

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2007

David R. Schanker
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. 2006AP508

Cir. Ct. No. 2004FA1461

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

VERONICA CARVER,

PETITIONER-RESPONDENT,

v.

THEODORE AMET,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Theodore Amet has appealed from a judgment of divorce from Veronica Carver. He challenges the trial court's decision to award

him monthly maintenance of \$2500 for a period of two years. We affirm the judgment.

¶2 The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of discretion. *Wolski v. Wolski*, 210 Wis. 2d 183, 188, 565 N.W.2d 196 (Ct. App. 1997). The exercise of discretion must be the product of a rational mental process by which the facts of record and the law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable result. *Kennedy v. Kennedy*, 145 Wis. 2d 219, 222, 426 N.W.2d 85 (Ct. App. 1988). The touchstone of analysis in determining or reviewing a maintenance award is the statutory factors set forth in WIS. STAT. § 767.26 (2003-04).¹ *Kennedy*, 145 Wis. 2d at 222. These factors reflect and are designed to further two distinct but related objectives: to support the recipient spouse in accordance with the needs and earning capacities of the parties and to ensure a fair and equitable financial arrangement between the parties in each individual case. *Id.*

¶3 The support objective is fulfilled when the trial court considers the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal, if the goal is feasible. *Id.* at 223. What will satisfy the fairness objective must be determined on a case-by-case basis, considering the statutory factors. *Id.* The fairness objective is to compensate the recipient spouse for contributions made to the marriage, to give

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

effect to the parties' financial arrangements, and to prevent unjust enrichment of either party. *LaRocque v. LaRocque*, 139 Wis.2d 23, 33, 406 N.W.2d 736 (1987). The findings of fact made by the trial court in evaluating the maintenance objectives and statutory factors will not be disturbed unless they are clearly erroneous. *See Sellers v. Sellers*, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996); WIS. STAT. § 805.17(2).

¶4 Theodore contends that the trial court erred and erroneously exercised its discretion by awarding maintenance of \$2500 per month for two years. He contends that fairness compels that he be compensated because he delayed employment and agreed to forgo pursuing lucrative potential job opportunities in deference to the needs of the parties' child and Veronica's medical practice. He also contends that the trial court's award fails to fulfill the support objective of maintenance because it is not feasible that he will achieve a standard of living reasonably comparable to that enjoyed during the marriage.

¶5 Theodore's arguments provide no basis for disturbing the trial court's award. The record indicates that the parties had been married for ten years when trial was held in October 2005. It was a second marriage for both parties, and neither brought significant assets to the marriage. As determined by the trial court, at the time of trial they were both forty-nine years old and in good health. One daughter was born to the parties in the first year of their marriage.

¶6 Veronica was a practicing obstetrician-gynecologist at the time the parties married. Shortly after the birth of the parties' daughter, she began her current employment at a hospital in Racine.

¶7 Both Veronica and Theodore were immigrants to the United States. Veronica was a U.S. citizen when the parties married, and Theodore became a

citizen as a result of the marriage. At the time of the marriage, Theodore had degrees from universities in Liberia and Wales and a Ph.D. in animal science and biotechnology from North Carolina State University. He completed a two-year postdoctoral fellowship in spermatogenesis of small mammals at Northwestern University the day before the birth of the parties' daughter. During the course of the marriage, he also completed an MBA program at Loyola University.

¶8 Veronica earned \$477,995 in 2004 and had earned \$406,960 through September 30, 2005. Evidence indicated that her average income for the six years preceding the divorce was \$498,423. In addition to her earnings, Veronica received multiple kinds of deferred compensation and retirement program contributions.

¶9 During a portion of the marriage, Theodore worked at Reproductive Genetics Institute (RGI) in Chicago, training in human reproductive science techniques and earning \$20,000 in 2000, \$16,075 in 2001, and \$2,167 in 2002. He had no taxable income in 2003. At the time of trial, Theodore was working full time in a limited-term position as the manager of a research laboratory studying insect reproduction at the University of Wisconsin-Parkside. He was earning \$30,600 at the time of trial in this position.² Although he was not teaching at the time of trial, Theodore was also listed as adjunct faculty at Gateway Technical College, where he had been employed part time in the spring of 2004.

² In its decision awarding maintenance, the trial court found that Theodore was earning approximately \$10,000 per year at the time of trial, but was capable of earning not less than \$30,000. While the trial court's finding as to Theodore's actual income at trial was erroneous, we conclude that any error was harmless since the income imputed to Theodore by the trial court matched his actual income. *See* WIS. STAT. § 805.18(1).

¶10 In the judgment of divorce, the trial court approved the parties' agreement to divide the marital assets equally and to share equal physical placement of their daughter. As proposed by Veronica, it also awarded child support of \$3500 per month to Theodore, which was more than the amount calculated under the child support percentage standards applicable to high-income payers like Veronica. In addition, Veronica was required to pay the child's private school tuition.

¶11 In awarding maintenance, the trial court found that the parties were healthy, well-educated and capable of supporting themselves. It found that the estate, which consisted primarily of Veronica's retirement accounts, had been divided fairly and equally. It further found that Theodore's budget could be met by the child support awarded to him and the annual earnings of \$30,000 that the trial court concluded he was capable of earning.

¶12 The trial court rejected Theodore's claim that he had forgone lucrative job opportunities to become a homemaker and child care provider and to allow Veronica to pursue her career. It found that when the parties' child was born, it was Theodore's decision to continue his education by commuting to Chicago. It found that he did not give up any meaningful economic benefit or opportunity to become a homemaker while Veronica became the family wage earner. It further found that Veronica's income supported him and enabled him to

further his education and job training, including enabling him to obtain degrees from Loyola and Northwestern Universities.³

¶13 In making its maintenance award, the trial court found that Theodore “curried job opportunities but rejected them in order to continue his lifestyle of education for himself.” It found that Theodore’s education and skills were impressive and outstanding, but that he had failed to utilize his training, degrees, intellect and talents. It concluded that his earning capacity was significant, and that he was in a position to obtain meaningful, well-paid and immediate employment. It concluded that fairness required that Veronica not be compelled to pay for more training for him, but that he should be granted a reasonable amount of time to get his affairs in order and find better employment. It concluded that upon gaining better employment, Theodore would be able to enjoy the same lifestyle he enjoyed in the marriage. It therefore awarded maintenance of \$2500 per month for two years.

¶14 In affirming the decision, we note that no party has a legal entitlement to maintenance. *King v. King*, 224 Wis. 2d 235, 250-51, 590 N.W.2d 480 (1999). In this case, the trial court considered all relevant factors under WIS. STAT. § 767.26 and relied upon them in considering the support and fairness

³ Theodore contends that the trial court’s finding is clearly erroneous because he completed his postdoctoral program at Northwestern shortly after the parties married, and it was funded by a fellowship. However, as pointed out by Veronica, her income paid the student debts he brought to the marriage. In addition, the record indicates that the MBA program that Theodore pursued at Loyola in 2003 cost \$43,000, and was paid from Veronica’s earnings.

objectives of maintenance.⁴ The weight to be afforded the different factors fall within the discretion of the trial court. *Metz v. Keener*, 215 Wis. 2d 626, 640, 573 N.W.2d 865 (Ct. App. 1997). Because the trial court considered the relevant factors and objectives and its decision is reasonable, no basis exists to disturb its award.

¶15 We reject the various challenges made by Theodore to the award. He contends that, based on an agreement with Veronica, he was a full-time caregiver for the parties' daughter for the first eighteen months after her birth and again from July 2002 to the fall of 2004. He testified that he failed to respond to job invitations in other parts of the country between 1996 and 1999 in order to facilitate Veronica's employment, and that if he had pursued those opportunities rather than commuting to RGI and devoting himself to his family, he would now be earning much more. He also contends that his decision to leave his poorly paid employment with RGI in 2002 and pursue an MBA was reasonable and in the interests of the family because it enabled him to spend more time with the parties' daughter, who needed his presence. He concludes that his actions constituted contributions to the marriage and contends that he is entitled to compensation for these contributions because they handicapped him economically.

¶16 The defect in Theodore's argument is that the trial court found that he did not forgo job opportunities to provide child care and homemaking services,

⁴ Theodore contends that the trial court failed to consider the length of the marriage. However, the trial court's discussion clearly reveals that it was aware of the length of their marriage. While it did not expressly discuss the length of the marriage in determining its award, as discussed above, the factors relied upon by the trial court and the reasons set forth in its decision support the maintenance award. Theodore has not shown how the length of the marriage provides a basis for disturbing the award.

and its finding is supported by the evidence.⁵ Veronica testified that she did not ask Theodore to remain at home to provide homemaking and childcare services, that he could not work for a period of time after the birth of the child because of visa problems, and that he never talked to her about relocating or told her that he had received letters from prospective employers. Veronica's testimony also indicates that she would have been willing and able to move to another part of the country to further Theodore's job opportunities if he had wanted to take a job elsewhere.

¶17 The evidence also indicates that Theodore took care of the parties' child at home for only one year to one and one-half years before the child commenced daycare and he commenced employment at RGI. Evidence indicates that during the period from 1997 to 2002, the parties' daughter received significant care through daycare and a live-in nanny and, after commencing school, was enrolled in summer school and after-school programs. The record indicates that rather than providing primary child care and homemaking services during these years, Theodore chose to commute daily to Chicago for the RGI position because he wanted to further his job training in human embryology, leaving early in the morning and arriving home at 9:00 p.m. or later. Evidence also indicates that Theodore subsequently left RGI because he was unhappy there. At the time he did so, the parties' daughter was already in school full time and, during some of the

⁵ Theodore relies on *Chen v. Warner*, 2005 WI 55, 280 Wis. 2d 344, 695 N.W.2d 758, to argue that the reasonableness of a parent's decision to reduce or forgo employment in order to care for his family presents a question of law which is reviewed with deference to the trial court. See *id.*, ¶¶3, 43. However, Theodore's reliance on *Chen* is misplaced. The trial court found that Theodore did not forgo employment for the purpose of providing child care and homemaking services to the family. Consequently, the issue of whether such a decision would have been reasonable is not before us.

time, had a live-in nanny. The evidence indicates that upon leaving RGI, Theodore did not work and instead pursued his MBA. After completion of the MBA, he accepted full-time, limited-term employment at UW-Parkside and an adjunct position at Gateway, thus continuing his pattern of attending school and working, rather than being a stay-at-home parent and homemaker.

¶18 Based upon this evidence, the trial court's findings that Theodore did not forgo job opportunities because of the marriage and that he benefited from Veronica's financial contributions to the marriage by being able to continue his education and training are not clearly erroneous. These findings therefore cannot be disturbed by this court.⁶ See WIS. STAT. § 805.17(2). Based upon them, the trial court reasonably concluded that Theodore had not made a contribution to the marriage for which he was entitled to compensation in the maintenance award, and that fairness precluded requiring Veronica to fund additional education or training for him.

¶19 Theodore also contends that the trial court's finding that he is in a position to obtain meaningful, well-paid, and immediate employment was not supported by expert testimony and is clearly erroneous. However, based upon Theodore's education and training, the trial court was entitled to find that he is in a position to obtain well-paid and stable employment and that his employment choices during the marriage were limited not by his contributions to the marriage or his inability to obtain a better job, but by his choice to pursue continued

⁶ A finding of fact is not clearly erroneous merely because, like here, there is evidence in the record to support a contrary finding. *Steiner v. Steiner*, 2004 WI App 169, ¶16 n.6, 276 Wis. 2d 290, 687 N.W.2d 740. Moreover, due regard must be given to the trial court's opportunity to judge the credibility of the witnesses. *Liddle v. Liddle*, 140 Wis. 2d 132, 136 n.1, 410 N.W.2d 196 (Ct. App. 1987); WIS. STAT. § 805.17(2).

education and training at the expense of better employment. Theodore himself testified that if he had pursued university or laboratory positions in the past, he would have been making two to four times what he makes now. Under these circumstances, the trial court could reasonably conclude that Theodore remains capable of pursuing university, hospital or private laboratory work and improving his employment and income. Testimony by outside experts was not required to reasonably draw such a conclusion.

¶20 Theodore also challenges the trial court's finding that he will be able to enjoy a lifestyle similar to that which he enjoyed in the marriage. However, as found by the trial court, the parties lived modestly, rather than ostentatiously, during their marriage and most of the marital estate consisted of Veronica's retirement accounts, which were divided equally. Even ignoring Theodore's current income, child support and maintenance ordered by the trial court meets the budget needs alleged by him for two years, at which time his income will exceed his budget if he finds better employment, as is feasible based upon his education and training. Moreover, as already discussed, this was not a lengthy marriage where one partner subordinated his or her education and job opportunities for the benefit of the other, and leaves the marriage with a diminished or negligible earning capacity, entitling the recipient spouse to greater maintenance. *See LaRocque*, 139 Wis. 2d at 37-38. The trial court therefore was not required to conclude that Theodore was entitled to maintenance of more than \$2500 per month, or for more than two years, in order to permit him to enjoy the lifestyle he would have enjoyed had he and Veronica remained married.

¶21 Because the trial court considered the appropriate factors, and reached a conclusion that a reasonable judge could reach, we will not disturb its maintenance award.

By the Court.—Judgment affirmed.

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

