

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 11, 1996

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

NOTICE

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

No. 93-0913

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DEBRA A. HOFFMAN,

Petitioner-Respondent,

v.

JOHN C. HOFFMAN,

Respondent-Appellant.

APPEAL from a judgment and an order of the circuit court for Sauk County: ANDREW P. BISSONNETTE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

SUNDBY, J. Debra A. Hoffman began this divorce action January 2, 1992. The trial court entered judgment ordering her former husband, John C. Hoffman, to pay Debra maintenance indefinitely and to pay the parties' tax on their income from January 1, 1992, to October 1, 1992. John moved the trial court to reconsider its determinations.

The court reduced John's maintenance obligation from \$1,000 to \$850 per month but refused to reconsider its award of indefinite maintenance. The court also refused to reconsider that part of the judgment requiring John to pay most of the 1992 income tax.

John claims that the trial court erroneously exercised its discretion when it ordered him to pay maintenance indefinitely and to pay the income tax. We conclude that the trial court properly exercised its discretion when it awarded Debra indefinite maintenance. However, we further conclude that the trial court erroneously exercised its discretion when it ordered John to pay most of the parties' 1992 income tax. We therefore reverse the judgment and order¹ in this respect and remand the case to the trial court to redetermine the income tax division. We do not preclude the trial court from redetermining the property division if it concludes that the fairness of this award is affected by its redetermination of the income tax division.

MAINTENANCE

We first consider the award of maintenance. The seminal decision is *LaRocque v. LaRocque*, 139 Wis.2d 23, 406 N.W.2d 736 (1987). The objectives of an award of maintenance are 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 (the fairness objective). *Id.* at 32-33, 406 N.W.2d at 740. The *LaRocque* court concluded that pursuant to § 767.26(6), STATS., "[t]he legislature ... has expressly declared that the standard of living for maintenance is a standard of living comparable to the one enjoyed during the marriage." *Id.* at 35, 406 N.W.2d at 741. The *LaRocque* court recognized, however, that the increased expenses of separate households may prevent the parties from continuing at their pre-divorce standard of living, and that "both parties may have to bear the sacrifices that the cost of an additional household imposes." *Id.*

¹ John Hoffman appealed from both the December 17, 1992 judgment of divorce and the February 16, 1993 order amending the judgment.

This was a long-term marriage; the parties married August 16, 1975, the summer before their senior year of college. The trial court stated that it "does not see anything on the horizon that would indicate that [Debra] would be in a position to provide for herself the standard of living enjoyed by the parties during their marriage, based on her income and the child support alone."

The parties do not deny that their standard of living during the marriage was "lavish." They were able to sustain this standard of living through credit-card borrowing and an annual gift by John's mother of \$20,000. The trial court concluded that despite its lavishness, the parties' standard of living during the marriage was the standard to achieve, if feasible. John complains that the court erroneously considered the mother's annual gifts because she ceased making those gifts early in 1991. John argues that the trial court erroneously exercised its discretion when it concluded that under *LaRocque*, its target was the parties' standard of living during their marriage, because the resources of the parties made that objective unrealistic.

However, John does not contest the *amount* of maintenance the court ordered him to pay, only the *duration*. John is willing to pay Debra \$850 per month for seven years. He argues that by then, Debra may have obtained her master's degree in education and a teaching position which would pay her \$35,000 to \$40,000 per year. At the time of trial, Debra was working as an interior decorator at an annual salary of approximately \$18,000, with medical insurance coverage.

We review a maintenance award for erroneous exercise of discretion. See *LaRocque*, 139 Wis.2d at 27, 406 N.W.2d at 737. We conclude that the trial court did not erroneously exercise its discretion when it awarded indefinite maintenance. Limited-term maintenance is not appropriate in this case because it is impossible to say that at a date certain in the future the income of the parties will be such that either of them will enjoy a standard of living approaching that enjoyed during their marriage. The parties are relatively young and in good health. John may again receive periodic gifts from his family. The maintenance awarded Debra is modest considering John's present and potential income.

The fairness objective suggests that Debra may be entitled to share in the family's largesse and John's probable increase in income. Of course, Debra's income may increase to the extent that, with modest maintenance, her standard of living may approach the standard the family enjoyed during the marriage.

Repeated resort to the courts to increase or decrease maintenance is not healthy; however, an award of limited-term maintenance is as subject to modification due to changed circumstances as is an award of indefinite maintenance. Further, in either case, if Debra comes to view the award as a life-time annuity and does not make a good faith effort to earn up to her potential, she runs the risk that the court may substantially reduce the maintenance award. We conclude that the trial court did not erroneously exercise its discretion when it awarded Debra indefinite maintenance.

PROPERTY DIVISION: INCOME TAX

With respect to the 1992 income taxes, the trial court allowed each party to keep his or her refund. The trial court said that it was going to "connect" the refunds:

[O]nly ... to the extent that [Debra] might find herself with a liability beyond what she would normally expect in light of the withholding. So we will protect her to that extent. But beyond that, they can each go their separate way. If they each get a refund, that's fine. He's going to keep his refund. She's going to keep hers. That's by reason of the fact the refund accrued during the period of time he was making payments twice a month. So I don't think the refund needs to be split fifty-fifty. But I don't want Debra ... to have to pay a lot of taxes because of all the complicated business arrangements on the other side here.

On reconsideration, the court refused to modify its previous judgment as to income tax liability. The court stated:

During the separation, [Debra] did not have access to or control of the various partnerships and family-owned businesses and therefore really had no input as to whether they were sending in some type of quarterly tax payments or what arrangements they were making for taxes. The Court wants to protect [Debra] from any significant unforeseen tax consequences relating solely from those businesses or other investments.

The voluntary payments of \$4,200 monthly to which the trial court referred were made by John to Debra after they separated. These payments were John's entire net pay from his law practice. He argues that the trial court's order is contrary to the parties' agreement to divide the net marital estate equally and treated their respective incomes during that period as if that income was available only to him. John argues that *Hauge v. Hauge*, 145 Wis.2d 600, 427 N.W.2d 154 (Ct. App. 1988), establishes that the trial court erroneously exercised its discretion. In *Hauge*, the trial court allocated an investment debt entirely to the husband because he had exclusive control over the transactions that resulted in losses. *Id.* at 603, 427 N.W.2d at 155. We held, however, that it was inappropriate for the trial court to allocate the entire debt to the husband without a showing that he had squandered or destroyed part of the marital estate. *Id.* at 604-05, 427 N.W.2d at 156.

John argues that if the trial court intended to protect Debra from unforeseen tax consequences, it should have directed its order to that contingency. Debra contends that the trial court properly classified the parties' income tax liability as property subject to division. Debra points out that although they had stipulated to an equal property division, they specifically reserved the issue of responsibility for the 1992 tax liability for decision by the trial court. She argues that therefore the court allocated the income tax liability equitably; the effect of the court's order was to protect Debra from tax liability over which she had no control. She distinguishes *Hauge* because that case involved investment losses, not income tax liability. Debra argues that the trial court's order in *Hauge* was intended to protect the wife from risky investment losses, not income tax liability. Income tax liability is foreseeable. She argues that the purpose of the trial court's allocation of the income tax liability was to protect Debra from John's possible lack of planning which could lead to unexpected tax liability, and to protect John from Debra's failure to have amounts withheld from her salary to pay her tax liability.

John responds that under § 767.255, STATS., income tax liability must be divided equally, unless there is intentional misconduct by one of the parties. He argues that the trial court did not take into consideration that he had paid most of his net income to his wife during the pendency of this action. Debra enjoyed the benefit of this income but will not be liable for taxes on that income. John argues that this is not equitable and is contrary to § 767.255.

Section 767.255(3), STATS., provides that the court shall presume that all marital property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering a number of factors, including the tax consequences to each party. The problem we have with the trial court's allocation of liability for income taxes is that it attempts to protect against conduct and circumstances which may never occur. We do not believe this is an adequate reason for departing from the requirement of equal division of the marital estate. Upon remand the parties' tax liability for this period and any income tax refund will be known and may be considered by the court. We therefore reverse this part of the judgment and order and remand for redetermination.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.