

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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**Appeal No. 03-0499
STATE OF WISCONSIN**

Cir. Ct. No. 00FA000087

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DOROTHY ELLEN ERICKSON,

PETITIONER-APPELLANT,

v.

MICHAEL JEROME ERICKSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 DEININGER, P.J. Dorothy Erickson appeals an order which reaffirmed on remand a maintenance award that we previously reversed. She claims that the court's additional findings on remand were clearly erroneous and

that the court again erroneously exercised its discretion in awarding her only \$1,000 per month in maintenance for twelve months. We disagree and affirm the appealed order.

BACKGROUND

¶2 The following excerpts from our decision in the previous appeal of the parties' divorce judgment, *Erickson v. Erickson*, No. 01-2827, unpublished slip op. (WI App June 27, 2002), provide background regarding the trial court's initial maintenance order and our rationale in reversing it:

The following facts are not in dispute. Dorothy and Michael were married for thirty-four years and both were in their mid-fifties at the time of the divorce. They had no children. Throughout her life, Dorothy has had health problems, rendering her largely unable to work. Michael worked as an automobile windshield installer, eventually buying the installation company with a partner and later buying out the partner. The year before the divorce, Michael's adjusted gross income was \$206,476, which included rents from buildings he owned that housed the glass company. At the time of the divorce, the net estate available for division totaled just over two million dollars.

The parties reached a stipulation on property division. After hearing two days of testimony, the court ruled on the remaining matters. Pertinent to this appeal, the circuit court awarded Dorothy one thousand dollars of maintenance per month for one year. The court reasoned that Dorothy would be able to live at the marital standard of living from the income earned on her share of the marital estate, but that she should have "some minimal maintenance for the next year to get her settled down and get her started."

....

The circuit court first went through the factors listed in WIS. STAT. § 767.26. The circuit court noted that this was a "long, long-term marriage," that the parties were both middle-aged, and that "Mrs. Erickson has some physical difficulties that have made it impossible for her to earn any kind of living." See WIS. STAT. § 767.26(1), (2)

and (5). The circuit court observed that the “educational level of each party was minimal at the time of the marriage, and neither has added much to it since then. Nobody has contributed to the education, training, or increased earning power of the other party.” *See id.* at subsecs. (4) and (9). The circuit court noted that the tax consequences had been discussed based on the property division and that there was no mutual agreement regarding maintenance. *See id.* at subsecs. (7) and (8). The circuit court concluded that the “primary factors that come into effect here are the length of the marriage, her physical condition, her earning capacity ... and the feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.” *See id.* at subsecs. (1), (2), (5) and (6).

In assessing the fairness objective of maintenance, the circuit court concluded, “all of the equities are on the side of Mr. Erickson.” The circuit court noted that Michael had worked his way up from a windshield installer to a business owner, going from “having nothing at the time of the marriage to dividing over \$2 million in property and assets.” The circuit court went on to note that Michael “had subordinated virtually all of his life to taking care of [Dorothy],” and that she had done “little in the way of cooking, cleaning, household maintenance” and had not been involved in running Michael’s business. The court concluded: “If you are talking about who made a substantial contribution to the other, the equities are all on his side.”

Regarding the support objective, the circuit court concluded that Dorothy could maintain the marital lifestyle by living off the income from her share of the marital estate, “without her ever having to dip into the principal for one dime.” The circuit court made estimates of Dorothy’s probable investment income under various scenarios, and concluded that an annual income of \$33,000 was the lowest possibility. The circuit court concluded that this amount was sufficient to support Dorothy at the lifestyle she was accustomed to at the time of the divorce.

Although the circuit court noted Dorothy’s medical condition, we conclude that the court erroneously exercised its discretion by not sufficiently taking Dorothy’s disability into account in determining the maintenance award. Although Michael disputes that Dorothy was unable to work due to her medical condition, the record supports the circuit court’s finding that Dorothy’s “physical difficulties ... made it impossible for her to earn any kind of a living.”

After making this finding, the circuit court lauded Michael's hard work and determination in improving the couple's economic status and his devoted care of Dorothy, while noting Dorothy's minimal financial contribution to the marriage. The circuit court failed to consider that a major reason the parties' economic contributions to the marriage were so unequal was no doubt because of Dorothy's disabilities. We thus conclude that the circuit court erred in its assessment of the fairness objective of maintenance.

We remand this case to the circuit court for a reconsideration of the maintenance award, both its amount and duration. In so doing, we observe that the unequal contributions of the parties to the marriage may justify a deviation from an equal division of post-divorce income, which is the "starting point" for a maintenance determination in a long-term marriage. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 39, 406 N.W.2d 736 (1987). The court must, however, consider the findings it made regarding Dorothy's health and earning capacity, as well as the length of the marriage, in assessing the support and fairness objectives of maintenance. Given that the marital estate was equally divided, Michael can expect to derive roughly the same investment income as Dorothy from his post-divorce assets. In addition, however, he is expected to receive substantial earned income in the ensuing years.

Erickson, No. 01-2827, unpublished slip op. at ¶¶2-10.

¶3 On remand, the trial court permitted the parties to submit briefs on the maintenance issue in light of our opinion but took no additional evidence. The court readopted its original findings and rationale in setting the maintenance award, and it made additional findings:

Mrs. Erickson's unequal contribution to this marriage had little, if anything, to do with her medical condition until quite recently, perhaps 1995....

....

And, in fact, at one point in time she indicated she got arthritis in 1995, but there were no contributions to this marriage for the first 20 or 25 years....

So my finding that she was incapable of earning anything was as of the date of the trial, not during the long

term of this marriage. The fact that she wasn't able to contribute anything to this marriage, economic or otherwise, was of relative[ly] recent origin, not during the ... first 20 to 25 years of this marriage....

... She deliberately chose a non-income-producing asset that she cannot use, that she cannot get to, can't walk around it, can't drive to it. And frankly, it's very clear that the only reason she wanted it was to spite him

....

The record, as I indicated, is very clear that for quite some period of time in this marriage she could have contributed both economically and otherwise and did not. During the course of this divorce her behavior was less than exemplary, and I'm not going to reward her for that....

....

She will receive from the assets that she has an income that will allow her to live at a standard of living far in excess of any enjoyed during the course of the marriage.

¶4 Based on its previous and additional findings, the court concluded that its original maintenance award satisfied the primary objectives of fairness and support as set forth in Wisconsin case law. Accordingly, it entered an order reaffirming the maintenance provisions of the original divorce judgment. Dorothy again appeals.

ANALYSIS

¶5 In our prior review of the trial court's award of \$1,000 per month of limited-term maintenance for twelve months, we were presented with parties leaving a thirty-four-year marriage with vastly disparate earning capacities. Michael had worked throughout the marriage and acquired sole ownership of a successful business that was producing income to the parties well in excess of \$100,000 in the years immediately preceding their separation and divorce. He left

the marriage with that business and other properties that would presumably continue to provide him with substantial annual income.

¶6 Dorothy, on the other hand, did not work outside the home during the marriage, and the parties stipulated that she left the marriage with no earning capacity whatsoever. Her share of the marital assets, while including substantial cash investments and a retirement account, also included two sizeable non-income-producing assets, the parties' home and some recreational land. Of particular significance to us in our first review was the trial court's finding that Dorothy "has some physical difficulties that have made it impossible for her to earn any kind of a living."

¶7 After our first review of the record, which contains extensive testimony and records relating to Dorothy's medical problems and treatment over the course of the marriage, we concluded that the trial court had erred when it assessed the "fairness" objective of maintenance by failing to consider "that a major reason the parties' economic contributions to the marriage were so unequal was no doubt because of Dorothy's disabilities." We specifically directed the trial court on remand to "consider the findings it made regarding Dorothy's health and earning capacity, as well as the length of the marriage, in assessing the support and fairness objectives of maintenance."

¶8 Dorothy asserts that the trial court failed to follow our directions on remand, that it made additional findings that were clearly erroneous and that the court again erroneously exercised its discretion in reaffirming the original maintenance order. We disagree.

¶9 The trial court on remand expressly revisited its finding regarding Dorothy's "physical difficulties" and considered their effect on her ability during

the marriage to work either outside or inside the home. The court clarified that it found her to be medically disabled from working (or otherwise contributing to the marriage) only since the onset of her rheumatoid arthritis in 1995, but *not* during the “first 20 to 25 years of this marriage.” The court determined that the record “is very clear that for quite some period of time in this marriage she could have contributed both economically and otherwise and did not.... Her lack of contribution had nothing to do with her health during the vast majority of the marriage.”

¶10 We conclude that the trial court’s additional finding regarding Dorothy’s lack of a disabling medical condition during most of the parties’ marriage is not clearly erroneous. The trial court, having the opportunity to hear, observe and evaluate the credibility of the parties and other witnesses, is better positioned than we to resolve disputed factual issues and to draw reasonable inferences from the facts it finds. *See* WIS. STAT. § 805.17(2) (2001-02)¹ (“[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”). Although it is true, as Dorothy asserts, that the trial court might have determined from the testimony that a series of maladies from which she suffered over the course of the marriage rendered her largely incapable of working, there is ample support for the inference the trial court made to the contrary. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (“When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.”).

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶11 Under the clearly erroneous standard of review, we are to 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. *See Johnson v. Merta*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Evidence in support of the trial court's finding that Dorothy's lack of economic or other contributions to the marriage was not attributable to her medical problems includes the following.

¶12 Dorothy testified that she had provided cleaning and bookkeeping services for Michael's business for several months after he and a partner acquired it. She also said that she had done some babysitting as well as helping with household tasks, such as laundry, lawn mowing and making curtains. Her testimony was quite specific that it was the onset of rheumatoid arthritis in 1995 that disabled her from performing these tasks. In her words, "[i]t hit me all of a sudden."

¶13 Michael testified that he took Dorothy to "dozens, if not hundreds, of medical appointments through the years," but that prior to 1995, except for her undergoing and recovering from two surgeries, no specific causes for her various medical complaints were determined. He said that Mayo Clinic personnel had advised Dorothy to get a job and that doctors in La Crosse advised her to quit smoking and do exercises, but her response was that "they should walk in my shoes. How the hell do they know?" Michael also testified that, after moving to their new home in about 1987, the parties never entertained guests there, and that they hired a person to clean once a week and ate supper out on a daily basis. There is no evidence in the record that these facts were attributable to Dorothy's medical condition, with Dorothy herself testifying that the reason the parties dined out in the evening was that "the business was making more money."

¶14 In short, we are satisfied that the record supports the trial court’s finding that, prior to 1995, Dorothy suffered no ongoing medical disability that prevented her from working or otherwise contributing to the marriage. It also supports the court’s original findings that Dorothy’s contributions were minimal, and that Michael was not only the sole breadwinner throughout the marriage, but that he performed or provided for the lion’s share of household tasks and went out of his way to cater to Dorothy’s asserted needs.²

¶15 The fairness objective is often cited in awarding maintenance to a spouse who has sacrificed workplace opportunities to raise children, provide homemaking services or enhance the other spouse’s business or professional success. *See, e.g., Lundberg v. Lundberg*, 107 Wis. 2d 1, 14, 318 N.W.2d 918 (1982). Dorothy urges us to overlook the absence of such facts in this case and to direct that maintenance be awarded to her solely on the basis of the length of the parties’ marriage and her lack of earning capacity at the end of it.³ We agree with Michael, however, that the fairness objective does not require a court to award maintenance simply on the basis of a lengthy marriage, regardless of what the parties contributed to it. *See Gerth v. Gerth*, 159 Wis. 2d 678, 683, 465 N.W.2d 507 (Ct. App. 1990) (noting that the “fairness objective must be viewed in light of both the payor and payee,” and that “whether maintenance payments are required

² For example, Dorothy did not have a driver’s license, having failed the test on one occasion and she resisted Michael’s urging over the course of the marriage to try again. Michael drove Dorothy not only to her many medical appointments, but on frequent shopping trips, which he described as her favorite if not sole “hobby.”

³ For example, Dorothy argues in her opening brief as follows: “Even acknowledging the superior contributions of Michael to this marriage, it is impossible to see how there could not be maintenance when one of the spouses has significant medical problems, is ‘totally vocationally disabled,’ and has been married for 34 years.”

may vary from case to case”). We also conclude that Dorothy’s lack of earning capacity at the time of the divorce, although a major consideration in evaluating the support objective, does not affect the fairness analysis inasmuch as her inability to earn income is not attributable to sacrifices or contributions she made on behalf of the marriage.

¶16 The trial court on remand reiterated its finding that Michael was virtually the sole contributor to the financial success and overall welfare of the parties during the marriage, and it reaffirmed its conclusion that fairness did not require awarding Dorothy anything beyond the one million dollars in assets she received as her one-half share of the marital estate. The court explained that it had refrained from making findings that were “personal and harsh” regarding Dorothy at the conclusion of the divorce hearing, but that, given our reversal and remand, “now I must make them and I have.” The court then summarized its conclusion by saying, “[s]he got half of everything that he worked long and hard for, and now she wants another half of his half, and I’m not going to give it to her.”

¶17 We do not conclude that the trial court’s frank summary indicates a bias against or animus toward Dorothy, or, as she suggests in her opening brief, pique at our reversal of the court’s earlier decision on maintenance. Rather, the court, in accordance with our instructions, revisited the fairness objective and answered the question of whether Dorothy’s health was a factor in the parties’ unequal contributions to the marriage. Based on its supplemental findings and our review of the record in light of them, we conclude that the trial court’s determination that fairness in this case does not require that Dorothy be awarded maintenance beyond the amount originally ordered represented an application of the proper legal standard to the relevant facts. See *Gerth*, 159 Wis. 2d at 683-84.

Although another judge might have reached a different conclusion regarding what fairness to these parties might require in the way of maintenance,

a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We conclude that the trial court's decision on remand meets the standard required for discretionary decision making.

¶18 Our instructions on remand also required the trial court to revisit the support objective, and it did so. The court again acknowledged that, as of the date of the divorce, Dorothy was “incapable of earning anything” in the way of earned income. It also made a finding, however, that in negotiating the parties' stipulated property division, Dorothy “deliberately chose a non-income-producing asset that she cannot use, that she cannot get to, can't walk around it, can't drive to it.” The court went on to state the inference it drew from the testimony was that “the only reason she wanted that hunting land was just to inflict pain” on Michael.

¶19 We do not necessarily agree that Dorothy's *motives* in seeking certain assets in the property division are particularly relevant to a consideration of the income available to meet her post-divorce needs. However, the *fact* that she willingly sought and accepted a substantial non-productive asset, after Michael had specifically proposed that she take the business buildings in order to provide her with ample post-divorce rental income, is a permissible factor for the court to consider in awarding maintenance. We thus conclude the court did not err by imputing to Dorothy income that a productive asset of similar value to the hunting land would earn her, based on its finding that her receipt of that property was a

deliberate choice on her part in the face of alternatives offered to her, a finding that we conclude finds support in the record.

¶20 Finally, we have again reviewed the evidence in the record pertaining to the parties' earning capacities, their standard of living and Dorothy's post-divorce income and budgetary needs. We conclude that the record provides support for the trial court's conclusion that, beyond transitional payments of \$1,000 per month for a year, additional maintenance was not required in order to meet Dorothy's post-divorce needs.

¶21 In addition to his own testimony, Michael presented exhibits and testimony from the manager of his glass installing business and from a certified public accountant (CPA). The CPA had reviewed both the appraisal of the business and the parties' household checking account records for several years prior to the divorce, as well as the property division they had agreed upon.

¶22 The evidence Michael put forward tended to establish the following: Michael had no managerial or business skills or experience, and the only services he provided to his business was "shop work," the actual crafting and installation of glass. During the time he was a co-owner of the business, his former partner handled all of the management functions, and after Michael became the sole owner, he had delegated all business and management decision-making to a manager. He actually worked no more than two-and-a-half days per week in the years preceding the divorce, and his duties consisted largely of answering questions for shop workers and fostering positive employer-employee relations. In recognition of their relative roles, the manager's compensation had increased to in excess of \$140,000 per year, while the income Michael drew from the corporation as salary declined. The CPA testified that, for all intents and

purposes, the amount Michael was being paid represented a return on his investment in the business, as opposed to compensation for services he rendered.

¶23 The CPA also testified that her analysis of the parties' household spending in the years leading up to the divorce, together with information provided her regarding Dorothy's post-divorce needs (such as individual insurance, medications, counseling, and transportation), indicated that, in order to maintain her in the parties' home at the marital standard of living enjoyed prior to the divorce, an annual income of approximately \$35,000 to \$38,600 would be required. The witness also testified that the assets Dorothy received, being the home, the hunting land, and substantial cash accounts plus a retirement account, would, under even conservative income projections, yield post-divorce income to Dorothy in excess of her needs as extrapolated from the parties' pre-divorce spending.

¶24 The trial court, both explicitly and implicitly, credited the evidence produced by Michael regarding his own earning capacity, the investment income available to Dorothy and her post-divorce budgetary needs. For example, in its original decision, the trial court found the parties' pre-divorce "standard of living was extremely frugal." The court also determined that if Michael "was not the owner of A-1 Glass, he'd be earning about \$35,000 a year and no more based on his education and training." The court specifically found the proposed post-divorce budget put forth by Dorothy was "drastically inflated and just not credible," and it stated it would rely, with certain exceptions, on the CPA's testimony and figures.

¶25 The court also found that, even using conservative income projections, the assets awarded to Dorothy would produce "pretty close to what

they were spending ... [on] the lifestyle they had at the time they were married and during the marriage and at the time they separated.” And, by imputing “some income” from the hunting land, the court determined that Dorothy would be able to “meet all her needs and have a pretty substantial amount left over,” even without invading the principal of her share of the property. We conclude that these findings, too, are based on evidence in the record and the trial court’s credibility determinations, and are thus not clearly erroneous.

¶26 Finally, on remand, the court restated its conclusion that, despite her lack of earning capacity, Dorothy “will receive from the assets that she has an income that will allow her to live at a standard of living far in excess of any enjoyed during the course of the marriage.” As we have concluded with respect to the court’s re-assessment of the fairness objective, we conclude that its determination that the original maintenance award satisfied the support objective was not an erroneous exercise of discretion. See *Kennedy v. Kennedy*, 145 Wis. 2d 219, 223, 426 N.W.2d 85 (Ct. App. 1988) (citing *LaRocque v. LaRocque*, 139 Wis. 2d 23, 35, 406 N.W.2d 736 (1987)) (“The support objective of maintenance 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”).

CONCLUSION

¶27 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

