

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 98-0535

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

JAMES E. PARRY,

**PETITIONER-RESPONDENT-CROSS-
APPELLANT,**

v.

JUDY A. PARRY,

**RESPONDENT-APPELLANT-CROSS-
RESPONDENT.**

APPEAL AND CROSS-APPEAL from a judgment of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Affirmed.*

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

PER CURIAM. Judy Parry appeals and James Parry cross-appeals a divorce judgment that awards Judy \$550 per month maintenance indefinitely.

Judy argues that the trial court improperly exercised its discretion by refusing to prospectively increase the maintenance when the children are emancipated, two years and four years after the divorce judgment, and by foreclosing Judy from using the children's emancipation as a changed circumstance. James argues that the trial court improperly exercised its discretion and made insufficient findings to support both the amount and the duration of the maintenance award. We reject these arguments and affirm the judgment.

All of Judy's arguments are based on her belief that the trial court's denial of prospective modification forecloses her from requesting an increase based on the children becoming emancipated. We do not read the trial court's decision to foreclose future modification on that basis. The court merely declined to prospectively increase maintenance as the children become adults. From the position James takes in his brief on appeal, he would be estopped from arguing that the issue has been foreclosed.

The trial court reasonably exercised its discretion when it declined to prospectively increase maintenance. While the court is allowed to anticipate changes that are certain to occur, *see Enders v. Enders*, 147 Wis.2d 138, 146, 432 N.W.2d 638, 641 (1988), it is not required to do so. Delaying a response to the children's emancipation will clarify Judy's earning capacity when she is not burdened with child care and will clarify the portions of her living expenses that are attributable to the children. The trial court's refusal to prospectively increase maintenance based solely on the children's emancipation was a valid exercise of its discretion.

The record supports the trial court's decisions on the amount and duration of maintenance. The parties had been married nineteen years and had

two daughters. James completed his education during the marriage. The parties jointly agreed that Judy would stay home and care for the children while they were small. At the time of the divorce, James earned \$56,160 per year, while Judy earned \$13,272.

Both the support objective and the fairness objective identified in *LaRocque v. LaRocque*, 139 Wis.2d 23, 32, 406 N.W.2d 736, 740 (1987), are advanced by the maintenance award. Judy's income from her jobs plus the maintenance amounts to less than \$20,000 per year. James's income less the maintenance award amounts to nearly \$50,000 a year. While James must pay child support of \$14,040 for two years and \$9,547 for two additional years, that money is presumptively necessary to pay child care expenses. Judy is also presumed to spend twenty-five percent of her income on the children. Even if the child support payments are subtracted from James's income, his income less child support and maintenance still exceeds Judy's income plus maintenance. In four years, the disparity would be greater.

A detailed examination of expenses is not necessary to determine that \$20,000 per year is necessary and reasonable to maintain a standard of living remotely comparable to that enjoyed during the marriage when the parties' joint income exceeded \$60,000 per year. In light of the nineteen-year marriage and the detriment to Judy's earning capacity that came from the parties' joint decision that she devote her energies to child care, the \$550 per month award is not unfair to James.

James argues that the trial court did not consider the tax consequences because the effect of the maintenance award will be to deny Judy the earned income tax credit she had been taking. The trial court reasonably

considered the fact that the maintenance payments are deductible to James and taxable to Judy. The trial court is not required to maximize the parties' tax credits when awarding maintenance.

James argues that the indefinite duration of the award is not justified. He correctly notes that payment of maintenance is not to be viewed as a permanent annuity. Rather, it is designed to maintain a party at an appropriate standard of living, until the party, exercising reasonable diligence, has reached a level of income at which maintenance is no longer necessary. *See Vander Perren v. Vander Perren*, 105 Wis.2d 219, 229-30, 313 N.W.2d 813, 818 (1982). The trial court considered Judy's desire to continue with her present jobs and distinguished her circumstances from those present in *LaRocque* in which the wife needed shorter term maintenance to fund her education. The trial court significantly cut the amount of Judy's maintenance from the fifty-percent of marital income presumed by *LaRocque* in light of her lack of ambition. If Judy had chosen to pursue further education to become self-supporting at a reasonable standard of living, James's maintenance obligation would have been much larger for a shorter time, assuming that Judy would ever succeed in becoming self-sufficient at a standard of living comparable to that enjoyed during the marriage.

This is not a situation in which Judy changed jobs to reduce her income at the time of the divorce. To the contrary, she added an additional job at the time of the divorce. While the trial court properly considered her "complacent outlook," it was required to allow her a choice of occupation for which she was suited and at which she was fairly and diligently working. *See Balaam v. Balaam*, 52 Wis.2d 20, 28, 187 N.W.2d 867, 871 (1971). The indefinite award of a relatively low amount of maintenance reasonably balances Judy's interest in

keeping the job she had during the marriage and the need to create an incentive for her to seek greater income.

By the Court.—Judgment affirmed. Neither party is awarded costs on appeal.

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

