

**COURT OF APPEALS
DECISION
DATED AND FILED**

OCTOBER 21, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 96-3109

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

CHARITA S. C.,

PETITIONER-RESPONDENT,

v.

TOMMY S. C.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

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

PER CURIAM. Tommy S. C. appeals a judgment of divorce. He challenges the trial court's determinations regarding visitation and the awards of maintenance, property division and attorney fees. Because the record discloses that the trial court reasonably exercised its discretion, we affirm the judgment.

At the time of the divorce judgment, Tommy was thirty-five years old, and his former wife, Charita S. C., was thirty-nine. Tommy had a bachelor of science degree from West Point and a master's degree in education from the University of Georgia. He had been in military service for ten years, obtaining the rank of captain. Charita had twelve years of schooling and obtained a GED. She was not employed outside the home during the marriage.

The parties had married in 1985 and resided in Tennessee, where they later divorced. In 1994, they reconciled, set aside the divorce decree and entered into an agreement concerning property rights and support. After moving to Wisconsin, Charita initiated this action for divorce. The parties' one child was born in 1991.

The trial court found that Charita was a homemaker with no monthly income. Tommy was employed as a shift supervisor at American National Can Company and earned an average of \$4,500 per month. Charita was granted sole legal custody and primary physical placement of the child. The court further ordered that prior to any visitation taking place, Tommy was to be evaluated by a psychologist to determine whether he had any pedophilic tendencies or other sexual dysfunctions that may endanger the child. The child's therapist or her designee was ordered to supervise Tommy's visits with his daughter, limited initially to one hour per week. The visits could be expanded up to two and one-half hours per week with therapist approval.

As for child support, the trial court ordered Tommy to pay 17% of his gross income. The court awarded maintenance to Charita in the sum of \$1,150 per month for a period of six years. The court ordered Tommy to

contribute \$3,600 attorney fees to Charita's attorney. The trial court also entered a detailed property division that will be described more fully below.

1. Visitation

Tommy argues that the trial court erroneously ordered the child's therapist, Connie Livingston-Dunn, to perform a six-month review to determine whether visitation should be increased. Tommy contends that this was error because Livingston-Dunn exhibited bias by concluding that he had abused his child, even though she had never met him. We review custody and placement issues to determine whether the trial court reasonably exercised its discretion. *Wiederholt v. Fischer*, 169 Wis.2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992). Underlying a trial court's discretionary decision may be issues of fact. We defer to a trial court's factual findings, reversing them only if they are clearly erroneous. Section 805.17(2), STATS. We conclude on the record before us the trial court reasonably exercised its discretion.

At the divorce trial, Gillian Halliday, a family court worker, presented her report with respect to the issues of custody and physical placement. She testified that the parties' child had been diagnosed with chronic posttraumatic stress disorder. The child was referred to a psychiatrist and placed on medication due to symptoms that included tantrums, hitting herself in the face and pulling her own hair. The symptoms worsened, and the child was pinching and choking herself and refusing to leave the house. She was eventually hospitalized at the Vanderbilt Psychiatric Hospital in July 1995.

Halliday testified that she met with Tommy four times and that he had told her that he was a sexual addict. She testified that a sexual addict uses sex to dull emotional pain and, when stress builds up, a person with a sexual addiction

will sexually act out. Tommy has been in treatment for sexual addiction, having participated in a twelve-step program. Halliday was also aware of Tommy's diagnosis as having a compulsive behavior disorder. Halliday had not personally met with Charita, but reviewed the Tennessee department of human services home study.¹

Halliday testified that after the child's visit with her father in May of 1996, Charita reported that the child was upset, did not want to go to school and that things were very difficult for a few days after. Halliday testified, however, that "even with children who are abused, they need to have a relationship with the person who abused them in order for them to do their own psychological work in order to get better."

Livingston-Dunn testified that she was a therapist at the Rape and Sexual Abuse Center in Nashville, and worked in the area of child sex abuse for about ten years, having previously worked for Lutheran Social Services in Illinois as a case manager. Livingston-Dunn testified that she began seeing the child in December of 1994, when the child was three and one-half years old, after she had been displaying upsetting behaviors. She testified that on numerous occasions, the child told Livingston-Dunn that her father was mean and "daddy ... sucked her 'peepee.'" She testified that the child is afraid of her father and does not want to see him.²

¹ Charita and the child moved back to Tennessee after the divorce was filed.

² Tommy testified that his attempts to visit his child have been frustrated because there is a warrant out for his arrest in the state of Tennessee where the child lives.

The court received into evidence a summary of therapy sessions with the child at the Rape and Sexual Abuse Center containing an assessment of the sexual assault allegations. The assessment concluded that the child described, as well as demonstrated with puppets and dolls, sexual acts she stated her father did to her. It reported that the acts are not of any type that would have been within her developmental level. The assessment further concluded that the child met none of the criteria for being coached and had numerous symptoms of a child who has been sexually abused. It noted that with therapy, the child has shown improvement, but that after a visit with her father, her symptoms escalated.

Tommy has not been treated for sexual abuse and has not admitted the alleged crime, nor has he been prosecuted.³ Livingston-Dunn has never met Tommy, but had a five- to ten-minute telephone conversation with him.

Livingston-Dunn testified that visits between perpetrators and victims need to follow a structured protocol. Both must be in therapy, and the victim needs to feel safe and want to see the perpetrator. Safeguards must be in place during visits by having the child's therapist at initial visits for at least six months to observe behaviors and to ensure the child's safety. The supervisor should be familiar with the child and her behaviors. Also, the supervisor must be aware of the perpetrator's inappropriate behaviors.

Livingston-Dunn testified that she had been working with the child long enough to be familiar with her behavior and that the child feels safe with her. She recommended that there be no visits between the child and Tommy.

³ At trial, Tommy denied that he was a sex addict, and testified that he has been in counseling over the years to "deal with my emotions in productive ways other than acting out and doing sexual activities, and to also learn to establish boundaries in all of my relationships."

Nonetheless, she would be willing to serve as supervisor in the event visits were ordered by the court.

The guardian ad litem recommended supervised visitation through Livingston-Dunn or other professionals for at least three visits, at which time they could continue through the department of human services in Tennessee. After a six-month period, either party could apply to the court to have the matter reviewed. The guardian ad litem acknowledged that he had not interviewed the child personally because the child and her mother had moved back to Tennessee during the pendency of the divorce. However, he stated that even if Tommy denies the assault occurred, "I don't believe that Miss Livingston-Dunn and the records I have reviewed are fictitious."

The trial court found that the guardian ad litem and other professionals believe that Tommy sexually assaulted his daughter and that Tommy denies that it occurred. The court also stated that it believes Tommy sexually assaulted his child based upon review of all the evidence in this case and assessment of the credibility of all witnesses, including the reports of the child's statements and symptoms. In ordering supervised visitation, the trial court ordered that Livingston-Dunn complete a review no sooner than six months and no later than fifteen months from the date of the hearing.⁴ No objection to that order appears on the record at the time of the hearing.

⁴ The judgment provides: "The Court further orders that a review of the respondent's physical placement shall be conducted no sooner than 6 months from July 2, 1996 and no later than 15 months after July 2, 1996. The Guardian Ad Litem of the minor child, Attorney Richard Bollenbeck, may request the review; and Connie Livingston-Dunn shall complete the review of the minor child."

Tommy refers us to Halliday's testimony, wherein she stated that she would object to Livingston-Dunn's reviewing and determining additional visitation because she considered Livingston-Dunn to be biased, "because [Livingston-Dunn] believes Tommy did abuse his daughter." She acknowledged that Livingston-Dunn had been the child's therapist for the last one and one-half years, and that the child had a good relationship with her therapist. Halliday was aware of the sexual assault allegations, but did not know whether they had in fact occurred. She recommended the six-month review be conducted by the guardian ad litem or the family court program.

We conclude that the trial court reasonably exercised its discretion under § 767.24(5), STATS., when it ordered that Livingston-Dunn prepare the review. The judgment does not imply that it limits evidence that Tommy may present to the court at the time of the review. There is no dispute that Livingston-Dunn is a qualified therapist and has a good relationship with the child. Tommy's alleged claim of bias stems only from Livingston-Dunn's belief that Tommy sexually abused his daughter. However, the trial court made the factual finding that Tommy sexually assaulted his daughter. Nowhere in his appellate brief does Tommy specifically attack this finding as clearly erroneous.⁵ Upon review of the record, we are satisfied that the court's ruling would withstand such an attack.

Tommy's claim of bias is based solely upon Livingston-Dunn's belief that sexual abuse occurred, but this belief is consistent with that of the guardian ad litem and the trial court's findings. Also, although Halliday testified

⁵ Throughout his appellate brief, Tommy refers to unproven allegations of misconduct. He does not, however, refer directly to the trial court's finding that it believed he sexually assaulted his daughter, nor does he challenge the sufficiency of the evidence to support the finding.

that she had no belief whether the sexual assaults occurred, she concluded that it was in the child's best interests to proceed as if they had occurred, based upon the nature of the child's symptoms and allegations. We conclude that Tommy's claim that the trial court erroneously exercised its discretion by appointing an allegedly biased individual to perform the review is meritless.

2. Maintenance

Tommy challenges the trial court's maintenance determination. He argues that the court failed to consider proper factors and punished him for misconduct. The trial court is vested with broad discretion in ordering maintenance. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). We conclude that the record discloses the trial court reasonably exercised its discretion.

The court first considered that the marriage was of eleven years' duration, that it was Tommy's wish that his wife not work, and that while in the military Tommy had work experience resulting in job advancement. It found that Charita was primarily providing for their child's care and rearing, "to the detriment of her ability to become employed and to get an education to better herself." The court found that Tommy's income is \$54,000 per year and that he had the ability to pay maintenance. The court further found that their child had "special needs" and that Charita will have to pay for additional care "as a result of the criminal acts" that Tommy perpetrated.⁶ In addition, the court determined that the child will need extra time from her mother for nurturing and rearing.

⁶ The trial court recognized that Tommy was not prosecuted criminally, but that the acts in question were of a criminal nature.

The court also considered that Charita was nearly forty-years-old, was able to secure some part-time employment at a minimum wage and imputed that income to her. It also found that she desired further education and, "with an ambitious plan, she might be able to get her degree in four years and then find employment." The court ordered monthly maintenance of \$1,150 for a term of six years.

Section 767.26, STATS., lists a number of factors to consider when determining the amount and duration of maintenance. They include: the length of the marriage, the parties' age and emotional health, their educational levels, the contribution of one party to the education or earning capacity of the other, and property division. Limiting the term of maintenance serves several functions, such as allowing the recipient to pursue training and education and seek employment. *LaRocque v. LaRocque*, 139 Wis.2d 23, 41, 406 N.W.2d 736, 743 (1987). "Because limited-term maintenance is relatively inflexible and final, the circuit court must take particular care to be realistic about the recipient spouse's future earning capacity." *Id.* It must "not prematurely relieve a payor spouse of a support obligation lest a needy former spouse become the obligation of the taxpayers." *Id.*

Here, the record discloses that the trial court reasonably considered appropriate factors under § 767.26, STATS., to determine that Charita was entitled to maintenance. In view of the parties' respective incomes, Tommy's \$4,500 per month and Charita's imputed part-time minimum wage, maintenance of \$1,150 per month is reasonable. Tommy challenges Charita's budget; however, we are satisfied that the record demonstrates her needs were commensurate with the award. The court weighed Charita's child care responsibilities with the desire that she eventually become self-supporting. It was reasonable for the trial court to

infer that the demands of being the child's primary caretaker would delay her educational and employment goals. Thus, the six-year limited term was reasonable.

Tommy complains that the trial court improperly considered his "alleged marital misconduct." The record fails to bear out his contention. The trial court considered that Charita will have additional expenses and time demands as a result of the child's special needs, caused in some degree by Tommy's criminal conduct. The court was entitled to consider the additional expenses and time demands as they affect Charita's expenses and earnings.

Tommy also complains that he is left with only \$1,567 disposable income per month and, assuming a 17% child support award and imputed part-time minimum wage, Charita is left with \$2,016 per month. Tommy contends that this violates the equalization of income principle enunciated in *LaRocque*. We disagree. Charita's monthly income includes child support, and her expenses include the cost of living for two people, in contrast to Tommy's expenses solely for himself. The maintenance award does not violate the fairness principle enunciated in *LaRocque*.

Tommy further complains that the trial court failed to consider his work ethic and the property division. We conclude that the trial court's failure to expressly mention these two specific factors does not result in reversible error. It is evident from the court's discussion that it relied on the factors it considered most important and did not discuss factors that it gave less weight. A proper exercise of discretion involves a reasoned approach, not a mechanistic one. *Id.* at 27, 406 N.W.2d at 737. Here, the trial court approached maintenance "based upon the facts appearing in the record and in reliance on the appropriate and applicable

law." *Hartung*, 102 Wis.2d at 66, 306 N.W.2d at 20. The record demonstrated a consideration of proper factors and achieved a "reasoned and reasonable determination." *Id.*

3. Property Division

Tommy argues that the trial court failed to consider proper factors in dividing the property and based its decision on suspicions rather than factual findings. We disagree. The trial court has broad discretion to distribute property in a divorce. *See Lang v. Lang*, 161 Wis.2d 210, 217, 467 N.W.2d 772, 774 (1991). The trial court is to presume an equal division, but may alter the division without regard to marital misconduct based upon the factors enumerated in § 767.255, STATS.

Tommy first challenges the trial court's decision to award to Charita the party's residence, valued at \$53,100 and carrying a mortgage in the sum of \$48,824. In so doing, the court considered the parties' marital agreement that titled the property in Charita's name, but gave it little weight. *See* § 767.255(3)(L), STATS. More weight was given to the parties' disparate earning capacities, and Tommy's withdrawal of approximately \$49,000 from his retirement plan without entirely accounting for it to the court's satisfaction. Section 767.255(3)(c), STATS. The court also considered the fact that Tommy had given approximately \$1,000 to his father to buy some timberland, yet there was insufficient evidence to determine ownership of the timberland. *See* § 767.255(3)(m), STATS. The court expressed its dissatisfaction with the questionable nature of these financial transactions in that they had a negative impact on the extent of the marital property subject to division. In addition, the trial court considered the desirability of awarding the home to the party having the greater periods of physical placement. Section

767.255(3)(h), STATS. The court also considered Charita's responsibility for paying the mortgage for many years. These are proper factors. The record discloses a reasonable exercise of discretion with respect to the award of the home.

Tommy argues that the trial court erroneously valued the residence. He contends that the residence is worth \$62,000, because three years ago it was purchased for \$55,900 and he thinks its value has gone up. This argument misses the mark. The trial court awarded the residence to Charita based upon factors other than its value. Further, Charita testified that she believed the property was worth \$53,100. A 1994 real estate tax bill showed the property valued at \$53,100. The trial court, not this court, assesses weight and credibility and resolves conflicts in testimony. *See Estate of Wolff v. Weston Town Bd.*, 156 Wis.2d 588, 598, 457 N.W.2d 510, 513-14 (Ct. App. 1990).

Tommy argues that the trial court mistakenly assumed that he benefited more from his retirement withdrawal. We disagree. The record supports the trial court's findings. There is no dispute that Tommy withdrew a substantial sum from his military retirement plan. Tommy claims the correct sum to be \$45,000. Charita testified that she used \$5,000 as a down payment on the home and that Tommy used \$10,000 to pay off their automobile loan. She testified that Tommy filed bankruptcy on his remaining debts. She further testified that Tommy did not disclose to her what he did with the remaining \$30,000. We conclude that Charita's testimony permits the inference that Tommy benefited from his retirement plan withdrawal.

Tommy further argues that the trial court erroneously valued the retirement withdrawal at \$49,000 instead of \$45,000. We disagree. The divorce judgment values the retirement withdrawal at zero. The trial court referenced the

retirement fund's value in a general way when awarding the residence to Charita, to demonstrate that Tommy had benefit of substantial funds while Charita did not. The equity in the home, even using Tommy's values, does not approach the unaccounted-for balance from the retirement withdrawal. The alleged discrepancy between the numbers does not prejudice Tommy in any discernible way.

Tommy further argues that the trial court mistakenly assumed Tommy had some interest in a camper and some land. We disagree. The trial court found that the evidence was insufficient to determine whether Tommy had some interest in a camper and the fifteen acres of land in South Carolina. The divorce judgment attributes zero value to these items. The court's reference was to Charita's testimony that Tommy gave his father money to buy some land, instead of taking care of family obligations.

Next, the trial court awarded the parties the household goods in their possession at the time of trial. Tommy argues that the trial court erroneously found that the household goods in Charita's possession were worth \$3,000 more than the ones in his possession. Charita claimed that the household goods were evenly divided and Tommy believed that the household goods in Charita's possession were worth \$6,000 more than those in his possession. Tommy argues that the trial court erred because it merely split the difference.

The record fails to support Tommy's claim of error. Tommy fails to suggest that the parties offered any evidence of value other than their own opinion. The trial court noted the meager record, stating: "So what I think the Court will do, then, in that particular situation, since I don't think either party proved their position one way or the other, is to split their difference." After some discussion, Charita's counsel asked: "So we put her at \$3,000.00 and put him at zero; that's

what it does?" The Court replied: "Essentially, yes." Tommy's counsel responded: "That's what I wanted you to do." In view of the record, we reject Tommy's claim that the trial court erroneously valued the household goods.

Next, Tommy argues that the trial court erroneously found that he "raided" the parties' checking account and investment account in contemplation of the divorce and awarded the accounts to him. We disagree. Charita filed the petition for divorce on October 27, 1994. She testified that on November 7, 1994, Tommy withdrew the entire balance of \$900 from the parties' joint checking account. Charita also testified that in August 1994, Tommy had withdrawn \$1,038 from their investment account and had the check sent to his place of employment. She testified that she has no knowledge of what happened to the funds.

Section 767.275, STATS., provides that any of the parties' assets valued at greater than \$500, which were transferred or otherwise unaccounted for within one year of filing the petition for divorce, shall be presumed to be part of the marital estate and accounted for. The trial court, as the arbiter of credibility, was entitled to reject Tommy's unsupported testimony that he used the money to pay rent and bills. We conclude that the trial court did not commit error when it awarded the funds to Tommy.

Next, Tommy argues that the trial court erroneously awarded him two lithographs valued at \$700 apiece, when he testified that he only wanted one. Tommy further objects to the court's valuation of the items, based solely on Charita's opinion of value. We are unpersuaded that the trial court committed reversible error. Tommy does not suggest that he offered any evidence to rebut Charita's opinion of value. "[A]n owner is competent to give opinion evidence as to the value of his own property." *Arneson v. Arneson*, 120 Wis.2d 236, 252, 355

N.W.2d 16, 23 (Ct. App. 1984). The trial court stated that the lithographs were "military oriented" and inferred that they would mean more to Tommy. The record discloses a reasonable exercise of discretion.

Finally, Tommy argues that the trial court's award of attorney fees should be reversed because the court failed to consider all relevant factors. We disagree. An award of attorney fees is addressed to trial court discretion. *Hennen v. Hennen*, 53 Wis.2d 600, 608, 193 N.W.2d 717, 721 (1972). The court must consider the financial resources of both parties. Section 767.262(1), STATS. The court must also consider the reasonableness of the fee. *Corliss v. Corliss*, 107 Wis.2d 338, 350-51, 320 N.W.2d 219, 224 (Ct. App. 1982).

In its written decision, the trial court stated that it had reviewed the billing and concluded that the fees were well documented. Under the circumstances, the court concluded, the substantial issues relating to maintenance, custody and child placement warranted extensive conversations between Charita and her attorney. The court found that the attorney fees indicated were reasonable. The exhibit to which the trial court referred shows an existing balance of \$6,918. The court reviewed the parties' financial statements and concluded that Charita was in a financial position that required a contribution to her attorney fees. The court also concluded that Tommy could afford to pay \$100 per month for thirty-six months as contribution to those fees. We conclude that the record reveals that the court exercised its discretion and the record provides a reasonable basis for its decision.

By the Court.—Judgment affirmed.

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

