



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT IV**

October 30, 2019

To:

Hon. William V. Gruber  
Circuit Court Judge  
311 S. Center Ave.. Rm. 115  
Jefferson, WI 53549

Cindy Hamre Incha  
Clerk of Circuit Court  
Jefferson County Courthouse  
311 S. Center Ave., Rm. 115  
Jefferson, WI 53549

Thomas J. Monogue  
Monogue Law Office, S.C.  
227 S. Main St.  
P.O. Box 28  
Jefferson, WI 53549-0028

Vicki Zick  
Zick Legal LLC  
P.O. Box 325  
Johnson Creek, WI 53038

You are hereby notified that the Court has entered the following opinion and order:

---

2018AP2422

Troy Green v. Kathy Green (L.C. # 2017FA455)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Troy Green appeals a divorce judgment that awarded maintenance to Troy's ex-spouse, Kathy Green.<sup>1</sup> Troy contends that the circuit court erred by including fifty percent of his future per diem payments and bonuses in the maintenance award and by setting maintenance for an indefinite term. Based upon our review of the briefs and record, we conclude at conference that

---

<sup>1</sup> Because the parties share a surname, we refer to them by their first names for ease of reading.

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>2</sup> We summarily affirm.

Troy and Kathy were married in August 1993. Troy petitioned for divorce in November 2017. The parties stipulated to the terms of the divorce except for maintenance. After a court trial on the disputed maintenance issue, the circuit court awarded maintenance to Kathy for an indefinite term, and the award included fifty percent of Troy’s future per diem payments and bonuses.

WISCONSIN STAT. § 767.56 authorizes maintenance payments and sets forth factors for a circuit court to consider in determining the amount and duration of a maintenance award. The factors are meant to ensure a fair and equitable financial arrangement that will provide for the support of the payee and account for the ability of the payer to pay. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 32–33, 406 N.W.2d 736 (1987). “[T]he goal of maintenance is to provide support at pre-divorce standards,” keeping in mind that while “[t]he increased expenses of separate households may prevent the parties from continuing at their pre-divorce standard of living, ... both parties may have to bear the sacrifices that the cost of an additional household imposes.” *Id.* at 35. Ultimately, “[t]he determination of the amount and duration of maintenance is entrusted to the sound discretion of the circuit court,” and will not be disturbed unless the circuit court erroneously exercised its discretion. *Id.* at 27. A discretionary decision will be upheld if it is “the product of a rational mental process by which the facts of record and law

---

<sup>2</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

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).

Troy argues that the circuit court erred by awarding fifty percent of his future per diem payments to Kathy as part of the maintenance award. He cites *Stephen L.N. v. Kara L.H.*, 178 Wis. 2d 466, 474-75, 504 N.W.2d 422 (Ct. App. 1993), for the proposition that per diem payments are counted as gross income only in the amount not offset by actual expenses. Troy points to his testimony that he receives per diem payments only when he is assigned to work out of town, and argues that only the amount of his per diem payments not offset by actual expenses should have been considered as gross income.

Kathy responds that Troy failed to argue in the circuit court that his per diem payments should be offset by actual expenses. See *Sprangers v. Greatway Ins. Co.*, 182 Wis. 2d 521, 544-45, 514 N.W.2d 1 (1994) (“The general rule is that issues not raised in the circuit court will not be considered for the first time on appeal.”). In reply, Troy essentially concedes that he did not argue in the circuit court that his per diem payments should be offset by his actual expenses in determining his gross income available for maintenance. Rather, he argues that the general rule that this court will not address issues raised for the first time on appeal is not absolute. See *id.* at 545. He points out that this court may choose to address a question of law that has been briefed by the parties, even if the issue was not raised in the circuit court. See *id.* He contends that the question of whether per diems should be included in gross income is a question of law. See *Stephen L.N.*, 178 Wis. 2d at 472 (stating that the question of whether per diems are included under the definition of “gross income” in the administrative code governing child support is a question of law).

We are not persuaded to reach the unpreserved issue of whether Troy has actual expenses to offset his per diem payments. The parties do not dispute the legal standard set forth in *Stephen L.N.* that per diem payments actually realized are considered gross income in the amount not offset by actual expenses. Rather, Troy argues for the first time on appeal that he has actual expenses that offset his realized per diem payments. Because the circuit court did not have the opportunity to consider whether Troy has expenses that offset his per diem payments, we will not consider that claim for the first time on appeal.

Next, Troy contends that the circuit court erred by awarding fifty percent of his future bonuses to Kathy as maintenance. He contends that the court should have limited the amount of bonus money that Troy is obligated to pay to Kathy to an amount necessary to help Kathy enjoy a standard of living similar to that which she enjoyed during the marriage. See *Johnson v. Johnson*, 225 Wis. 2d 513, 519, 593 N.W.2d 827 (1999) (“A payee spouse is not entitled to maintenance allowing a lifestyle above and beyond the predivorce standard of living.”). Troy argues that, should he receive an exponential bonus, Kathy will receive maintenance far beyond the amount necessary to maintain her predivorce standard of living.

Kathy responds that the award of fifty percent of Troy’s bonuses was appropriate because Troy’s bonuses are unpredictable. See *Hefty v. Hefty*, 172 Wis. 2d 124, 132-33, 493 N.W.2d 33 (1992) (holding that use of percentage for maintenance award may be preferable if payer’s income fluctuates, because “[w]hen a court sets a percentage award, a subsequent increase or decrease in the payer’s income results in an automatic adjustment”). Kathy contends that the percentage award does not result in excessive maintenance, but was based on the circuit court’s reasonable consideration of the length of the marriage and the parties’ lifestyle around the time of the divorce. See *id.* at 134 (“[A] reasonable maintenance award is measured not by the

average annual earnings over the duration of a long marriage but by the lifestyle that the parties enjoyed in the years immediately before the divorce and could anticipate enjoying if they were to stay married.”) (quoted source omitted). In reply, Troy clarifies that he does not dispute the circuit court’s decision to award a percentage of his bonuses as maintenance. He specifies that his contention is only that the circuit court failed to set a limit on the amount of maintenance that Kathy may receive from Troy’s bonuses, and reiterates his argument that a dramatic increase in his bonuses may result in excessive maintenance to Kathy.

We conclude that the circuit court properly exercised its discretion by awarding Kathy fifty percent of Troy’s future bonuses. “[A] court may ... set a flexible percentage award which will take into account any post-divorce increases which the parties could reasonably anticipate. Thus, a court may decide maintenance based on the amount and nature of the income at the time the divorce is granted.” *Id.* Here, Troy testified that he had received bonuses the last two years and that his most recent bonus was \$6,000. The circuit court determined that a maintenance award that included fifty percent of Troy’s future bonuses was reasonable, considering the length of the marriage, the disparity in the parties’ incomes, the contributions of Kathy to the advancement of Troy’s career, and the need to support Kathy at a level enjoyed just before the time of divorce. *See* WIS. STAT. § 767.56(1c). While Troy speculates that his bonuses may dramatically exceed the parties’ expectations, he does not point to any evidence suggesting that a dramatic increase in Troy’s annual bonuses may occur. In fact, Troy testified that he does not receive bonuses every year and that the bonuses are not guaranteed. Moreover, Troy may seek modification of the maintenance award in the future if a dramatic increase in his actual bonuses amounts to a substantial change in circumstances. *See Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452.

Finally, Troy contends that the circuit court erred by setting maintenance for an indefinite term. He contends that he testified that he intended to retire in about four years, at age sixty-two, and that the indefinite maintenance award unfairly forces him to obtain court approval before he may retire. He points out that “[t]here is no rule of law in Wisconsin stating that a recipient spouse is entitled to one-half of the other’s salary for the rest of his or her life.” *See Johnson*, 225 Wis. 2d at 520 (quoted source omitted). He contends that the indefinite maintenance did not serve the fairness objective as to either party, because it prevents them from planning definitively for retirement based on a known end date of maintenance.

Kathy responds that the circuit court properly exercised its discretion by considering the statutory factors in determining that an indefinite award of maintenance was appropriate. Kathy also points out that the circuit court explicitly stated that Troy may seek to modify or terminate maintenance as circumstances warrant. In reply, Troy argues that the court has now disapproved his stated plan to retire at age sixty-two and that he is unfairly tethered to the court for any future retirement plans. He again asserts that neither he nor Kathy can effectively plan for retirement without a known end date for maintenance.

We conclude that the circuit court properly exercised its discretion by setting maintenance for an indefinite term. The court determined that, considering the fairness and support objectives, an indefinite award of maintenance was appropriate. The court considered the length of the marriage, Kathy’s contributions to Troy’s career advancement, their wage disparities, and the need to allow Kathy to continue at a standard of living comparable to that enjoyed just before the time of divorce. *See WIS. STAT. § 767.56(1c)*. The court also specifically noted that Troy could seek to modify or terminate maintenance if circumstances changed, thus taking into account the possibility that Troy would retire in several years and that a change to

maintenance may then be necessary. Because the circuit court considered the relevant law and the facts of record to reach a reasonable result, we perceive no erroneous exercise of discretion in the court's setting indefinite maintenance.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

---

*Sheila T. Reiff*  
*Clerk of Court of Appeals*