

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-3398
STATE OF WISCONSIN

Cir. Ct. No. 00-FA-365

**IN COURT OF APPEALS
DISTRICT III**

JOHN R. BRESKE,

PETITIONER-APPELLANT,

V.

JANICE B. BRESKE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK BRADY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Breske appeals his divorce judgment, challenging the award of maintenance to his former wife, Janice Breske. John contends that the trial court awarded excessive maintenance, miscalculated his income and misinterpreted his offer to provide Janice a leased vehicle. Because

the record reflects a rational basis for the court's exercise of discretion, we affirm the judgment.

BACKGROUND

¶2 John and Janice, who married in 1980, are in their early forties and have two minor children. John has a high school diploma, and Janice attended a technical college for one year to obtain training as a dental assistant.

¶3 Throughout the marriage, John worked in the drywalling business and Janice worked primarily as a homemaker. Since 1995, John was self-employed as a fifty percent co-owner of Fischer Drywall, LLC. The trial court found that John's income was \$75,000 per year. The court also found that as part of their compensation, the co-owners and their wives each received the use of a leased vehicle and a cell phone.

¶4 For four years, until John fired her several weeks before the divorce trial, Janice was employed by Fischer Drywall. She testified that she cleaned the company's offices and mowed its lawns. She earned \$709 per month and, in addition to her leased vehicle, she received auto expenses, a cell phone and health and life insurance. Her income and benefits totaled approximately \$1,424 per month.

¶5 At trial, John's counsel called Kerry Karnitz to testify as an accounting expert. He testified that the co-owners of Fischer Drywall paid their wives wages and fringe benefits as a way to take money out of their business without having to be taxed at higher rates, explaining that they would pay taxes with W-2 income rather than self-employment tax. He further testified that now that Janice is no longer employed at Fischer Drywall, John, as half owner, will

receive the benefit of one-half her income. He stated: “Actually Janice was getting 709, approximately, a month, assuming just a hundred a week, and it was an agreement between the partners that that was done. The hundred dollars a week will go directly to John as additional draw each week.”

¶6 After John terminated her employment at Fischer Drywall, Janice obtained employment at \$10.50 per hour for thirty-two hours per week, with no benefits except vacation. The court determined that she was capable of earning \$20,000 per year.

¶7 During arguments concerning maintenance, John’s counsel argued that although Janice no longer worked at Fisher Drywall, her fringe benefits of a car and cell phone would still be available. He stated:

And we have offered, and stand here willing to say that Mrs. Breske will always – will always have a vehicle for the term of any maintenance award that this court may order. So her fringe benefits – and a cell phone – her fringe benefits are not gone.

¶8 The court attempted to clarify John’s position, inquiring:

Your proposal -- what you are representing to the court, that however long a period that I order maintenance to be paid, that the fringe benefits she currently enjoys, consisting of the car and the cell phone, will not go away even if she loses her -- everything else in terms of income and job at Fischer Drywall?

John responded: “As long as Fischer Drywall is here.”

¶9 The trial court ordered an equal property division and that John pay weekly child support of \$360.57. It also awarded Janice \$500 per month maintenance for ten years. In addition, it awarded Janice additional maintenance in the form of a leased vehicle and a cell phone for the ten-year term.

STANDARD OF REVIEW

¶10 The determination of maintenance requires the exercise of discretion. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Discretion is the reasoned application of applicable principles of law to facts that are properly found. *Id.* It is well-established that a trial court, in the exercise of its discretion, may reasonably reach a conclusion that another court would not. *Id.* We are to look to the record for reasons to sustain a trial court's discretionary decision. *See Brandt v. Witzling*, 98 Wis. 2d 613, 619, 297 N.W.2d 833 (1980).

¶11 The trial court's determination of the amount of income available for payment of maintenance presents a question of fact. *See Rosplock v. Rosplock*, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). We apply the "clearly erroneous" standard to review factual findings. WIS. STAT. § 805.17(2).¹ The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. *Id.* Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. *Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe the witness demeanor and gauge the persuasiveness of testimony. *Id.* at 151-52.

¹ All statutory references are to the 1999-2000 version unless otherwise noted.

DISCUSSION

1. Statutory factors.

¶12 John claims that the trial court ordered excessive maintenance. He contends the court erroneously exercised its discretion by not considering the appropriate factors and failing to consider the dual objectives of fairness and support. We are unpersuaded.

¶13 In awarding maintenance, the trial court must consider the factors in § 767.26, STATS.² On review, the question is whether the trial court's application

² 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.
- (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.

(continued)

of the factors achieves both the support and fairness objectives of maintenance. *Forester v. Forester*, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993). The first objective is to support the recipient spouse in accordance with the needs and earning capacities of the parties. *Id.* “The goal of the support objective of maintenance is to provide the recipient spouse with support at pre-divorce standards.” *Fowler v. Fowler*, 158 Wis. 2d 508, 520, 463 N.W.2d 370 (Ct. App. 1990). “This goal may require that the recipient spouse be awarded maintenance beyond bare subsistence needs.” *Id.* In a long-term marriage, “[i]t is reasonable to begin maintenance evaluation with proposition that [the] dependent partner may be entitled to fifty percent of the parties’ total earnings” *Id.* at 520-21.

¶14 The fairness objective is to ensure a fair and equitable financial arrangement between the parties in each individual case. *King v. King*, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999). Over a long marriage, parties each contribute to the income stream as marital partners and should share in the rewards. *Fowler*, 158 Wis. 2d at 519. “Sharing the rewards of the stream of income produced in a long marriage is encompassed in the fairness objective of maintenance.” *Id.*

(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.

¶15 The record reflects the trial court's consideration of proper factors to achieve the dual objectives of support and fairness. The court began with its finding that John earned an average of \$75,000 per year and that Janice was capable of earning \$20,000. *See* WIS. STAT. § 767.26(5). It considered that John was required to pay \$1,550.45 per month child support. The record shows that subtracting John's child support obligation from his gross average income of \$75,000 leaves well over \$50,000 per year. Adding Janice's purported annual earnings of \$20,000 to the sum of \$50,000 available for maintenance arrives at an income stream of \$70,000. Thus, the court could reasonably find that each party may be entitled to fifty percent of \$70,000, or \$35,000, as a starting place for a maintenance evaluation. *See id.*

¶16 Here, the court ordered that Janice receive maintenance of \$500 per month, along with a car, leased at \$530 per month and cell phone use of \$42 per month. Consequently, the maintenance awarded, plus Janice's earnings, equals less than \$33,000 per year, which is less than half of the parties' income stream.³

¶17 We conclude that the record reflects a rational basis for the court's decision. The twenty-year marriage was long term. *See* WIS. STAT. § 767.26(1). Janice was not employed during the majority of the marriage so that she could care for the children. *See* WIS. STAT. § 767.26(5). She has good health, but at age forty-three, her earnings are limited due to her lack of consistent employment. *See*

³ Neither party argues that a portion of Janice's income is presumed to be used for child support. Therefore we do not address this factor. *See Kjelstrup v. Kjelstrup*, 181 Wis. 2d 973, 977, 512 N.W.2d 264 (Ct. App. 1994) (The trial court erroneously calculated the disposable income of the custodial parent by failing to take into account that the percentage child support standards set by DHSS for non-custodial parents presume that the custodial parent is contributing the same percentage of his or her income to the support of the children.).

id. As a result, her earnings lag behind John's. John does not contend that the sum ordered exceeds the support objective. We are satisfied that the trial court considered appropriate factors and properly calculated maintenance to achieve the dual objectives of support and fairness to both parties.

¶18 John complains that the court improperly considered that his partner's wife received as a fringe benefit a car leased at \$525 per month. We disagree. The court may consider "[s]uch other factors as the court may in each individual case determine to be relevant." WIS. STAT. § 767.26(10). Here, the court explained that it considered the sum available to the partner's wife because "I cannot believe there's not [\$]525 going to the other partner in some manner." Because the amount of money available is a relevant consideration, the court stayed within the limits of an appropriate discretionary exercise.

2. Calculation of income.

¶19 John argues that the trial court miscalculated his income. We disagree. Calculation of income is a factual matter that we review under a clearly erroneous standard. WIS. STAT. § 805.17(2). The weight and credibility of testimony is for the trial court, not the appellate court to determine. *Id.* We are satisfied that the court's finding of \$75,000 per year is not clearly erroneous.

¶20 Karnitz testified that an average experienced drywaller makes \$47,000 per year and that John's five-year average income was \$67,430 per year. He further testified that with the exception of 1997, John's business has grown since its inception six years ago. The record indicates that John's 1998 income was in excess of \$67,000. Karnitz testified that in 1999, John's income was over \$100,000 and in 2000, over \$75,000. On cross-examination, Karnitz testified that if he had used a three-year average rather than a five-year average, John's average

income would have been higher than his estimate of \$67,430. We conclude that the court could reasonably consider that John's business is growing and demonstrates a trend of increased earnings. Based on Karnitz's testimony, the court's finding of \$75,000 is not clearly erroneous.

¶21 John contends, nonetheless, that he works between sixty and eighty hours per week. He points out that the court determined that Janice's earning capacity was based upon a forty-hour work week at \$10.50 per hour. He argues that his income should be based upon a comparable forty-hour week.

¶22 We are unpersuaded. John's testimony regarding the number of hours per week he worked varied. Although he testified that throughout the marriage he worked sixty to eighty hours per week, he also testified that he worked "50 to 80" hours and "[a]nywhere from 55, 60 hours a week, sometimes more." The trial court, not this court, resolves conflicts in testimony. WIS. STAT. § 805.17(2). Based on his testimony, the court could have believed John worked the number of hours at the lower end of his estimate. Because Janice has primary placement of the minor children, the court could have reasonably limited the number of hours attributed to her work week to forty. Because the record supports the court's finding, we do not overturn it on appeal.

¶23 John further complains that the trial court should have offset the value of the car and cell phone against the maintenance it ordered. He claims that the tax returns the court relied upon to establish his \$75,000 per year income included the leased car and cell phone fringe benefits. Therefore, he contends, awarding maintenance plus a car and cell phone based on a \$75,000 per year income was error.

¶24 We are unpersuaded. We conclude that by ordering only \$500 per month maintenance, the court offset the value of the car and the cell phone. Because a cell phone and car were included in the court's calculation of annual income, it was appropriate for the court to consider those benefits available for maintenance payments.

3. Interpretation of John's stipulation to provide a leased vehicle.

¶25 Finally, John argues that at the time of the final hearing, it was undisputed he stipulated to providing a vehicle of comparable value to the one Janice had before the divorce and that it was undisputed that her vehicle was leased for \$373.25 per month. John contends that the court erred when, without explanation, it expanded the amount for the vehicle to \$530 per month and then failed to offset it against the maintenance award. We disagree. The trial court explained that it used the sum that was available to John's partner's wife to calculate a reasonable sum to award Janice. There was evidence that a comparable vehicle was not available at the previous lease rate. Consistent with the fairness objective, the court could reasonably conclude that the \$530 lease payment would reflect a standard of living comparable to that which the parties would have enjoyed at pre-divorce standards. *See LaRocque v. LaRocque*, 139 Wis. 2d 23, 39, 406 N.W.2d 736 (1987). Because the record discloses a reasonable basis for its decision, we do not overturn it on appeal.

By the Court.—Judgment affirmed.

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

