

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 27, 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(1), 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. 95-2260

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

In re the Marriage of:

PATRICIA FROSTMAN,

Petitioner-Respondent,

v.

KENNETH R. FROSTMAN,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Ashland County:
NORMAN L. YACKEL, Judge. *Affirmed in part and reversed in part.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Kenneth Frostman appeals a judgment of legal separation, claiming that the trial court erroneously exercised its discretion with respect to: (1) the award of maintenance to his former wife, Patricia Frostman; (2) the award of the residence to Patricia; and (3) the imposition of a "penalty" when he exercises his right to convert the legal separation to a divorce decree. We conclude that the record reflects a reasonable basis for the maintenance award of \$400 per month to Patricia, as well as for the award of the residence to

her. Because the record does not demonstrate a reasonable basis for an automatic increase upon conversion of the decree to one of divorce, we affirm in part and reverse in part.

The parties were married in 1959. At the time of their legal separation, Patricia was fifty-eight and Kenneth was sixty-three years of age. Their children had reached the age of majority. Patricia works as a part-time secretary at James River Corporation, and in 1994 her gross annual income was \$2,745.55 and \$2,202.64 net. She also earned in 1994 a total of \$766.61 as secretary of the board at Marathon Credit Union. Edward Utities, a vocational expert, testified that Patricia's earning capacity was approximately \$3,440 per year. Jack Casper, also a vocational expert, testified that her earning capacity was between \$7,800 and \$11,700 annually.

Kenneth, who retired after thirty-four years at James River, receives a social security disability check for \$1,056 per month. He also is eligible for a pension from James River, that pays \$766.79 per month. When Kenneth retired, he elected the joint survivor option, which means that if Patricia survives Kenneth, she receives one-half the amount of the pension for her life. As a result, he receives \$104.17 per month less in pension than he would have otherwise received.

Patricia testified that she has high blood pressure and heart arrhythmia, related to stress. Kenneth, a machinist by training and experience, has had several back surgeries and a fusion and has been determined disabled by the Social Security Administration.

The parties stipulated the value of their residence to be \$70,750. The parties also own a cabin that the court valued at \$30,000.

Kenneth testified that his monthly expenses were \$1,502. Patricia testified that her monthly expenses were \$1,380, which included \$223.91 for health insurance and \$350 for food. She testified that her two sons live with her and contribute \$100 apiece each month for food.

If the parties divorce, Patricia is not eligible for the health insurance coverage from James River, but, if legally separated, she will continue to be covered. The premium is currently \$223.91 per month.

The trial court found that the parties' combined monthly income totaled \$1,303.43, consisting of Kenneth's social security disability income of \$1,056 per month and Patricia's net earnings from James River of \$183.55 and Marathon Credit Union of \$63.88. The trial court equally divided Kenneth's pension from James River by means of a Qualified Domestic Relations Order and for that reason did not include the pension in its calculation of monthly income.

In its written decision, the trial court concluded that the parties' combined income should be equally divided. It ordered Kenneth to pay Patricia \$400 per month as maintenance and ordered that in the event he elects to change the legal separation to a divorce judgment, his maintenance obligation shall increase to \$515 per month. Patricia was awarded the residence, and Kenneth was awarded the cabin. Other items of personalty were divided to effectuate an equal property division.

Kenneth first challenges the maintenance award. He argues that the trial court incorrectly understated Patricia's gross income; it failed to articulate its rationale in granting Patricia maintenance; its award does not reflect its intent to award Patricia one-half the parties' combined total income; the court failed to consider Patricia's earning capacity; it failed to consider the parties' relative ages and health; it failed to consider the effect of the property division; and failed to consider Patricia's asset-generating income. We conclude that the record discloses a reasonable exercise of discretion and affirm the maintenance award.

Maintenance is addressed to trial court discretion. *Hefty v. Hefty*, 172 Wis.2d 124, 134, 493 N.W.2d 33, 37 (1992). We affirm the trial court's discretionary decision if it reflects a reasoned approach based upon proper consideration of law and articulates reasons for its conclusion. *Enders v. Enders*, 147 Wis.2d 138, 142, 432 N.W.2d 638, 640 (Ct. App. 1988). Maintenance furthers two distinct objectives: support and fairness. *Id.* In reaching these objectives, the trial court is to consider the relevant factors set out in § 767.26, STATS., on a

case-by-case basis. *Kennedy v. Kennedy*, 145 Wis.2d 219, 223, 426 N.W.2d 85, 87 (Ct. App. 1988).

Here, the record discloses a reasonable exercise of trial court discretion. The trial court observed that during the thirty-four-year marriage, Kenneth worked outside the home while Patricia was for the most part a homemaker with limited work experience outside the home. It noted that her gross income for the past few years approximated \$3,000 per year. It concluded that one-half the parties' combined total income of \$1,303.43 equaled \$651.71. These findings are not clearly erroneous. See § 805.17(2), STATS. That figure, reduced by Patricia's monthly income, supports the \$400 per month maintenance award.

We conclude that the record discloses a reasonable basis for using Patricia's net income instead of her gross income. Patricia testified that Kenneth pays no income tax on his social security disability income. Consequently, we conclude that it was reasonable for the court to use Patricia's after tax earnings to calculate maintenance. We further conclude that the court adequately articulated its rationale. The trial court considered the length of the marriage, the parties' ages and Kenneth's disability. These are appropriate factors. Section 767.26, STATS.

The court further considered that Patricia earned approximately \$3,000 per year. The court was not required to accept the vocational expert's testimony that her earning capacity was substantially higher, especially since another expert gave conflicting testimony. We defer to the trial court's assessment of weight and credibility of evidence. Section 805.17(2), STATS.

We further conclude that the court's silence with respect to the effect of the property division and Patricia's income generating assets is not reversible error because the court effectuated an equal property division and both parties were awarded income generating liquid assets. The divorce judgment shows that Kenneth was awarded two IRA's valued at \$7,061 and \$18,340 respectively, as well as two bank accounts valued at \$5,434 and \$10,640 respectively. In addition, Patricia was ordered to pay Kenneth cash to balance the property division in the sum of \$5,025.50. Although Patricia received \$12,000 in savings bonds not subject to division, Kenneth does not tell us what income this asset is capable of generating. In addition, Patricia's receipt of \$100

per month from each of her sons was offset by the expense of household groceries. Because the maintenance determination reflects a reasonable exercise of discretion, we sustain it on appeal.

Next, Kenneth argues that the trial court misused its discretion when it awarded Patricia the residence. He does not dispute that the property division was equal, but contends that his reasons for desiring the house were more compelling than Patricia's. For example, he argues that he built the house himself and has emotional and practical reasons associated with retirement activities and his disability. He argues that the trial court erroneously premised its decision on the erroneous finding that his sister lives next door to the Iron River cabin. He states that his sister owns the cabin next door but does not live there. He further contends that Patricia's reasons for wanting the house, relating to her now deceased mother and social and church activities, did not relate to that particular house but to living in Ashland in general.

The award of a marital asset is particularly within the discretion of the trial court. *Ably v. Ably*, 155 Wis.2d 286, 289, 455 N.W.2d 632, 633 (Ct. App. 1990). "[W]hen a matter is committed to the discretion of the trial judge for determination, the judge has an appreciable latitude of choice of possible decisions, that he has the duty carefully to weigh the data before him, and to render a decision which he conscientiously thinks will promote the ends of justice." MCELROY, SOME OBSERVATIONS CONCERNING THE DISCRETIONS REPOSED IN TRIAL JUDGES BY THE AMERICAN LAW INSTITUTE'S CODE OF EVIDENCE, MODEL CODE OF EVIDENCE 360 (1942).

Here, Kenneth does not argue that the trial court had no reasons for his decision, only that his reasons are better. We conclude that the trial court's recitation of its rationale, including that Patricia wanted to live near the hospital due to her heart problem, that her job is in Ashland, and that both parties clearly had an emotional attachment to the house, making it a difficult decision for the trial court, set out a reasonable basis for its decision. We will not disturb its determination on appeal.

Finally, Kenneth challenges the court's decision to raise maintenance to \$515 per month if he elects to convert the legal separation to a divorce decree. The trial court based its decision on Patricia's anticipated increased expenditure of health insurance premiums. We conclude that the

court's decision, while taking into account increased future needs of Patricia, failed to take into account Kenneth's future ability to pay. Kenneth testified that his monthly expenses were \$1,502. His monthly income, consisting of \$1,056, social security disability, and \$383 pension payment, will be reduced by the \$400 monthly maintenance payment to Patricia. Also, the parties' future economic circumstances are unpredictable. Consequently, the analysis did not comport with the fairness component required by *LaRocque v. LaRocque*, 139 Wis.2d 23, 32-33, 406 N.W.2d 736, 740 (1987). A misapplication of the law amounts to an erroneous exercise of discretion. *State v. Hutnik*, 39 Wis.2d 754, 763, 159 N.W.2d 733, 737 (1968). As a result, we overturn the trial court's order that automatically increases maintenance without an examination of the parties' circumstances at the time of the increase. We observe that in the event either party's financial circumstances change, requiring an adjustment in maintenance, the trial court may address the issue in the future pursuant to § 767.32, STATS.

By the Court. – Judgment affirmed in part and reversed in part. No costs awarded on appeal.

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