

> [w]here a mandate directs the entry of a particular judgment, it is the duty of the trial court to proceed as directed. The trial court may, however, determine any matters left open, and in the absence of specific directions, is generally vested with a legal discretion to take such action, not inconsistent with the order of the upper court, as seems wise and proper under the circumstances.

Keith's income was not an outstanding issue because the parties stipulated to his annual income of $348,000 at trial. Furthermore, we remanded the original maintenance award because "[t]he circuit court erroneously exercised its

discretion in setting maintenance because it did not base its decision on Keith's actual income of $348,000 per year." ***Herlitzke v. Herlitzke***, No. 2003AP2115, unpublished slip op. at ¶14 (WI App Aug. 12, 2004). Absent a mandate from this court or the need to decide an outstanding issue, the trial court was not required to consider additional evidence regarding Keith's income.

¶44 Keith also asserts that even if the circuit court did not require new evidence to implement the court of appeal's decision on remand, the circuit court had a duty to determine Keith's actual income and ability to pay. *See* ***Vander Perren***, 105 Wis. 2d at 227. However, Jolene argues that Keith failed to preserve any issue regarding his income for appeal. First, Jolene asserts that Keith never appealed the issue. Second, Jolene explains that Keith did not bring a proper motion for reconsideration in the trial court because under WIS. STAT. § 805.17(3) such a motion must be made within twenty days after the entry of a judgment.[3] Next, Jolene states that Keith failed to file a motion for a new trial under WIS. STAT. § 805.15(3) based on "newly discovered evidence" regarding his income. Lastly, Jolene notes that Keith failed to make a motion to correct any mathematical error in his income. Under WIS. STAT. § 806.07, a party can make a motion to obtain relief from a judgment based on a mistake. However, this motion must be made within one year of the judgment. Section 806.07(2).

[3] In ***Schinner v. Schinner***, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988), we interpreted WIS. STAT. § 805.17(3)(4) as requiring parties to bring matters of manifest error to the trial court's attention before raising the issue on appeal. A "'manifest error' contemplates that self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation…. Failure to bring a motion to correct such manifest errors properly constitutes a waiver of the right to have such an issue considered on appeal." ***Id***.

¶45 Jolene further contends that the trial court considered Keith's evidence concerning his taxes several times. Before the circuit court signed the original Findings of Fact, Keith filed a motion for reconsideration, claiming that the parties failed to take into consideration the tax consequences of Keith's status as a minority shareholder in a Subchapter S corporation. However, for unexplained reasons Keith withdrew this motion and never reinstated it. In September 2003, Keith filed a motion for modification of judgment asking the court to reduce his support based on the tax consequences of his income. The court denied the motion. Keith did not appeal the order, but filed another motion for modification of judgment on the same issue. Again, the court denied his motion. In June 2004, Keith filed another motion asking the court to modify his child support obligation based on the alleged error in his income. The court denied the motion, finding that there had been no significant change of circumstances. In summary, Jolene argues that Keith is trying to "relitigate prior motions through this appeal." Keith failed to properly preserve the income issue for appeal. Therefore, we affirm the trial court's decision on the cross-appeal and use $348,000 as Keith's annual income for all issues raised by this appeal.

*By the Court*.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶46 LUNDSTEN, P.J. (*concurring*/*dissenting*). I agree with and join the portions of the majority decision that affirm the circuit court. In particular, I join in affirming the circuit court as to the valuation issue in Jolene's appeal and in rejecting all of Keith's arguments in his cross-appeal. I dissent from the portions of the majority decision that reverse the circuit court. That is, I disagree with the majority's conclusion that the circuit court did not sufficiently explain its maintenance award and its award of attorney's fees for overtrial. I would affirm the circuit court's order in its entirety.

*Maintenance*

¶47 In our first decision, we concluded that the circuit court did not explain how Jolene's maintenance award met the support and fairness objectives. The majority correctly concludes that the circuit court has now adequately explained why the award satisfies the support objective. *See* Majority, ¶19. But the majority believes the circuit court's explanation of why the award satisfies the fairness objective is insufficient. *See* ***id.***, ¶¶20-35. I disagree.

¶48 Circuit courts have broad discretion in setting maintenance. ***Poindexter v. Poindexter***, 142 Wis. 2d 517, 531, 419 N.W.2d 223 (1988). Although we might not have made the same maintenance determination, or might not have used the same reasons, that is not the test we employ when determining whether the circuit court erroneously exercised its discretion.

¶49 The circuit court supplemented its original decision, and provided several specific reasons supporting its conclusion that the maintenance award is "fair and reasonable":

> During the marriage, the parties enjoyed a lifestyle that could only be described as "lavish." Because of the divorce, neither party will be able to live that same lifestyle since there is simply not enough money to support two "lavish" lifestyles.
>
> Because of this Court's decision regarding the property division, the respondent now has substantial assets available to her. She will now have assets capable of generating additional income, whereas Mr. Herlitzke will have assets that he cannot sell, that will generate more "taxable income" than actual cash in his pocket, and little if any retirement accounts in his name.
>
> The respondent requests $5,000 per month in maintenance. This amount, combined with child support, would give her a gross income of $12,275 per month. Thus, her income would be over $150,000 per year, which does not include any of her earned income, nor does it include any income generated by the assets she is to receive. She supports this with a budget that this Court finds to be vastly over inflated.
>
> On the opposite side, the petitioner is a shareholder in a subchapter "S" corporation and thus pays taxes on reported income, not the actual cash that he receives. As a result, his ability to pay, in reality, is substantially different than on paper. Additionally, both the appraisers used a cash flow approach when evaluating the businesses. Thus, a portion of the petitioner's income is already included in the appreciation of the business, a portion of which the respondent has received.
>
> Considering these new factors, including the substantial property award to the respondent, her inflated budget proposal, the tax issues binding the petitioner, and the standard of living neither party can afford any longer, this Court believes that the amounts and duration of maintenance previously ordered by this Court are fair and reasonable to both parties and accurately reflect[] the petitioner's ability to pay and the respondent's needs.

These reasons, especially when combined with the court's original explanation for structuring the award as "step-down" maintenance, demonstrate the court's application of relevant factors under the maintenance statute, WIS. STAT. § 767.26 (2003-04), and persuade me that the court has acted within its broad discretion.[1] Taken in total and in context, the factors listed by the court "reflect and are designed to further" the support and fairness objectives. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987).

¶50 The majority now directs the circuit court to "explain its methodology and address why its award is fair." Majority, ¶22. Because the circuit court has already done that, I cannot join in remanding on this topic.

*Attorney's Fees*

¶51 In our prior decision, we directed the circuit court to reconsider Jolene's motion for attorney's fees after it had also reconsidered property division and maintenance. We explained that the circuit court

> had just awarded Keith over one million dollars in separate and marital property, while Jolene was awarded approximately $350,000, much of which was unavailable to her to pay for her attorney fees because it was equity in the family home. The circuit court's decision to deny any contribution by Keith whatsoever was unreasonable because it would have imposed an extreme hardship on Jolene and would have forced her to spend a substantial portion of the money available to her on her attorney fees.

***Herlitzke v. Herlitzke***, No. 2003AP2115, unpublished slip op. ¶16 (WI App Aug. 12, 2004).

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

¶52 On remand, the property division changed significantly in Jolene's favor, and Jolene argued that she was entitled to attorney's fees based primarily on overtrial, although she also made arguments with respect to her need and Keith's ability to pay. The only authority Jolene cited was an overtrial-type case. Although the court's award to Jolene for attorney's fees relating to overtrial by Keith falls short of Jolene's request, the circuit court did order Keith, consistent with Jolene's argument, to contribute $15,000 toward Jolene's attorney's fees based on overtrial. The circuit court determined, essentially, that both parties were responsible for overtrying the case, but that Keith was somewhat more responsible because "his actions originally triggered the mutually destructive actions of both parties."

¶53 The standard we apply when reviewing an award of attorney's fees depends on which type of award the circuit court is making. When an award is based on a court's general authority to order one party to contribute to the other's attorney fees, the court must normally address need, ability to pay, and whether the fees are reasonable fees for the services rendered by the attorney. *See* ***Johnson v. Johnson***, 199 Wis. 2d 367, 377-78, 545 N.W.2d 239 (Ct. App. 1996). When the award is based on overtrial, the court need not address need or ability to pay, but only the reasonableness of the fees. ***Id.***

¶54 Jolene's appellate briefing does not distinguish these two types of awards. More importantly, it does not demonstrate to me that the circuit court erred. I conclude that Jolene has not properly preserved a challenge to the circuit court's decision not to award her attorney's fees based on its general authority to apportion legal fees. And, regardless of waiver, I conclude that her appellate brief is inadequate on the issue. I also conclude that nothing in her appellate brief demonstrates that the circuit court erred by not ordering Keith to contribute to

non-overtrial attorney's fees. Finally, I conclude that Jolene has failed to identify a problem with the circuit court's overtrial award. In this respect, need and ability to pay are not relevant, and neither party suggests that the fees were not reasonable fees for the services rendered.