COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0894-FT **Cir. Ct. No. 03-FA-101**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE MARRIAGE OF:

KELLY KAY CALDIE,

PETITIONER-APPELLANT,

V.

DENNIS ALLEN CALDIE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oconto County: LARRY L. JESKE, Judge. *Reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Kelly Caldie appeals that part of the parties' divorce judgment denying her maintenance.[1] Because the court erroneously exercised its discretion, we reverse the maintenance portion of the divorce judgment and remand to the circuit court for further proceedings consistent with this opinion.

Background

¶2 Kelly and Dennis Caldie were married in 1986 and this action for divorce was filed in 2003. The parties stipulated to the property division and placement of their two children, with Dennis paying $470 per month child support. The court was then asked to determine whether Dennis should pay maintenance to Kelly.[2] The court's entire decision on maintenance is as follows:

> The sole issue for decision is whether the wife gets maintenance. She has a net take home pay of $1,460.00 per month. She will receive child support of $470.00 per month, so her total income will be $1,930.00 per month. Her Financial Disclosure shows her monthly expense to be $2,185.00 leaving a shortfall of $255.00.
>
> The complicating factor is that her list of expenses for food, heat, shelter and the like also include expenses for Mrs. Caldie's live-in boyfriend. The boyfriend is fully employed but makes no financial contribution to any of these expenses. It would seem reasonable that he could pay $255.00 per month to balance the household budget. Even with an entry level job the boyfriend grosses over a thousand dollars a month.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 2001-02 version unless otherwise noted.

[2] Kelly makes $11.50 per hour and makes around $24,000 per year. Dennis makes $12.18 an hour but makes approximately $53,000 because he works substantial overtime.

> Mr. Caldie must support his children. He doesn't have to support the boyfriend. The request for maintenance is denied.

Kelly appeals, contending that the circuit court failed to consider the appropriate factors.

Discussion

¶3 The amount and duration of maintenance are committed to the circuit court's discretion. ***King v. King***, 224 Wis. 2d 235, 247-48, 590 N.W.2d 480 (1999). 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." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). A circuit court erroneously exercises its discretion if it fails to consider and make a record of relevant factors. ***Sunnyside Feed Co. v. City of Portage***, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998).

¶4 A circuit court determining a maintenance award, and this court upon reviewing one, must begin with the factors in WIS. STAT. § 767.26. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 31, 406 N.W.2d 736 (1987). Section 767.26 states:

> 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.
>
> (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.

¶5 These statutory factors are the touchstone of the analysis for making or reviewing a maintenance award. ***LaRocque***, 139 Wis. 2d at 32. The court need not consider all the statutory factors, but rather is obligated to consider all that are relevant. ***Rohde-Giovanni v. Baumgart***, 2003 WI App 136, ¶8, 266 Wis. 2d 339, 667 N.W.2d 718. These factors "reflect and are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective)." ***LaRocque***, 139 Wis. 2d

at 33. "Sound discretion in a maintenance determination must reflect consideration of the factors set out in WIS. STAT. § 767.26, but the factors in the statute do not appear to be weighted, implying that the weighing will be done by the circuit court." ***Meyer v. Meyer***, 2000 WI 132, ¶49, 239 Wis. 2d 731, 620 N.W.2d 382 (Prosser, J., concurring).

¶6 Here, the record indicates that the court neglected to consider some of the relevant factors under WIS. STAT. § 767.26(1)-(9)[3] and further neglected to weigh these factors. Rather, the decision appears to focus on circumstances created by Kelly's cohabitation with her boyfriend. While cohabitation may be a factor that the court will "determine to be relevant" under WIS. STAT. § 767.26(10), "[c]ohabitation is only a factor to consider to the extent it may change a … spouse's economic status" and should not be the sole basis for denying maintenance. *See* ***Van Gorder v. Van Gorder***, 110 Wis. 2d 188, 197-98, 327 N.W.2d 674 (1983). While ***Van Gorder*** dealt with modification of a maintenance order after an initial award, its reasoning is equally appropriate in the consideration of an initial maintenance order.

¶7 There are two concerns when a spouse cohabits while seeking maintenance. *See* ***id.*** at 198. First, where cohabitation enhances the proposed recipient's financial conditions, payments not needed for support should not be ordered. ***Id.*** Second, cohabitors should not be allowed to fashion their relationship and finances in a manner intended to make maintenance necessary. ***Id.*** Determining whether to award maintenance in the case of cohabitation is not

[3] Both parties, for example, point out the length of their marriage, a factor under WIS. STAT. § 767.26(1), and their respective educational backgrounds, a factor under § 767.26(3).

necessarily an easy or clear-cut task, and there is a variety of factors the court should consider.

¶8 The court must examine all the circumstances surrounding the proposed maintenance recipient's financial status. *See* ***id.*** at 198. If the evidence shows that the recipient is entirely supported by the cohabitor, that would likely constitute a basis for denying maintenance. *See* ***id.*** at 197. Where it appears the proposed recipient is supporting the cohabitor, that fact is relevant only to the extent that the requested maintenance might be sought to support a budget for two people. *See* ***id.*** at 198.

¶9 However, it must be recognized that certain expenses, such as rent, would in many cases be the same whether the proposed recipient lives alone or not. ***Id.*** Thus, the fact that a cohabitor does not contribute to rent or other expenses might not be relevant to the proposed recipient's economic circumstances. *See* ***id.*** It would be relevant only if the court could find those expenses were made unnecessarily high by the cohabitor—for instance, if the proposed recipient is living in more spacious or luxurious accommodations as a consequence of the cohabitation. *See* ***id.***

¶10 In addition to considering the circumstances of the proposed recipient's financial status, the court should also consider relevant the factors of WIS. STAT. § 767.26, as well as the effect cohabitation has on those factors. *See* ***id.*** Finally, the court should consider whether the cohabitating parties have fashioned their living arrangement for the purpose of winning a maintenance order. *See* ***id.***

¶11 In this case, the circuit court considered that Kelly's "list of expenses for food, heat, shelter and the like also include expenses for" the

boyfriend, but the list does not actually attribute any expense to the boyfriend. While Kelly acknowledges that he really does not contribute to the household and that she pays the house, tax, insurance, and food expenses, there is no analysis as to how much of a burden the boyfriend actually is, nor is there currently any factual basis in the record to make such an assessment. As ***Van Gorder*** points out, many of Kelly's expenses might be the same whether she were living with her boyfriend or not. Cohabitation must be viewed based on its impact on the financial situation of the spouse seeking maintenance but, again, is not to be the sole basis for denying maintenance.

¶12 Cohabitation must also be viewed in light of its impact on the WIS. STAT. § 767.26 factors and the ***LaRocque*** objectives. However, there is no discussion by the court on the record or in its decision regarding the § 767.26 factors.

¶13 As to the support and fairness objective in ***LaRocque***, it appears the court considered them only in passing. There is no statement of "facts of record or law relied upon." *See* ***Hartung***, 102 Wis. 2d at 66. As to support, the court correctly noted that Dennis had to support the children but not the boyfriend. However, the support objective of maintenance is to be viewed in light of Kelly's needs and her earning capacity. In this case, we have an incomplete picture of her needs particularly without the ***Van Gorder*** analysis, and there is no discussion of her earning capacity.

¶14 It appears the court considered it would also be unfair for Dennis to pay to support the boyfriend, a proposition with which we also agree. However, the fairness objective must be considered in light of fairness to both the payor and the payee. ***Gerth v. Gerth***, 159 Wis. 2d 678, 683, 465 N.W.2d 507 (Ct. App.

1990). It does not appear fairness to Kelly was considered, except to the extent that the court viewed the cohabitation as contributing to her financial burden and a situation of her own making.

¶15 In short, the court must consider all relevant factors under WIS. STAT. § 767.26. While it appears the court considered the situation of Kelly's cohabitation to be relevant under WIS. STAT. § 767.26(10), the mere fact of cohabitation, by itself, is not a sufficient basis for denial of an award. It must be considered as described by ***Van Gorder***, in light of § 767.26, and with the ***LaRocque*** fairness and support objectives in mind. The court did not fully address or weigh all the relevant factors under WIS. STAT. § 767.26(1)-(9) and did not properly analyze the cohabitation here. Because a factual record should be developed regarding the cohabitation, and because the circuit court is entitled to weigh all relevant § 767.26 factors to arrive at a maintenance determination, we decline to exercise the court's discretion for it. *See* ***Milwaukee Women's Med. Serv. v. Scheidler***, 228 Wis. 2d 514, 528 n.5, 598 N.W.2d 588 (Ct. App. 1999). We therefore reverse the order denying Kelly maintenance and remand the case for reconsideration of the maintenance question in a manner consistent with this opinion.

By the Court.—Judgment reversed in part and cause remanded with directions. No costs on appeal.

This opinion will not be published. *See* WIS. STAT. RULE 80923(1)(b)5.