

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-3244

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

BETTY L. SCHWARZ,

PETITIONER-APPELLANT,

v.

DONALD G. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Columbia County:
DANIEL S. GEORGE, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Vergeront and Deininger, JJ., and William Eich, Reserve
Judge.

¶1 PER CURIAM. Betty Schwarz appeals from the judgment divorcing her from Donald Schwarz. She claims the trial court erred by: (1) setting maintenance at \$2,000 per month instead of the \$5,000 per month she requested; (2) refusing to award her a 50% interest in a FirStar Insurance Trust; (3) refusing to award her \$141,127 in support she claimed was past due under a prior Marital Property Agreement (MPA); and (4) refusing to order Donald to contribute to her attorney fees. For the reasons discussed below, we affirm the trial court's decision on the trust and the MPA and its refusal to award Betty an interest in the trust or attorney fees, but reverse and remand on the maintenance issue.

BACKGROUND

¶2 Betty and Donald divorced after a twenty-year marriage that was a second marriage for both parties and produced no children. Donald was the primary wage earner throughout the marriage, although Betty also held a number of different jobs. Betty performed all of the housekeeping tasks such as cooking and laundry. Neither party contributed to the other's education. At the time of the divorce, Betty was sixty-three years old, in good health, and receiving \$437 per month in social security. Donald was sixty-five years old, suffering from cancer, and earning over \$200,000 per year from a family-owned insurance agency and his interest in a rental partnership. The parties had commenced and abandoned two prior divorce actions during the marriage. One of those actions had resulted in a MPA, signed in 1993, which divided the major assets of the parties. Under the MPA, Donald also agreed to assume certain support obligations for Betty. More detailed facts will be set forth in the discussion below.

STANDARD OF REVIEW

¶3 Maintenance and the valuation and division of the marital estate are both within the sound discretion of the circuit court. *See Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996); *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). Therefore, we will affirm maintenance and property division awards when they represent a rational decision based on the application of the correct legal standards to the facts of record. *See id.* An award of attorney fees is also within the trial court's discretion, and will not be altered on appeal unless the trial court erroneously exercises its discretion. *See Bisone v. Bisone*, 165 Wis. 2d 114, 123-24, 477 N.W.2d 59 (Ct. App. 1991). The trial court properly exercises its discretion when it states its reasons and bases its decision on law and the facts in the record. *See Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996).

ANALYSIS

Maintenance.

¶4 WISCONSIN STAT. § 767.26 (1997-98)¹ lists a number of factors for a trial court to consider when determining the amount and duration of a maintenance award, including the length of the marriage, the age and health of the parties, the property division, the parties' respective educational levels and earning capacities, the contributions of one party to the education or earning power of the other, tax consequences, and the standard of living enjoyed during the marriage. These factors "are designed to further two distinct but related objectives in the award of

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective).” *LaRocque v. LaRocque*, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987). Taken together, the support and fairness objectives generally require that even if “[t]he increased expenses of separate households may prevent the parties from continuing at their pre- divorce standard of living, ... [a] court must not reduce the recipient spouse to subsistence level while the payor spouse preserves the pre-divorce standard of living.” *Id.* at 35.

¶5 The trial court characterized the marriage in this case as one of “considerable length” in which the parties enjoyed an “affluent” lifestyle.² At the time of the final hearing, Donald was earning \$174,000 per year from the Schwarz Insurance Agency (based on a part-time work schedule), plus a number of fringe benefits including health insurance and a new car every two to three years, plus \$32,664 per year from his share of income from the Schwarz Rental Limited Partnership, for a total monthly income of \$17,222.³ Betty was receiving \$437 per month in social security benefits at the time of the divorce, but testified that she was planning to seek work. Although she said she did not believe that she could earn much more than minimum wage in the small town where she was living,

² We note that a common starting point for maintenance following a long-term marriage is to award the dependent spouse half of the total combined earnings of both parties. *See Bahr v. Bahr*, 107 Wis. 2d 72, 84-85, 318 N.W.2d 391 (1982). While the trial court is not necessarily compelled to use that mechanism for its maintenance determination, it would be helpful if it articulated why it chose not to do so.

³ The trial court excluded the \$32,664 from Donald’s annual earning capacity without mentioning it. We therefore assume the omission was an oversight, perhaps because Donald neglected to include the income on his financial disclosure statement. If the trial court had a specific reason for limiting Donald’s income to his salary from the insurance agency, it should explain that on remand.

given her age and lack of secretarial skills, the trial court determined that she had an annual earning capacity of between \$25,000 and \$30,000 based on her past work history.⁴ That finding is not clearly erroneous given Betty's testimony that she was still licensed to sell real estate and insurance.

¶6 Donald submitted a monthly budget of \$10,913, although that amount included payments for the lake house which was in the process of being sold. Betty submitted a monthly budget of \$5,865. As the trial court made no specific findings about the parties' monthly expenses, it would appear that it accepted these figures as given by the parties.

¶7 The trial court acknowledged that the substantial disparity in the parties' earning capacities favored maintenance, but cited Donald's health problems and the property division under the MPA in support of limiting the award to \$2,000. The trial court's discussion, however, does not fully explain why either of these two factors would justify allowing Donald, but not Betty, to meet monthly expenses and maintain a standard of living comparable to that enjoyed during the marriage.

¶8 It was reasonable for the trial court to consider the possibility that Donald's age and health would very likely lead him to retire in the near future. However, the court did not take into account that Betty was nearing retirement age herself, and we are unable to determine a reason for considering these future events for Donald but not Betty. In any event, because the trial court specifically

⁴ The trial court also mentioned, without quantifying, Betty's ability to earn rental income from the upper level of her duplex and her few remaining investments, without discussing the considerably greater amount of income which Donald would be able to generate from his other real estate and investments.

indicated that maintenance could be adjusted when and if Donald stopped drawing income from the insurance agency, these future events did not provide a reasoned explanation for limiting the amount of maintenance based on the parties' income and imputed income at the time of the final hearing.

¶9 With regard to the MPA, the trial court determined that the property division had been substantially equal and had "awarded to both parties considerable financial assets." The trial court went on to state that it was awarding maintenance "at the present rate of \$2,000 per month." Upon examining the record, it does not appear that \$2,000 per month was the amount of support due under the MPA.

¶10 The support due under the MPA included a \$6,000 annual payment and \$1,500 per month for a household account to cover food, personal care, and routine automobile expenses, *in addition to* payments for the mortgage, property taxes, utilities and routine maintenance of the parties' primary ("lake house") residence, maintenance fees on the parties' timeshare condominiums, an automobile for Betty and major automobile repair costs, insurance, health care, vacation, country club dues, and "other necessities consistent with a reasonable and appropriate standard of living for the family."

¶11 Donald testified that he was paying \$1,350 per month on the mortgages for the lake house. His financial disclosure statement indicated he was paying a combined \$963 per month in property taxes, insurance, utilities, and routine maintenance for the lake house and two other condos.⁵ The maintenance

⁵ While we recognize that Donald's support obligation under the MPA would not have extended to these condos, this figure provides a point from which to infer the amount which would have been due for the lake house.

fees for the timeshare condominiums, which the trial court determined were covered by the MPA from 1994 through 1998, average about \$133 per month. The payments for Betty's car were \$519 per month before Donald paid off the balance. The Schwarz Insurance Agency apparently paid the premiums for the parties' health insurance. Betty testified that it would cost her \$400 per month to obtain comparable insurance on her own, and listed another \$82 per month for health care related expenses in her budget. The vacation costs were disputed, but at a minimum would have included plane fares for the parties' trips, which Betty estimated averaged out to something in the neighborhood of \$150 per month. Betty also allotted \$278 per month for Badger basketball tickets, Madison Civic Center performances, newspapers, golf fees, dog care costs, and beauty salon costs, which would appear to fall within the category of other items reasonably consistent with the parties' standard of living.

¶12 When these expenses are added to the fixed household account payments, it would appear that Donald was obligated to provide more than \$5,000 worth of support to Betty each month under the MPA. Thus, the trial court's award of \$2,000 did not represent the "present rate" of maintenance, but rather constituted a substantial reduction from the amount which would have been due under the MPA — an amount which Donald agreed to provide in 1993 notwithstanding the considerable value of the assets which Betty had also been awarded at that time.

¶13 It appears, therefore, that the court misunderstood the amount Betty received each month under the MPA, and that this misunderstanding was a basis for the amount of maintenance it awarded. If, on the other hand, the court accurately understood what Betty received under the MPA, we are unable to discern the court's reason for setting maintenance at an amount which would allow

Donald, but not Betty, to maintain an “affluent” standard of living. We therefore conclude that this matter must be remanded for a redetermination of the maintenance. Because, given the retirement situation, it is possible that the situation of the parties has materially changed by this time, we leave it to the trial court’s discretion whether to accept additional evidence, hold a supplemental hearing on the issue, or redetermine the issue based on the original evidence presented.

FirStar Insurance Trust

¶14 The MPA called for an equal division of any interest either party might have in a FirStar Insurance Trust which was set up in 1979 for the benefit of Donald’s children. The trial court correctly determined that the asset was not available for division because it was an irrevocable trust in which neither party had any interest. Betty’s understanding of the nature of the fund at the time the MPA was drafted is not relevant because the trial court had no authority to award it to either party.

Past Support Due Under the MPA

¶15 Betty presented the trial court with an itemized list of all the obligations which she believed that Donald had failed to satisfy according to the terms of the MPA. These included \$47,650 in unpaid household account payments, \$10,031 in lease payments for her 1998 Chevy Blazer, \$23,000 to buy out the lease on the Blazer, \$31,200 for depreciation on her 1992 Oldsmobile, \$1,000 for gasoline, \$14,070 in maintenance fees for the timeshare condominiums, \$8,053 in airfares for vacations, and \$13,632 for other vacation expenses.

¶16 Donald admitted that he had not made all of the household account payments specified in the MPA. He explained, however, that he had offset the amounts due under the MPA for the household account against payments which he had made to satisfy Betty's tax obligations after she sold some real estate and withdrew funds from an IRA. Betty disputed Donald's tax analysis, but it was supported by Exhibits 16 and 21, as well as his testimony. We will not set aside the trial court's choice between conflicting evidence. The trial court reasonably found, based on the evidence, that Donald owed Betty only \$5,000 for household support payments, which he had deliberately withheld after she took all the furniture from the house.

¶17 Betty claimed that Donald should have replaced her 1992 Oldsmobile long before she went out and leased the Blazer on her own in 1998, since he himself generally had a new car every two to three years. The trial court, however, found that it was reasonable to replace the Oldsmobile as of the date of the final hearing, and ordered Donald to buy out the \$23,000 remaining on the lease for the Blazer. Implicit in its decision was a finding that the Oldsmobile was serviceable enough to satisfy Donald's obligation under the MPA up until that time. That finding was supported by testimony that the car had not needed any major repairs, and that Betty had usually replaced her cars every five to six years during the marriage. It was also reasonable for the trial court to determine that the MPA, which required Betty to pay for any car maintenance which was under \$100, did not require Donald to reimburse Betty for gas or depreciation based on mileage.

¶18 Donald conceded that he had not made all of the maintenance fee payments for all of the timeshare condominiums.⁶ He contended, however, that he should only be responsible for the fees on those condos which the parties had owned at the time the MPA was signed. The trial court agreed and awarded Betty \$7,714 for unpaid maintenance fees on the timeshare condos. Again, the trial court's decision was reasonably based on the facts of record.

¶19 Finally, Betty claimed that Donald should reimburse her for plane tickets and money spent on a number of vacations. Some of the vacations were trips she took herself, and others were trips she and Donald made together. Donald contended that he had reimbursed Betty for plane tickets on several occasions. While the evidence would also have supported a finding that Donald should have footed a greater portion of the vacation expenses than he did, we cannot say the trial court's determination of what expenses were reasonably required under the MPA was clearly erroneous. In sum, we are satisfied that the trial court made appropriate adjustments in the property division to fulfill the obligations set forth in the MPA.

Attorney Fees

¶20 Attorney fees may be awarded “upon a showing of need, ability to pay, and ... reasonableness....” *Bisone*, 165 Wis. 2d at 124. The trial court found that Betty had not demonstrated the need for a contribution to attorney fees, because “both sides have considerable assets.” That finding is not clearly

⁶ He claimed that he had made some of the payments, and introduced some cancelled checks he had made out to Betty to support his position, but the trial court decided there was no way to determine what the checks were intended for.

erroneous, given Betty's equity in both the lake house, which was being sold, and her duplex.

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

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

