

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 2, 1995

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. 95-1103

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DOMINIC J. VITTONI,

Petitioner-Respondent,

v.

KATHLEEN M. VITTONI,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Rock County: PATRICK J. RUDE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Kathleen M. Vittone appeals from a judgment of divorce in which the trial court ordered her former husband, Dominic J. Vittone, to pay her \$91.96 per week in maintenance. The issues are whether the trial court erroneously exercised its discretion: (1) when it used forty hour work

weeks to determine Dominic's income though the record indicates that Dominic routinely works more than forty hours per week; (2) when it divided the parties' total income in proportion to the number of hours each party worked, without giving consideration to the health of the parties; and (3) when it did not take into account the tax implications of the maintenance payment. We conclude that the court erred when it did not consider the health of the parties and the tax consequences to each party. We also conclude that it erred when it excluded Dominic's overtime pay. Consequently, the court's decision did not achieve the objectives of fairness and support. Accordingly, we reverse that part of the judgment awarding maintenance, and remand with directions that the trial court recalculate the maintenance award.

BACKGROUND

Kathleen and Dominic Vittone were married for about twenty-six years when Dominic started this divorce action. Dominic works as a union electrician. His income rose substantially over the years and at the time of the divorce, he was earning \$21.36 per hour. During the last four years of the marriage, he worked considerably more than forty hours per week.

Kathleen graduated from nursing school and worked for a few months after the marriage. She stayed home from 1969 to 1984 to care for the couple's children. She also provided care to their son who had insulin dependent diabetes. In 1984, Kathleen returned to work as a nurse. Currently, she works about twenty-four hours per week, at \$14.49 per hour, for the Riverview Clinic.

Kathleen asserts that she works part time because she suffers from migraine headaches. She received specialized care from Dr. Frederick Freitag, a headache specialist in Chicago, Illinois, during the last two years of the marriage. Kathleen was referred to Dr. Freitag by her physician in Madison, Wisconsin, who attempted several different treatments for her migraine headaches without success. Dr. Freitag prescribed several types of drugs for Kathleen, and advised her to limit her work hours to twenty-four to twenty-eight hours per week. This treatment has proven effective in controlling her migraines.

The trial court calculated the maintenance award by considering Dominic's earnings as if he only worked forty hours per week. It relied upon each spouse's net income after federal, state, and social security taxes were deducted at each spouse's tax bracket level. Then the court divided the parties' total net income in proportion to the hours each worked. Kathleen appeals.

MAINTENANCE

The determination of the amount and duration of maintenance rests within the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of that discretion. *LaRocque v. LaRocque*, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). An erroneous exercise of discretion occurs when the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either excessive or inadequate. *DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 582-83, 445 N.W.2d 676, 679 (Ct. App. 1989). Therefore, the "court's decision 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." *Trieschmann v. Trieschmann*, 178 Wis.2d 538, 541-542, 504 N.W.2d 433, 434 (Ct. App. 1993) (quoted source omitted).

The dual objectives of maintenance are support and fairness. *LaRocque*, 139 Wis.2d at 33, 406 N.W.2d at 740. The support objective is to maintain the recipient spouse in accordance with the needs and the earning capacities of the parties. *Id.* The fairness objective is meant to ensure a fair and equitable arrangement in each individual case. *Id.* Thus, maintenance is not to be calculated at bare subsistence levels, *Forester v. Forester*, 174 Wis.2d 78, 89, 496 N.W.2d 771, 775 (Ct. App. 1993), but at a standard of living the parties enjoyed in the years immediately preceding the divorce. *LaRocque*, 139 Wis.2d at 36, 406 N.W.2d at 741. In determining the amount of maintenance, the trial court should begin with an equal division of the total earnings of both parties. *Bahr v. Bahr*, 107 Wis.2d 72, 85, 318 N.W.2d 391, 398 (1982). If a spouse works overtime on a regular basis, the total earnings must include the overtime income. *DeLaMatter*, 151 Wis.2d at 589, 445 N.W.2d at 682. The court may then adjust the maintenance award following a reasoned consideration of the statutory factors. *Bahr*, 107 Wis.2d at 85, 318 N.W.2d at 398. Section 727.26,

STATS., specifies that the court may order a maintenance award after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
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- (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.

We conclude that the trial court erroneously exercised its discretion when it did not include Dominic's overtime pay in its calculation of the parties' total earnings. Similar to the husband in *DeLaMatter*, Dominic routinely worked more than forty hours per week. Therefore, his overtime pay should have been included in the maintenance calculation.

Furthermore, the trial court erroneously calculated the maintenance award by dividing the total income between the parties in proportion to the number of hours each spouse worked per week. It failed to start with the presumed equal division of total income and did not consider evidence that Kathleen is unable to work full time because of her migraine headaches. The court should have started with a equal division of total income, and then considered Kathleen's asserted inability to work full time, her contributions to the marriage, and other relevant factors to decide whether to deviate from that division in either direction.

The trial court also erroneously exercised its discretion because it failed to consider the tax consequences of its maintenance award. It used each party's net income to calculate the total earnings of the parties and then divided that total between them. This method is incorrect. First, because Kathleen earns

less, her income is taxed at a lower rate than Dominic's. Second, Kathleen will have to pay income tax on the maintenance award while Dominic can deduct his maintenance payments from his gross income. The court should have used the parties' gross income to calculate maintenance payments.

Finally, we conclude that the weekly payment of \$91.96 is inadequate to support Kathleen at a standard of living comparable to that she enjoyed during the marriage. There may be insufficient income to permit both Dominic and Kathleen to enjoy a standard of living comparable to that enjoyed during the marriage. But in that case, the court should equitably divide the shortfall. Consequently, we reverse in part and remand for a recalculation of the maintenance award.

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

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.