

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0859-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-FA-63

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JAMES WUNROW,

PETITIONER-RESPONDENT,

v.

SHEILA WUNROW,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Reversed and cause remanded.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Sheila Wunrow appeals from the judgment divorcing her from James Wunrow. The issue is whether the trial court erred by

denying her request for limited-term maintenance. Because the trial court erroneously exercised its discretion in the matter, we reverse.

¶2 Sheila, then thirty-five, divorced James, thirty-nine, after sixteen years of marriage. Sheila received primary custody of the two children of the marriage, ages fifteen and thirteen.

¶3 James earned \$40,000 per year from his job. His child support obligation was set at \$826 per month, or \$9,900 per year. Sheila did not work outside the home, but received a non-taxed payment to care for foster children. The payment varied, depending on how many foster children she cared for at a given time. The trial court determined the payment to be \$19,000 per year based on an average of four foster children at any given time.

¶4 Sheila had some training as a cosmetologist but had not worked in the field for several years. She had no other appreciable job skills. The parties' debts exceeded their assets.

¶5 Sheila requested limited-term maintenance of \$400 per month for four years. The trial court denied the request, concluding that Sheila would receive nearly half of the total marital income, tax free, when the \$19,000 she received for caring for foster children was added to the \$9,900 in child support James would pay. The trial court also considered that Sheila had no definite education plans, the parties had no prior financial agreements, and that neither had contributed to the other's education or current earning capacity.

¶6 The determination of the amount and duration of maintenance rests within the trial court's discretion, and we reverse only upon an erroneous exercise of that discretion. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736

(1987). An erroneous exercise of discretion occurs when the trial court fails to consider proper factors, bases the award upon a factual error, or the award is excessive or inadequate under the circumstances. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (Ct. App. 1989).

¶7 The dual objectives of maintenance are support and fairness. *LaRocque*, 139 Wis. 2d at 32-33. The support objective is intended to maintain the recipient spouse in accordance with the needs and the earning capacities of the parties. *Id.* at 33. The fairness objective is meant to insure a fair and equitable arrangement in each case. *Id.*

¶8 The trial court did not properly consider facts essential to a fair comparison of the parties' comparative financial situations. First, for maintenance purposes the trial court treated James's child support payments as income available to Sheila to meet her own needs. It is not. Child support pays for the children's needs. Second, having credited James with paying support, fairness required the trial court to consider Sheila's financial support of the children as well. *See Cook v. Cook*, 208 Wis. 2d 166, 184, 560 N.W.2d 246 (1997) (stating courts may presume that the custodial parent also expends money to support the children). Third, the court failed to consider Sheila's costs for providing foster care. Plainly, and as James acknowledged, Sheila must use a portion of the foster care payments to provide food and care for the foster children. Consequently, the trial court's decision to treat the full stipend amount as income available to Sheila was unfair. Only the amount available to her after deducting her expenses should be considered income for maintenance purposes. It may be the trial court was taking their expenses into account by relying on Sheila's statement of expenses, which appear to include expenses for the foster children. However, if the trial court did rely on this, it failed to recognize that Sheila's monthly payments on her

debts, including her monthly payments on her vehicle, were listed under “Statement of Debts and Obligations,” but were not included in her monthly expenses; in contrast, James’s monthly payments on his debts were included in his monthly expenses. Therefore, a comparison of each parties’ monthly income to the figure James identified as “Total Monthly Budget” on his financial disclosure statement and Shelia identified as “Total Monthly Expenses” on hers does not give an accurate picture of their comparative financial situations. The parties’ financial disclosure statements did not treat expenses in the same way.

¶9 For these reasons, the trial court’s apparent reliance on the fact that Sheila received approximately half of the funds available to the parties leads to a fundamentally unfair result. After paying his support obligation, James has a gross income of \$30,000 to meet his own needs, which does not include transportation costs, which his employer pays. Even after taxes, that is indisputably far more than Sheila has available to meet her expenses, including substantial transportation expenses, if her financial contribution to meeting her children’s needs and her foster care expenses are fairly considered. On remand, the trial court shall reconsider Sheila’s claim for limited-term maintenance, giving due weight to the factors identified in this opinion and the resulting disparity in income and its effect on Sheila’s ability to support herself. The court may also wish to reconsider the award of a dependent exemption to Sheila, since she does not have taxable income.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

