

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2004

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. 03-2283
STATE OF WISCONSIN

Cir. Ct. No. 02-FA-136

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

GEORGIA C. LANG,

PETITIONER-RESPONDENT,

v.

CHARLES A. LANG,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
DOROTHY L. BAIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles Lang appeals a divorce judgment, arguing that the trial court erroneously exercised its discretion when it (1) determined that

the parties' premarital agreement was inequitable under WIS. STAT. § 767.255(L)¹ and therefore unenforceable, and (2) awarded excessive maintenance. Because the record supports the trial court's exercise of discretion, we affirm the judgment.

¶2 Charles and Georgia Lang were married in 1984. The day before their wedding, the parties entered into a premarital agreement. The record reflects that Georgia brought few, if any, significant assets to the marriage. Charles, on the other hand, identified several items of property that, according to the agreement, he would be awarded in the event of a divorce. These items included two vacant lots, valued at \$5,454 and \$2,639, property known as the "shop" valued at \$14,000, Charles's profit sharing account with his employer, valued at \$28,519, and an inheritance in the sum of \$20,000.

¶3 During the marriage, Charles was successfully employed as a salesman but became permanently disabled in 1999 or 2000 with venous malformation, a life threatening condition. He is, however, able to live an independent life, provided that he is careful with his health. At the time of trial, his gross annual income, consisting of disability payments until the age of sixty-five, totaled approximately \$76,500. Charles was age forty-nine at the time of the March 20, 2003, divorce hearing.

¶4 Georgia was age fifty at the time of the divorce. From 1990 to 1997, Georgia was employed at an art museum, first part-time and later full time. Her income gradually increased over the course of her employment, reaching approximately \$28,000 per year. Between 1997 and 1998, Georgia returned to

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

college to earn a Master's degree in museum education. When she returned to her museum employment, her income increased and, in 2002, her salary was \$35,000 per year. However, Georgia was terminated from her employment in November 2002 following hospitalization due to mental health problems and alcohol abuse. Georgia was not employed at the time of the divorce, but testified that she intended to make every effort to obtain employment in her field as soon as she was able.

¶5 The trial court determined that the premarital agreement was unenforceable. The trial court found Georgia suffered from significant mental health, alcohol and drug problems that were so severe at the time of the divorce she was unable to be employed. The court also found that at the time they entered into the premarital agreement, the parties did not anticipate Georgia's severe health problems. The trial court relied upon this ground and a number of other reasons to conclude that the presumption of fairness under WIS. STAT. § 767.255(3)(L) had been overcome.

¶6 The trial court found that the assets of the marital estate at the time of the divorce equaled \$400,155. That total included several items that the premarital agreement had excluded. Charles's retirement account was valued at \$143,477 and the shop and a lot was valued at \$31,000. The trial court entered an unequal property division, taking into account the property Charles brought to the marriage. Charles received \$224,577 or 56% of the marital estate and Georgia received \$175,579 or 44% of the marital estate.²

² The property division is not challenged on appeal.

¶7 The trial court awarded Georgia maintenance for ten years. The court ordered that for twenty-four months, maintenance would be \$2,000 per month. The court stated that should Georgia obtain employment, it would reduce the award. In any event, after twenty-four months maintenance would be reduced to \$1,500 for the remainder of the term. The court ordered that Georgia inform Charles immediately upon obtaining employment that paid more than \$20,000 per year. The court's considerations included the length of the marriage, the parties' income disparity, and their health conditions.

1. Premarital agreement

¶8 Charles argues that the trial court erroneously determined that the parties' premarital agreement was unfair and unenforceable. He acknowledges that the court identified the correct legal standard. He contends, however, "the inferences drawn by the court are not reasonable considering the testimony of record." He further claims that the trial court's finding that the agreement was ambiguous was an error of law. We conclude that the record supports the trial court's determination that the agreement was substantively unfair and therefore unenforceable. Because this ground is sufficient to uphold the trial court's decision, we need not address Charles's other claims of error.

¶9 When dividing property upon divorce, WIS. STAT. § 767.255(L) requires the trial court to consider:

Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

¶10 A circuit court's determination of inequity under WIS. STAT. § 767.255(3)(L) is discretionary and our review is limited. See *Button v. Button*, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986).

[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that 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).

¶11 While a marital agreement is presumed to be fair to both parties, and subsection (L) permits the parties' freedom of contract, it also empowers a divorce court to override the parties' agreement if the agreement is inequitable. *Button*, 131 Wis. 2d at 94. "[T]he legislature requires a divorce court to scrutinize an agreement between the spouses carefully." *Id.*

¶12 A premarital agreement is equitable if: (1) each spouse made fair and reasonable disclosure to the other of his or her financial status; (2) each spouse has entered into the agreement voluntarily and freely; and (3) the substantive provisions of the agreement dividing the property upon divorce are fair to each party. *Brandt v. Brandt*, 145 Wis. 2d 394, 414, 427 N.W.2d 126 (Ct. App. 1988). Here, we address the third requirement, that the substantive provisions must be fair at the time of the divorce. See *Krejci v. Krejci*, 2003 WI App 160, ¶20, 266 Wis. 2d 284, 667 N.W.2d 780 (citations omitted). A premarital agreement cannot be enforced if at divorce it is inequitable in its substantive provisions. *Id.*

¶13 In the context of a marital agreement, “[s]ubstantive fairness is an amorphous concept” that must be determined on a case-by-case basis. *Id.* An agreement is not unfair merely because its application results in an unequal property division or one that might not be ordered under WIS. STAT. § 767.255. *Id.* “If, however, there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, an agreement which is fair at execution may be unfair to the parties at divorce.” *Id.* (citation omitted). For a change of circumstances to be unanticipated, the event must not have been reasonably foreseen by the parties prior to or at the time of the making of the agreement. *Id.*, ¶21.

¶14 Here, the record supports the trial court’s finding that at the time they entered into the premarital agreement, the parties did not anticipate Georgia’s significant mental health, alcohol and drug problems or that they would be so severe she would be unable to be employed. Georgia testified that she had returned to school because she anticipated she may become the primary breadwinner due to Charles’s disability. Georgia testified that in 2002, however, she became increasingly ill and began to have very serious problems coping on a daily basis. She was hospitalized for a three-week period for alcohol treatment and depression.

¶15 While Georgia was hospitalized, she was terminated from her employment. Her application for unemployment compensation was denied in part because her mental health condition at the time prohibited work. Georgia testified that she would love to return to work in her field but at the time of trial was not completely recovered. Georgia testified that she submitted a claim with both state

and federal agencies for workplace discrimination due to her mental illness. The claim had not been resolved at the time of the divorce trial.

¶16 Georgia abstained from alcohol since her inpatient treatment. After her inpatient program, Georgia continued to be treated for depression, anxiety and post-traumatic stress syndrome. She also suffered from agoraphobia, which involved a fear of leaving her home.³ Her recovery plan included cognitive therapy, walking for depression, massage, a prescription for panic attacks and creating a support system of friends and professionals.

¶17 “[F]or a change of circumstances to be unanticipated, the event must not have been reasonably foreseen by the parties prior to or at the time of the making of the agreement.” *Krecji*, 266 Wis. 2d 284, ¶21 (citation omitted). Here, the record supports the court’s finding that at the time the parties entered into the premarital agreement, the parties could not have reasonably foreseen Georgia’s significant mental health problems that disabled her from employment. The court was entitled to find that Georgia’s disability presented significantly changed circumstances following the execution of an agreement. The court could reasonably conclude that the agreement as applied at divorce would exclude a major portion of the marital estate. While Charles is also disabled, his disability income is guaranteed until age sixty-five. Georgia has no disability income and no employment. The court could conclude that the parties’ premarital agreement no longer comports with reasonable expectations of the parties because after an eighteen-year marriage, it would exclude a major portion of the marital estate and

³ Georgia testified that she also suffers from fibromyalgia, but the record is unclear whether this condition is disabling.

leave Georgia disabled, unemployed and with significantly fewer assets. Therefore, the court could reasonably determine that the premarital agreement's substantive provisions were unfair as applied at divorce. *Id.*, ¶20 (citation omitted).

¶18 The record demonstrates that the trial court reached a decision that a reasonable court could arrive at by the consideration of the applicable law, the facts of record and a process of logical reasoning. See *Hartung*, 102 Wis. 2d at 66. Because the record supports the trial court's decision, we do not disturb it on appeal.

2. Maintenance

¶19 Charles argues that the trial court awarded excessive maintenance. Charles characterizes the issue as follows: "This is an 18-year marriage with a disparity of earnings An award of maintenance was appropriate. It is the amount ... particularly in the first two years, that constitutes an abuse of discretion." Charles contends that the court's order encourages Georgia to delay finding employment and minimizes productivity. We are unpersuaded.

¶20 Charles recognizes that a maintenance award is addressed to trial court discretion. In awarding maintenance, the trial court must consider the factors in WIS. STAT. § 767.26.⁴ On review, the question is whether the trial

⁴ 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:

(continued)

court's application 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. *See id.* "The goal of the support objective of maintenance is to provide the recipient spouse with

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- (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.
 - (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.

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.

¶21 The fairness objective is 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). Over a long marriage, parties 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.*

¶22 The record demonstrates that the trial court considered the facts of record and law relied upon, considering them together to arrive at a reasoned decision. The court considered the parties’ ages, physical and emotional health. It concluded that although Charles’s physical health is poor, his income is significant due to disability income, noting that the disability income will cease at sixty-five. Nonetheless, until that time, his disability income was guaranteed. In contrast, the court found that Georgia’s emotional health adversely affects her ability to obtain and maintain employment. *See* WIS. STAT. § 767.26(2). The court also considered the parties’ educational levels and that Charles contributed to Georgia’s education. *See* WIS. STAT. § 767.26(9). It found, however, that Georgia’s enhanced education did not translate into enhanced employability. *See* WIS. STAT. § 767.26(4). The court determined that her earning capacity, if she were employed in her field, was \$35,000 per year. *See* WIS. STAT. § 767.26(5).

¶23 The court also found that even with her enhanced earning capacity due to her Master's degree, it was not feasible that Georgia would become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. *See* WIS. STAT. § 767.26(6). The court found that Georgia currently had no income and may not have income from employment for some time, although that is unknown. If Georgia worked outside her field, she would earn only \$10 per hour.

¶24 The court concluded:

Given the rationales underlying maintenance, that is support and fairness, this court finds given the totality of the circumstances that maintenance should be paid for a period of ten years. This will mean that [Charles's] maintenance [obligations] will cease when he is approximately age 59 to 60, giving him some years to save for the time at which his disability income ceases. This will also give [Georgia] the opportunity to become better established in an employment situation.

¶25 The court awarded \$2,000 per month maintenance for two years, providing,

If [Georgia] cannot find a job in her chosen field, the two year period of enhanced maintenance will allow her the opportunity to seek training or skills in some other field of endeavor. Should [Georgia] become employed in that time period, this court will reduce the amount of maintenance payable.

In any event, the court ordered that after two years, maintenance would be \$1,500 per month for the balance of the term.

¶26 The court's order took into account the limitations on Charles's disability payments. The effect of the court's award was to provide for Georgia

beyond bare subsistence and to approximate an equal income stream. Because the record reflects a rational basis for the court's award, it is sustained on appeal.

¶27 Charles's argument emphasizes Georgia's testimony that optimistically she could find employment in three months. He points to his vocational expert's testimony that placed Georgia's earning capacity at \$35,000 to \$54,000 annually. Charles argues that his income will drop when he reaches sixty-five. He suggests that a six-month order at \$1,500 per month would have been more appropriate to meet the goals of support and fairness. He claims that the court "abused its discretion by ignoring the parties' lifestyle needs and providing a disincentive for [Georgia] to seek meaningful employment."

¶28 We reject Charles's arguments. The trial court, not the appellate court, is the arbiter of the weight and credibility of expert testimony. WIS. STAT. § 805.17(2). The court was entitled to believe that the evidence of Georgia's earnings history demonstrated her earning capacity. The finding of Georgia's \$35,000 earning capacity is not clearly erroneous. If Georgia were to obtain employment within three months, the court stated it would reduce the award. Georgia has an incentive to obtain employment, however, because even with employment, maintenance would remain at \$1,500 per month for ten years, providing her an income commensurate with a shared income stream.

¶29 Also, the court's order considered Charles's anticipated reduced income, in that maintenance was designed to end five years before his disability payments cease. In addition, on the record before us, Charles's suggestion that maintenance end in six months fails to meet the objectives of fairness and support. We conclude Charles's arguments do not reveal an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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