COURT OF APPEALS DECISION DATED AND FILED

October 6, 2010

A. John Voelker
Acting 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. 2009AP2376

Cir. Ct. No. 2007FA945

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

MARGARET M. PASCUAL,

PETITIONER-APPELLANT,

V.

MANUEL M. PASCUAL

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Margaret M. Pascual appeals pro se from the divorce judgment ending her thirty-two-year marriage to Manuel M. Pascual. The

judgment equally divided the parties' property and debts and awarded Manuel maintenance. Margaret contends the trial court: gave undue weight to the length of the marriage; ignored that Manuel works below his capacity; improperly valued a business asset; and failed to allow her, on the day of trial, to seek evidence of a pension Manuel possibly had. All of these questions are in the realm of trial court discretion, which we conclude was properly exercised. We therefore must affirm.

¶2 Margaret, 52, and Manuel, 51, divorced after thirty-two years. Both have high-school educations and are in good health. They have five adult children, three sons and two daughters. The sons and the eldest son's girlfriend and their two children live with Margaret. Margaret has worked in a variety of capacities at the same federal agency throughout the marriage, and currently is a paralegal earning about $73,000 a year. Manuel has worked various jobs over the years and currently works part time in housekeeping at Aurora Medical Center. He earns about $22,000 but has an earning capacity of $30,000 to $35,000 if he works full time, as he anticipates. Manuel also owns and operates Marman Comics, which sells comic books and collectibles. He works there several days a week besides his regular employment. His income from the store is unclear.

¶3 Per the parties' stipulation, Margaret has a vested pension plan with a present value of $384,255. She also has a tax savings plan vested in the amount of $20,699.92, although a loan against it reduced its net value to $1,616.54. The present value of Manuel's social security benefits is $69,821. As a civil service employee, Margaret's pension plan is in lieu of social security benefits.

¶4 Manuel sought maintenance. The trial court found that both parties' have realized their earning potential; that Manuel's testimony that the parties shared housekeeping and child-care duties throughout the marriage was more

credible than Margaret's claim that Manuel did nothing in those areas; that Manuel is only minimally able to support himself and at a level below that enjoyed during the marriage; and that Margaret has incurred substantial debt because the family members who live with her apparently contribute little to household expenses.

¶5 The trial court concluded that the long-term marriage strongly favored an award of maintenance and that a fifty-fifty division of the parties' $95,000 total income should be the starting point for determining the award. It ordered Margaret to pay Manuel $125 a week until: (a) he reached age sixty-six when he would be eligible for full social security benefits, (b) he remarried or (c) further order of the court. Maintenance would drop to $100 per week should Manuel obtain full-time employment. After dividing the marital assets and debts and factoring in Margaret's maintenance arrearages that accrued during the pendency of the divorce, the court found that a payment of $6,768.17 from Manuel to Margaret would equalize the marital estate. Margaret appeals.

¶6 Determining the amount and duration of maintenance rests within the sound discretion of the trial court and will not be upset absent an erroneous exercise of that discretion. ***Wikel v. Wikel***, 168 Wis. 2d 278, 282, 483 N.W.2d 292 (Ct. App. 1992). Discretion is exercised properly when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. ***Id.*** We accept all findings of fact made by the trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).[1]

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

¶7 WISCONSIN STAT. § 767.56 lists a number of factors for a trial court to consider when determining the amount and duration of a maintenance award. The factors include the length of the marriage, the age and health of the parties, the property division, the parties' respective educational levels and earning capacities, the contributions of one party to the education or earning power of the other, tax consequences and the standard of living enjoyed during the marriage. The factors are designed to further two objectives: to support the recipient according to the parties' needs and earning capacities, and to ensure a fair and equitable financial arrangement in the individual case. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987). The starting point for a maintenance evaluation following a long-term marriage is to consider an equal division of total income. ***Schmitt v. Schmitt***, 2001 WI App 78, ¶13, 242 Wis. 2d 565, 626 N.W.2d 14. This amount then may be adjusted after "reasoned consideration of the statutorily enumerated maintenance factors." ***Id.*** (citation omitted).

¶8 Here, the trial court thoroughly considered all the relevant statutory factors. It observed that the length of the Pascuals' marriage was "a strong factor favoring an award of maintenance," and determined that the equal-division-of-total-income formula translated to a maintenance payment of $490 per week. But after considering the parties' financial disclosure statements and Margaret's substantial credit card debt, the court reduced the award to $125 per week.

¶9 Margaret first argues that the trial court wrongly emphasized the length of the marriage because the only reason the marriage endured was that she was afraid to leave. The following comprises the evidence of the "many occasions" that Manuel "displayed violence and threats of violence" to her. Margaret testified that "[t]he police took him" from the marital residence in

January 2007 and indicated there was a restraining order; that Manuel wanted her home at 6:00 p.m. "or else there was problems"; that she paid the bills because Manuel "didn't want to know" about them, and if she showed him a bill he would "tear [it] up … and throw it in the garbage"; that for thirteen years she prepared false quarterly sales tax returns for the comic book store because Manuel "stood over me with a bat and threatened to break stuff in the house" if she refused; and that she gave him $300 cash every Wednesday because "[y]ou can't say 'no' to him. Everything he takes from me is by force." Margaret elaborated on none of these points. She did not testify that she feared him and her trial brief made no mention of violence or that she was afraid to leave the marriage.

¶10 Margaret argues here on appeal that throughout the marriage Manuel made threats to blow up the house or to kill the whole family, and includes items in her appendix to support her claim of his ongoing violence. We will not consider those items, however, because they were not part of the record before the trial court. *See* ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979). Our role is to correct errors the trial court made, not to rule on matters it never considered. ***State v. Hanna***, 163 Wis. 2d 193, 201, 471 N.W.2d 238 (Ct. App. 1991). A party must raise and argue an issue with some prominence to allow the trial court to address and rule on it. ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). We reject her claim of error when she did not bring it squarely to the court's attention.

¶11 Margaret next contends the trial court ignored Manuel's earning capacity and his income from Marman's and instead focused solely on the parties' declared income. We disagree with Margaret's interpretation of what transpired.

¶12 The trial court did not ignore Manuel's earning capacity. It found that he could earn $30,000 to $35,000 if, consistent with his expectations, he assumes full-time hours. Nor did the court ignore income from the comic book store. Manuel testified that his income from Marman's did not cover even the store's rent expenses. Margaret testified, as noted earlier, that Manuel forced her to prepare false sales tax returns for the business. She also testified that she did not believe income tax returns ever were prepared for the business. The court expressly found that it was "difficult from the evidence to determine what income, after expenses, if any [Manuel] makes from Marman Comics." This finding is not clearly erroneous.

¶13 We also understand a part of Margaret's argument to be that because Manuel works part time despite being "physically and mentally able to work full time," he is "shirking"—making voluntary and unreasonable employment decisions to reduce his income. *See* ***Chen v. Warner***, 2004 WI App 112, ¶11, 274 Wis. 2d 443, 683 N.W.2d 468. The issue of whether a spouse's job choice is unreasonable presents a question of law. ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492-93, 496 N.W.2d 660 (Ct. App. 1992).

¶14 The trial court found that Manuel held a number of jobs throughout the marriage, mostly in maintenance. It also found that a recent position paid thirteen dollars per hour, or approximately $27,000 per year. He currently earns fourteen dollars per hour working part time with the possibility to go full time. Manuel virtually always has held similar types of jobs, makes a greater hourly wage than previously and is hoping his part-time position will evolve into a full-time one. We see no evidence of shirking.

¶15 Margaret also challenges the valuation the trial court accepted for the comic book store. We must reject her claim of error.

¶16 The trial court's determination of the value of an asset presents a question of fact. ***Preuss v. Preuss***, 195 Wis. 2d 95, 107, 536 N.W.2d 101 (Ct. App. 1995). We apply the clearly erroneous standard to factual findings. WIS. STAT. § 805.17(2). The trial court judges the credibility of witnesses and the weight of their testimony. *See* ***id.*** We will uphold its credibility assessments unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶17 Here, two witnesses testified as to the value of the inventory of the business: John Delany, an appraiser, and Shawn Pascual, Margaret's and Manuel's twenty-one-year-old son. Although Margaret retained Delany, she did not call him at trial. Manuel did. Delany testified that he had not specifically appraised comic books in his four years as an appraiser but described the sources he consulted and the process he engaged in to arrive at his opinion. Delany appraised the inventory at $15,213.60. Shawn testified that he helped out at the store as a boy but had not been there since he was sixteen or seventeen. One of his duties was pricing the comic books. Recalling that they were priced at about three dollars each, and estimating how many comic books the inventory comprised, Shawn estimated that the approximate value of the inventory was $313,000.

¶18 Delaney's appraisal dramatically conflicted with Shawn's opinion. The trial court observed that Shawn was unfamiliar with the cost of purchasing comic books in quantity as opposed to their retail value. It also noted that Shawn

acknowledged that some of the boxes of comic books included in his inventory estimate may have been stolen and sold by his older brother. The court concluded that Delaney's opinion was the "credible and best evidence" of the value of the business and inventory. This assessment is not inherently or patently incredible.

¶19 Finally, Margaret complains that the trial court erroneously refused to consider a pension Manuel possibly had through Aurora. Margaret's counsel advised the court on the morning of trial that the day before she noticed for the first time a reference to a pension on a pay stub Manuel had submitted. No dollar amount was listed. Manuel, through counsel, denied knowledge of a pension and argued that he had worked part-time at Aurora for just three years, so even if one existed, it would be very small. The court denied a request to supplement the record. Margaret asserts that Manuel's failure to disclose its existence and the court's denial of the request to supplement the record to explore its existence so as to include it in the calculations constitutes reversible error.

¶20 We review a trial court's discovery ruling under the erroneous use of discretion standard of review. *See* ***Van Straten v. Milwaukee Journal Newspaper-Publisher***, 151 Wis. 2d 905, 919, 447 N.W.2d 105 (Ct. App. 1989). The trial court noted that eighteen months had elapsed since the action was filed and Manuel's pay stubs were available since "Day One." Margaret's counsel conceded she had undertaken no formal discovery. The court reasoned that whether to engage in discovery is a party's call but when he or she chooses not to, the day of trial is no time to seek leave of the court to pursue readily discoverable information. We see no misuse of discretion.

By the Court.—Judgment affirmed.

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