

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2008

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. 2007AP2576

Cir. Ct. No. 2006FA581

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

LAUREL ANN SUTPHIN ABT,

PETITIONER-APPELLANT,

V.

DAVID KARL ABT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Laurel Abt appeals from a judgment of divorce from David Abt. She challenges the circuit court's imputation of income to her

and the amount of indefinite maintenance David must pay. We conclude that the circuit court properly exercised its discretion and affirm the judgment.

¶2 The parties were married twenty-three years when the divorce action was filed. They have three children, twins age fifteen and a daughter age twelve at the time of the divorce. They agreed that primary physical placement of the children would be with Laurel. David does not have overnight placement with the children.

¶3 The property division was made pursuant to the parties' stipulation. The two biggest assets were the family home and David's pension account and 401K account. Laurel took the home subject to existing mortgages. David took both retirement accounts.¹

¶4 During the marriage Laurel did not work outside the home. She has a college dietician's degree and is a certified lactation counselor. Laurel has osteoarthritis. She had left knee replacement surgery in October 2005. She is in need of right knee and hip replacement surgery when she can no longer function with the pain caused by osteoarthritis. David's annual gross income is approximately \$78,000.

¶5 The circuit court found that Laurel could be employed and imputed income to her of \$23,000 the first year after the divorce and \$30,000 each year thereafter. It awarded Laurel maintenance of \$12,000 for one year, \$8,000 per year for the next five years, and \$10,000 per year for the years after all three

¹ A large IRA was split equally with \$4,100 of Laurel's share going into an educational investment fund for the children.

children have graduated from high school. The child support component of the family support award is \$22,818 annually until the twins graduate from high school and reduces to \$13,376 annually for four more years until their daughter graduates from high school.

¶6 Maintenance determinations are discretionary with the circuit court, and we will not reverse absent an erroneous exercise of that discretion. *See Grace v. Grace*, 195 Wis. 2d 153, 157, 536 N.W.2d 109 (Ct. App. 1995). We look to the circuit court's explanation of the reasons underlying its decision and where it appears that the circuit court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision as a proper exercise of discretion. *See id.* Maintenance has two objectives: support and fairness. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987). The former ensures that the payee spouse is supported in accordance with the needs and earning capacities of the parties; the latter ensures a fair and equitable financial arrangement between the parties in the individual case. *Id.* We must consider whether the circuit court's application of the statutory factors enumerated in WIS. STAT. § 767.56 (2005-06),² achieves both the fairness and support objectives of maintenance. *Forester v. Forester*, 174 Wis. 2d 78, 85, 496 N.W.2d 771 (Ct. App. 1993).

¶7 Laurel contends that the maintenance award is inadequate because she is not able to work due to osteoarthritis pain and corresponding limitations, the

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

recovery period she will need after necessary surgeries, and the need to be available at a moment's notice to care for their daughter who suffers epileptic seizures. Laurel remained unemployed at the time of the divorce. She argues that the circuit court erred in imputing income to her by ignoring undisputed evidence that her and her daughter's medical conditions prevent her from working. The circuit court may consider earning capacity when determining a maintenance obligation if it finds a spouse's job choice voluntary and unreasonable. *Sellers v. Sellers*, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). The concept recognizes that "there must be some limit to the degree of underemployment one may elect to choose when the former spouse is being presented the bill for the financial consequences of the choice." *Id.* at 586.

¶8 A party asserting that his or her decision to reduce or forgo income is involuntary and reasonable has the burden of proof on both points. *Chen v. Warner*, 2004 WI App 112, ¶¶12, 14, 274 Wis. 2d 443, 683 N.W.2d 468. "The voluntariness of a decision to reduce or forgo income is a question of fact, and we do not disturb a finding of fact unless it is clearly erroneous." *Id.*, ¶12. With respect to the reasonableness of the spouse's choice, we defer to the circuit court's conclusion if the circuit court reached a conclusion that a reasonable court could reach based on the record before it. *See id.*, ¶13. We defer because the legal conclusion as to reasonableness is so intertwined with the factual findings supporting that conclusion. *Id.*

¶9 It is true that Laurel's testimony about her current condition, level of pain, and limitations on both sedentary and active employment functions was not contradicted by anything other than David's testimony that he thought Laurel could "do something." A witness's statement need not be contradicted by other evidence in the record as a condition precedent to the circuit court's review of the

witness's credibility. See *State v. Kimbrough*, 2001 WI App 138, ¶28, 246 Wis. 2d 648, 630 N.W.2d 752. The circuit court may choose to believe some assertions of the witness and disbelieve others; this is especially true when the witness is the sole possessor of the relevant facts. *Id.*, ¶29. We are required to give due regard to the opportunity of the circuit court to assess the credibility of the witnesses. WIS. STAT. § 805.17(2). Appellate court deference considers that the circuit court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶10 The circuit court concluded Laurel's absence from the labor market for twenty-three years and her and her daughter's medical conditions did not prevent her current employment. The circuit court rejected her testimony. It found that if the pain was such that she could put off knee and hip replacement surgery, the pain would not be so much as to negate an ability to work. The court acknowledged that it is desirable to put off replacement surgery for as long as possible but found that when a person claims the medical condition is preventing employment, it is time to have the surgery. The circuit court expressed concern that Laurel had "squandered" the one year while the action was pending to have the surgeries and prepare herself to reenter the labor market. It is relevant to consider how the refusal of available treatment impacts the ability to work. See *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 587-88, 445 N.W.2d 676 (Ct. App. 1989) ("[t]he court should also consider the likely effect of the treatment (whether or not accepted) on the alcoholic spouse's ability to obtain and maintain employment").

¶11 The circuit court's findings that Laurel could work or improve her ability to work is not clearly erroneous. As the circuit court noted there was no

doctor's testimony that she cannot work in her current condition. Her doctor's letter indicated that it was for Laurel to decide when to have surgery because she could not tolerate the pain any further. The doctor opined that after recovery she could do sedentary work. David testified that Laurel's mobility improved after recovery from the first knee replacement. Although the vocational expert's report indicated that based on Laurel's reported limitations "it is doubtful that Ms. Abt could currently find and maintain employment," it concluded that if her medical condition improved after having the replacement surgeries she could work in various jobs, including her desired employment as a lactation counselor.³ The circuit court correctly determined that the choice to not work or ready oneself for work was Laurel's voluntary choice.

¶12 The court also found that other persons are available to care for the parties' daughter when the need arises. That finding is not clearly erroneous. David indicated his availability and desire to help with his daughter's medical condition. There was also testimony that Laurel's mother is available. The daughter pursues activities, such as school and riding the bus home, without Laurel's direct observation and because Laurel has talked with adults supervising those activities about her daughter's condition and needs. Further, Laurel acknowledged having told the orthodontist that her daughter's condition was stabilizing so that the orthodontist would not refuse or delay treatment. There was no medical evidence that Laurel needed to be available twenty-four hours a day or that she is the only person who can care for the parties' daughter.

³ Laurel argues the circuit court's reliance on the vocational report was inconsistent because the court rejected the proposition that Laurel could not work in her current condition. The circuit court rejected that conclusion in the report because it was based on Laurel's self-reporting of her limitations, which the circuit court also rejected as self-serving.

¶13 Based on the facts found, and the deference we give the circuit court's determination, we sustain the determination that Laurel's decision to remain unemployed was voluntary and unreasonable. The circuit court did not erroneously exercise its discretion when it considered Laurel's earning capacity in determining maintenance. The amount of imputed income is supported by the range of earnings in the vocational report, the only evidence of Laurel's earning capacity. That the amount jumps \$7,000 after one year was not intended to reflect an actual raise that Laurel might receive from an employer. Rather, the circuit court recognized that Laurel's absence from the labor market would result in lower earnings the first year back in that market. We reject Laurel's claim that the amount of imputed income is excessive.

¶14 Laurel also argues that the maintenance award is inadequate because the circuit court failed to give full consideration to the support and fairness objectives of maintenance as they apply to her. To clarify, Laurel does not dispute that the circuit court considered the relevant factors in WIS. STAT. § 767.56. Rather, she insists that the circuit court relied on only one thing when determining the amount of maintenance—that David not be forced to pay for Laurel's decision to forego the surgeries until some later date. She also suggests that the circuit court's use of a computer program, and the running of multiple alternatives under that program, shows a mechanistic and result oriented approach.

¶15 We disagree. The alternative scenarios the circuit court ran on the computer program fulfilled its duty to consider the fairness and support components of maintenance as to each party. The circuit court's discussion of those scenarios followed its discussion of the relevant statutory factors and the recognition that a 50/50 division of total income was the starting point. The alternative scenarios and the circuit court's discussion of them demonstrate the

circuit court's weighing of different possibilities and augmented its decisional process. *See Bisone v. Bisone*, 165 Wis. 2d 114, 123 n.6, 477 N.W.2d 59 (Ct. App. 1991) (recognizing that "if properly used [,] new technology can augment the prudent application of judicial discretion").

¶16 We conclude the circuit court properly exercised its discretion in deviating from the 50/50 starting point.⁴ The circuit court found that child support and maintenance were intertwined. It factored in David's child support obligation and how that obligation, coupled with maintenance, would substantially limit his disposable income. It demonstrated how a 50/50 split of David's income, without any imputed income, and a separate calculation of child support leads to an absurd result in terms of David being able to support himself. It also determined that a higher award to Laurel would be a disincentive to her to become self-supporting and improve her standard of living by being in the labor market. It explained that the maintenance reduction to \$8,000 after the first year was intertwined with the increase in the imputed income and implicitly fosters Laurel's incentive to contribute to her support. The circuit court recognized that it would be unfair to Laurel to keep maintenance at only \$8,000 after the cessation of child support and so it provided for the increase to \$10,000 indefinitely.

¶17 The circuit court demonstrated consideration of the fairness and support components of maintenance as applied to both parties. The decision is tailored to the circumstances and is based on the facts of record. We recognize, as

⁴ The circuit court indicated that its ruling provided Laurel with a little over 60% of the disposable income (with imputed income), 56% of the disposal income when there is only one minor child, and only \$3 short of receiving 40% of the disposable income indefinitely after all the children are emancipated.

the circuit court did, that the decision may not survive a substantial change in circumstances that may be occasioned by Laurel's medical condition or a showing that Laurel is not able to earn the income imputed to her. The indefinite nature of the maintenance award makes it subject to revision upon an appropriate showing of a substantial change of circumstances by either party.

By the Court.—Judgment affirmed.

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

