COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2006AP2237
2006AP2726

Cir. Ct. No. 2005FA65

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

IN RE THE MARRIAGE OF:

JUDITH LADWIG,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

DANIEL A. LADWIG,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS and PATRICK C. HAUGHNEY, Judges. *Judgment affirmed in part; reversed in part and cause remanded; order affirmed.*

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

¶1 PER CURIAM. Judith Ladwig appeals from the maintenance and child support provisions of a judgment of divorce. Daniel Ladwig cross-appeals a postjudgment order challenging the division of a college savings account.[1] We affirm the division of that asset in the judgment of divorce and the order denying an adjustment on the account. We conclude that the circuit court erroneously exercised its discretion with respect to the maintenance and child support provisions and we reverse those parts of the judgment and remand for further proceedings.

¶2 The parties were married thirteen years. Daniel, age 46, is a doctor and his annual income averages $900,000. This was the second marriage for Daniel and he pays about $3311 monthly, or $39,732 annually, in base child support for the two children of his first marriage. He is also required to save funds for college for those two children.[2] Daniel testified that his total child support and educational savings obligation for those two children is nearly $11,000 monthly. During the marriage, Daniel placed college savings funds for those two children in a Prudential investment account but withdrew sums as he deemed necessary for other expenses and investments.

¶3 Judith, age 46, has a high school education and was employed as a medical secretary prior to her marriage to Daniel. During the marriage she did not

[1] Judge J. Mac Davis entered the judgment of divorce and heard and decided Daniel's postjudgment motion to correct the judgment of divorce. Judge Patrick C. Haughney entered the order disposing of the postjudgment motion. To consolidate the appeals, we realigned the parties as if a cross-appeal was filed.

[2] At a minimum, Daniel is required to save thirty percent of his net income that exceeds $300,000 for the college education of his two children from his first marriage. The youngest of those two children will be eighteen in December 2008. Any unused college savings when the youngest child reaches twenty-five revert to Daniel.

work outside the home and devoted time to raising the parties' two children, ages 13 and 11 at the time of trial. She is currently employed as an account manager for $10.50/hour and earns about $21,840 annually.

¶4 The circuit court made a nearly equal division of property awarding Judith assets worth $1,500,000 and Daniel assets worth $1,417,385. The Prudential account was valued as a marital asset at $550,000.[3] Daniel is required to pay Judith maintenance for three years, $3000 for eighteen months and then $1500 for the remaining eighteen months. The parties share legal custody and physical placement of their two children. The circuit court determined that application of the child support percentage guideline was unfair to Daniel and set child support at $4000 a month with annual increases of $250 per month in 2008, 2009 and 2010.

¶5 Maintenance and child support determinations are entrusted to the discretion of the circuit court and are not disturbed on review unless there has been an erroneous exercise of discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. A discretionary decision is upheld as long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** (quoting ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct.

[3] Although the account was valued as marital property, the obligation to pay for the college education of Daniel's two children from his first marriage was paramount. The account was not included in the total on the martial property balance sheet and only excess funds are to be divided equally after those two children are done with college.

App. 1995)). We accept all findings of fact made by the circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2005-06).[4]

¶6 The two primary objectives of a maintenance award are "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." ***King v. King***, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999). The circuit court erroneously exercises its discretion if it fails to fully consider the dual objectives of maintenance. ***Forester v. Forester***, 174 Wis. 2d 78, 86, 496 N.W.2d 771 (Ct. App. 1993). The support objective looks to the standard of living enjoyed during the marriage. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 35, 406 N.W.2d 736 (1987). Thus, limited-term maintenance seeks to place the recipient spouse in a self-supporting economic situation at the predivorce standard of living by the end of the maintenance period.

¶7 With maintenance and child support, Judith has net monthly income of $7917. Daniel has net monthly income of $27,183. Judith observes that Daniel has about three and one-half times more to live on than she does.

¶8 We recognize, as the circuit court did, that this was not a long-term marriage and it was not necessary to employ as a starting point the presumption that an equal division of income meets the support and fairness objectives of maintenance. *Cf.* ***Parrett v. Parrett***, 146 Wis. 2d 830, 839, 432 N.W.2d 664 (Ct. App. 1988) (observing with respect to an eight-year marriage that the fairness objective can be satisfied absent an equal division of income because the

[4] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

"***LaRocque*** facts are hardly comparable to those before us"); ***Wikel v. Wikel***, 168 Wis. 2d 278, 282, 483 N.W.2d 292 (Ct. App. 1992) (when a couple has been married many years, an equal division of total income is a reasonable starting point in determining maintenance). However, the circuit court failed to give full-play to Judith's noneconomic contributions to the marriage. The court flatly stated that Daniel had the same education at the start and end of the marriage and, therefore, Judith had not made a direct contribution to his career or increased earnings. But Judith's contributions at home and with the children freed Daniel to focus on his career and achieve higher earnings. The fairness objective of maintenance is much broader than a direct contribution to education or increased earning, "it brings under its umbrella all of the noneconomic contributions" during the marriage that contribute to increased earning power. ***Hubert v. Hubert***, 159 Wis. 2d 803, 821, 465 N.W.2d 252 (Ct. App. 1990).

¶9 The circuit court rejected the budget Judith submitted reflecting monthly expenses of $17,599. The court adopted a budget Daniel submitted of Judith's expenses based on bank and credit cards statements. That budget showed monthly expenses of $5920.[5] Although the court explained that Daniel's budget of Judith's expenses was quantitative and credible, it ignored evidence that during the marriage the parties made cash investments and savings. Daniel's budget for Judith had no allowance for a comparable amount of investment or savings. It is error to not consider the continuation of the parties' savings and investment practices in determining maintenance. ***Id.*** at 820-21.

[5] Daniel submitted a budget for himself indicating he would need $15,000 monthly after the divorce and after he moved into the new home he was building.

¶10 In addressing the standard of living, the circuit court noted that with her property division award, Judith would have "assets far beyond what most high school graduates with office occupations expect to be able to have on their own." It also found that Judith could obtain a "fairly comfortable, middle class, and maybe even upper middle class standard of living in our community, even without maintenance." That Judith would have a better lifestyle than the average high school graduate or live at an upper middle class standard is not the benchmark. "The standard of living must be individualized for each case by considering the facts and circumstances of the marriage. There is no requirement that maintenance is limited to an amount that will permit the recipient to enjoy an average standard of living." ***Id.*** at 819 (citation omitted). The circuit court did not adhere to the charge that the recipient spouse is entitled to maintenance to support the predivorce standard of living.

¶11 On more than one occasion the circuit court alluded to Judith's property division award and relied on those assets in concluding that Judith could support her budgetary needs. It found that the equity in the homestead, once the children are grown and the house lost its importance, would be available to support Judith at a reasonable standard of living.[6] The court also treated an excess $41,000 Judith received in the property division as an offset to a fair maintenance award. Although the division of property is a factor to be considered in determining maintenance, WIS. STAT. § 767.56(3), one spouse should not be

[6] The circuit court alluded to the possibility that Judith would sell the home in seven to ten years and buy a condominium or smaller home and then have investment assets generating income to permit a reasonable standard of living.

forced to invade the property division in order to live while the other does not. ***Dowd v. Dowd***, 167 Wis. 2d 409, 417, 481 N.W.2d 504 (Ct. App. 1992).

¶12 The circuit court characterized maintenance to Judith as "transitional maintenance." What was Judith transitioning to? The court found that Judith would never be self-supporting at a comparable marital standard of living.[7] It does appear, as Judith suggests, that the court utilized maintenance to "soften the blow" of lowering Judith's standard of living.[8]

¶13 We are also left to wonder why three years is the appropriate term of limited maintenance. The circuit court adopted a budget for Judith that included her share of expenses for the children and the children will still be minors when limited maintenance ends. Although the payment of maintenance is not to be viewed as a permanent annuity, it must be sufficient to maintain the recipient spouse at an appropriate standard of living until there is a level of income where maintenance is no longer necessary. ***Vander Perren v. Vander Perren***, 105 Wis. 2d 219, 230, 313 N.W.2d 813 (1982). If the court limits the term of maintenance, it must explain why. ***Parrett***, 146 Wis. 2d at 840. Here, the court failed to explain why in three years Judith would be able to maintain the comparable marital standard of living without invading the property division.

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[7] The circuit court first found that Judith was at her earning capacity and would not make more than $30,000 a year "without a major retraining or lightening strike." It then considered the feasibility of Judith becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and concluded: "She certainly can't do that based on her earned income, ever. I think that there may be times, or there is a possibility or substantial possibility that she could reach a standard of living reasonably comparable to that enjoyed during this marriage by virtue of the asset award."

[8] The circuit court explained that "[t]he goal of transitional maintenance would be to allow her to adjust to the new *status quo* of being a single person responsible for her own finances. It is fair to provide her that cushion against abruptness."

¶14 "[T]he support objective of maintenance is not satisfied when the payee spouse is not living at the standard of living reasonably comparable to that enjoyed during the marriage and the payor spouse is." ***Dowd***, 167 Wis. 2d at 417. Of course, "[t]he increased expenses of separate households may prevent the parties from continuing at their pre-divorce standard of living." ***LaRocque***, 139 Wis. 2d at 35. If that is true, both parties may have to bear the sacrifices that the cost of an additional household imposes. ***Id.*** However, that does not appear to be the case here. Daniel has the ability to pay.

¶15 We reverse the award of maintenance because it does not meet the support and fairness objectives of maintenance. Upon remand, the circuit court should consider maintenance sufficient to allow Judith to maintain a standard of living reasonably comparable to that enjoyed during the marriage. The court should also explain its choice if maintenance is limited to a specific term.[9]

¶16 It is presumed that child support established pursuant to the percentage standard in WIS. ADMIN. CODE ch. DWD 40 is fair. ***Abitz v. Abitz***, 155 Wis. 2d 161, 179, 455 N.W.2d 609 (1990). The court may deviate from the percentage standard if it finds by the greater weight of the credible evidence that the use of the standard would be unfair to the child or the party requesting deviation. ***Mary L.O. v. Tommy R.B.***, 199 Wis. 2d 186, 193, 544 N.W.2d 417 (1996). The factors the circuit court is to consider in determining unfairness are enumerated in WIS. STAT. § 767.511(1m).

[9] Because property division, child support and maintenance are all interrelated, on remand the circuit court may in its discretion review property division. ***Lendman v. Lendman***, 157 Wis. 2d 606, 619, 460 N.W.2d 781 (Ct. App. 1990).

¶17 Under the percentage standard for equal placement of the parties' two minor children, Daniel would be required to pay child support of $8455 per month. Without any discussion of the statutory factors, the circuit court concluded that amount would be unfair to Daniel. The circuit court concluded "I just don't think it is reasonable to think that there is any evidentiary, scientific, or commonsense basis to think that DWD 40 should be applied where someone's income is $900,000 a year." But even in the case of a high-income payee, the percentage standard presumptively applies. ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 285, 544 N.W.2d 561 (1996). The circuit court proceeded on an erroneous view of the law and failed to place the burden on Daniel to show that application of the percentage standard was unfair to him by the greater weight of the credible evidence. *See* ***id.*** at 295 (the burden of proof lies with the party requesting the modification of the percentage standard). The child support determination was an erroneous exercise of discretion when the determination of unfairness was not made in reference to the statutory factors. *See* ***Hubert***, 159 Wis. 2d at 814-15.

¶18 Usually this court will search the record for reasons to sustain the circuit court's discretionary determination when we conclude the court failed to adequately set forth its reasoning in reaching that decision. ***Long***, 196 Wis. 2d at 698. However, we properly decline to search the record when it is tantamount to exercising discretion in the first instance. *See* ***Vlies v. Brookman***, 2005 WI App 158, ¶33, 285 Wis. 2d 411, 701 N.W.2d 642; ***Priske v. General Motors Corp.***, 89 Wis. 2d 642, 663, 279 N.W.2d 227 (1979). We conclude that this is an appropriate case to reverse the child support determination and remand to the circuit court to exercise its discretion since we reverse and remand the maintenance determination.

¶19 Judith challenges the circuit court's authority to order increases in child support over the next three years because the facts supporting such an increase are unknown. Because child support will be determined anew, we need not address this issue. We note that although the circuit court did not preclude a motion for modification of child support based on changed circumstances, a provision for automatic future increases in child support appears suspect when child support is supposed to be set at a percentage standard based on the payor's present income and where no findings support the amount of increase.

¶20 Daniel's cross-appeal is limited to the valuation of the Prudential college savings account as a marital asset. Daniel does not dispute that the account was to be funded during the marriage with marital income. However, at the time of the divorce, the account was not fully funded. Daniel had not made required payments to the account from his 2004 and 2005 earned income. He owed the account $69,648. Postjudgment Daniel requested that the first $69,648 from the proceeds of the sale of marital real estate be deposited into the account so that it is fully funded with marital income. The circuit court denied the request because Daniel had not offered adequate proof at trial and it was not inequitable to require Daniel to repay the funds from postdivorce income when he had withdrawn money from the account at will to fund the building of his new home. Daniel argues it was an erroneous exercise of discretion to value the account at $550,000 or in not providing that the funding shortfall be paid with marital funds.

¶21 Daniel contends that the circuit court was required to accept his uncontroverted posttrial evidence of the deposits and withdrawals from the account demonstrating that it never reached a value of $550,000. *See* ***Ashraf v. Ashraf***, 134 Wis. 2d 336, 345, 397 N.W.2d 128 (Ct. App. 1986) ("[T]he court cannot disregard uncontradicted testimony as to the existence of some fact or the

happening of some event in the absence of something in the case which discredits the testimony or renders it against reasonable probabilities."). However, Daniel's posttrial exhibit was contradicted by the exhibit he offered at trial showing that the support due for college savings was $553,934.70. Further, the circuit court was suspect of Daniel's accounting since he was in sole possession of the information of how the account had been funded and utilized.[10] The valuation of the account was not clearly erroneous. *See* ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987) (the valuation of a particular marital asset is a finding of fact which we will not upset unless clearly erroneous).

¶22 The circuit court's refusal to replace missing funds in the account with the proceeds of the sale of marital assets was not an erroneous exercise of discretion. The obligation to fully fund the account arose during the marriage. Repayment to the fund is no different than when a marital debt is charged to one party to be paid from postdivorce income. We affirm the circuit court's handling of the Prudential college savings account.

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

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

[10] The circuit court explained: "I'm not going to hold her accountable for knowing what happened to this account and what the balance was because the evidence clearly supports that he controlled it, and he took money out without permission or authority other than his own say-so, and he decided how to handle it."