

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 30, 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. 95-1412

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

NANCY A. WEINREICH,

Petitioner-Respondent,

v.

KENTON L. WEINREICH,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
DOMINIC S. AMATO, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Kenton L. Weinreich appeals from an order denying his motion to reconsider his divorce judgment. He raises four main issues on appeal, relating to the amount of family support, the length of the support payments, the computation of his income, and contribution to

attorney's fees. For reasons discussed more fully below, we affirm in part, reverse in part, and remand the matter to the trial court for a resolution consistent with this opinion.

I. BACKGROUND.

Kenton and Nancy were married in 1980 and had two children during the marriage. The judgment of divorce was entered by a court commissioner on August 17, 1994. The judgment of divorce incorporated a marital settlement agreement executed by the two parties on May 12, 1994. The agreement included a temporary family maintenance provision requiring Kenton to pay 25% of his gross monthly income for family maintenance until a hearing in the circuit court was held. The agreement settled all issues regarding the divorce settlement with the exception of the amount of future family maintenance, classification of Ken's per diem pay and income tax issues. These issues were settled by hearings in the circuit court held on November 9 and November 14, 1994. As a result of these hearings, the circuit court entered an order on February 27, 1995.

The February 1995 order mandated Kenton to pay family support beginning January 1, 1995, and continuing indefinitely. The amount of support due each month is based on a formula of 50% of Kenton's gross income less 50% of Nancy's gross income, with Nancy's gross income being lowered by the approximately \$150/month medical insurance premium she paid. The parties are also required to exchange updated wage statements every four months so that the monthly payment can be adjusted to reflect any changes in either party's gross income. The order mandated that all per diems received by Kenton must be included in his gross income for purposes of the support formula. Additionally, Nancy was awarded the tax exemptions for both of the children. The order also required Kenton to pay \$375 towards the \$750 Nancy incurred in attorney's fees for the two days of hearings.

The court ordered a hearing to be held on November 14, 1996, to review the economic situation of both parties. On April 10, 1995, the trial court entered a final order denying Kenton's motion for reconsideration of the issues before this court.

II. ANALYSIS.

Kenton argues that the trial court erroneously exercised its discretion by: (1) failing to consider the relevant statutory factors in determining the amount of family support; (2) failing to limit the length of time the family support would last; and, (3) including in the award formula his entire per diem reimbursement amount without considering actual expenses.

Section 767.26, STATS., authorizes maintenance payments and sets forth factors for an award. The factors are designed to ensure a fair and equitable financial arrangement that provides for the support of the payee in accordance with the ability of the payor to pay. *LaRocque v. LaRocque*, 139 Wis.2d 23, 32-33, 406 N.W.2d 736, 740 (1987). The determination of the amount of maintenance is within the sound discretion of the trial court, and we will affirm it absent an erroneous exercise of discretion. *Id.* at 27, 406 N.W.2d at 737. A discretionary decision is “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, 20 (1981).

A. Section 767.26, STATS., factors.

Kenton's first argument deals with the perceived failure of the trial court to consider relevant factors under § 767.26, STATS. The trial court has an obligation to consider relevant statutory factors, but the court need not address every factor. *Parrett v. Parrett*, 146 Wis.2d 830, 838, 432 N.W.2d 664, 667 (Ct. App. 1988). The first factor Kenton claims the court did not fully consider was Nancy's earning capacity. Contrary to Kenton's claim, the trial court did consider Nancy's earning capacity. Her testimony indicates that she had many short-term positions because she and Kenton moved often. Her testimony also indicates that she needed to improve her skills to increase her earning capacity. The trial court determined that Nancy was credible regarding her earning capacity, and we must accept the trial court's factual findings that are not clearly erroneous. *Bentz v. Bentz*, 148 Wis.2d 400, 403-404, 435 N.W.2d 293, 294 (Ct. App. 1988).

Kenton next argues that the trial court erred by beginning its analysis in determining maintenance with a fifty-fifty split of income, as was done in *LaRocque*, because his marriage only lasted thirteen years. While this is shorter than the twenty-five-year marriage in *LaRocque*, we see no merit in Kenton's argument that a fifty-fifty *starting point* was an erroneous exercise of discretion. There was no erroneous exercise of discretion on this point.

Kenton also argues that the trial court relied on a budget submitted by Nancy which he claims was flawed in many respects. He argues that the result is that he must pay more support than is actually needed by Nancy. In its decision, the trial court noted Nancy's non-economic contributions to the marriage and her assistance to Kenton in his successful effort to become a commercial airline captain. The trial court relied on this factor, in addition to Nancy's budget, when it determined the amount of support that it would award.¹ The trial court found Nancy's budget and testimony credible, and we see no erroneous exercise of discretion.

Kenton also alleges that the trial court failed to properly consider the tax consequences that arose out of its decision. Kenton claims that the trial court failed to consider his social security and medicare tax in computing income available for support. He also claims that it erred in granting both of the exemptions for the children to Nancy because their monthly value to her is \$63, while the monthly value to him would be \$123.² The trial court did not make a specific reference as to the impact of social security and medicare taxes on Kenton's total income. It also failed to make a specific reference to why it made economic sense to grant both of the children's income tax deductions to Nancy. Indeed, it appears that the allocation of the exemptions to Nancy unduly reduces Kenton's income, leaving less available resources for both parties – it is mutually disadvantageous. Under *Wetzel v. Wetzel*, 35 Wis.2d 103, 110-11, 150 N.W.2d 482, 485-86 (1967), tax considerations are not controlling, but the court should consider and be aware of the tax consequences. While we do not find that the trial court erroneously exercised its discretion, we do suggest that the trial court may wish to consider these tax matters at the upcoming November

¹ Section 767.26(9), STATS., allows the court to consider “the contribution of one party to the education, training or increased earning power of the other.”

² See I.R.C. § 152(e)(1).

14, 1996, review of maintenance and make appropriate adjustments that the trial court may conclude are equitable.

B. Duration of support.

Kenton also argues that the trial court erroneously exercised its discretion by failing to limit the term of the family support. Kenton asserts that the term of support should be limited and the burden of proof should be on Nancy, and not him, to show that further support is necessary. The amount and duration of maintenance lies within the sound discretion of the trial court. *Bentz*, 148 Wis.2d at 403, 435 N.W.2d at 294. As the trial court noted, Nancy must make an effort to improve her employability. The trial court also stated that when it would reexamine the situation at the November 1996 hearing, it would look at both parties on a level playing field, with neither party having to carry a burden of proof. Given the factual findings of the court regarding the specific circumstances of both parties, we perceive no erroneous exercise of discretion in the trial court's setting of indefinite maintenance.

C. Per diem expenses.

Kenton contends that the trial court erroneously exercised its discretion when it assessed family support against his entire per diem reimbursement amount without considering actual expenses. This court has held that any per diems greater than actual expenses for which the per diems are designed to compensate must be considered gross income. *Stephen L.N. v. Kara L.H.*, 178 Wis.2d 466, 474-75, 504 N.W.2d 422, 426 (Ct. App. 1993). Under the record before this court, we see no consideration by the trial court of the actual expenses that the per diems compensate. Therefore, we reverse and remand for a hearing, which may be held on November 14, 1996, for the court to determine the adjustment to income for actual expenses.

D. Attorney's fees.

Kenton asserts that the trial court erroneously exercised its discretion by ordering him to pay \$325 towards Nancy's attorney's fees for the

hearings held on November 9, and 14, 1994, because the agreement executed on May 12, 1994, provided that each party pay his or her own attorney's fees for the divorce. The agreement provides that "[e]ach party shall be liable for their own attorney's fees and costs in connection with this action, no contribution being required of either party." The trial court found that the agreement was fair and reasonable, approved it, and incorporated it into the judgment which was entered August 17, 1994. The hearings held in November 1994 were in connection with the divorce action and are governed by the terms of the agreement regarding attorney's fees. Neither party moved for relief from the judgment. *See* § 806.07, STATS. The trial court did not vacate the judgment as to attorney's fees, which is a prerequisite for it to have the power to deviate from the agreement which was incorporated into the judgment. We therefore conclude that the trial court was without competency to act on the issue of attorney's fees in its February 27, 1995 order. *See Brandt v. LIRC*, 160 Wis.2d 353, 366-67, 466 N.W.2d 673, 678 (Ct. App. 1991), *aff'd*, 166 Wis.2d 623, 480 N.W.2d 494 (1992). That portion of the order directing Kenton to pay \$375 towards Nancy's attorney's fees is hereby reversed.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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