

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2003

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. 03-0169
STATE OF WISCONSIN**

Cir. Ct. No. 01FA000424

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

**BARBARA E. DECKER-SIDMORE N/K/A BARBARA E.
DECKER,**

PETITIONER-RESPONDENT,

V.

KENNETH D. SIDMORE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed in part, reversed in part and cause
remanded with directions.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Kenneth Sidmore appeals from a judgment of divorce seeking reversal of a trial court determination that Barbara E. Decker-

Sidmore's school loans were marital debt and awarding maintenance. Kenneth contends that the trial court erred in finding that Barbara's school loans were marital debt because said finding is against the great weight and clear preponderance of the evidence. Kenneth additionally argues that the trial court's order of maintenance to Barbara in the amount of \$992 per month for four years is in error because the trial court failed to make the necessary findings, because the trial court failed to explain its decision and because the trial court's award goes against the great weight and clear preponderance of the evidence. We conclude the trial court did not erroneously exercise its discretion by finding that the school loans were marital debt. However, we also conclude the trial court erroneously exercised its discretion in its calculation of maintenance because the evidence of record does not support the trial court's determination of the amount of Kenneth's unreimbursed business expenses. We therefore affirm with respect to the duration of maintenance, reverse with respect to the amount of maintenance and remand for proceedings consistent with this decision.

BACKGROUND

¶2 Barbara and Kenneth were married on August 25, 1990 and divorced on December 31, 2002. Barbara was forty years old and Kenneth was fifty-three years old at the time of the divorce. Both parties have had problems with alcohol. Barbara has been treated for alcohol abuse twice as an in-patient and Kenneth has been treated for alcohol abuse as an in-patient seven times. Both parties also have health problems. Kenneth broke his back in 1983 while employed as a heavy equipment operator. He has been treated by a chiropractor approximately every three months since the incident. Barbara suffers from post-traumatic stress disorder and depression (recurrent moderate type).

¶3 The parties lived together for five years prior to marriage. The trial court found this to be a medium length marriage. Barbara and Kenneth did not have any children together.

¶4 Barbara graduated from high school and completed a counselor training program at the Mental Health Institute in Independence, Iowa. She worked in her own practice as a substance abuse counselor for three to four years until June 2001. In 1995, Barbara began a four-year undergraduate program at Upper Iowa University in Manchester, Iowa, and received a bachelor of science degree in psychology in 1999. That same year, Barbara began a master's program in counseling education at the University of Wisconsin-Platteville. She has not completed the program because she was prohibited from continuing with her practicum due to an ethical violation.

¶5 Barbara lost her Iowa counseling certification in October 2002, during the pendency of the divorce trial, for drinking with her clients. The trial court found that due to her license revocation, she is prevented from completing her practicum for her master's degree. Barbara needs to complete a practicum, six credits of classroom work and a semester paper to complete her master's program. The trial court further found Barbara will be unable to complete her master's program with clinical certification for approximately three years and that without clinical certification, she will not be eligible for third-party reimbursement from insurance carriers. The trial court also found that Barbara's earning capacity would be greatly enhanced once she is eligible to receive third-party reimbursement. The trial court further found that Barbara would be qualified to work as a residential director at a university, work for the Department of Vocational Rehabilitation or work as a human resource manager with her academic master's degree.

¶6 The trial court also found Barbara has reduced her earning capacity because of her alcohol abuse resulting in the ethical violation. The trial court found her gross income for the last six years to be \$1,217. The trial court further found that at the time of trial, Barbara earned \$7.00 an hour, although she had charged up to \$35.00 an hour as a substance abuse counselor. The trial court additionally found Barbara's living expenses to be approximately \$2,500 per month.

¶7 Kenneth also completed the counselor training program at the Mental Health Institute in Independence, Iowa, in or about 1994 or 1995. Kenneth has worked as a heavy equipment operator for most of his adult life except during the time he served as a substance abuse counselor due to a back injury. The trial court further found Kenneth's gross income for the last six taxable years to be \$263,910. The trial court also found Kenneth earned at the time of trial approximately \$50,000 per year and determined this to be his earning capacity.

¶8 The issues of maintenance and property division were tried to the court. In determining that Barbara's school loans were marital debt, the trial court found that the parties had used some of the money for living expenses, permitting Barbara to attend college rather than work. In determining maintenance, the trial court considered the length of the marriage, when Barbara would be able to complete her master's degree, Barbara's debt load, Barbara's lack of reasonable effort to use her education, Barbara's work history, Barbara's income for the last six taxable years, her living expenses and the parties' marital standard of living. The trial court also considered Kenneth's earning capacity, his gross earned income for the last six taxable years, Kenneth's unreimbursable employee business expenses and Kenneth's ability to supplement his income with work while unemployed from early December through March.

¶9 The trial court concluded, under the fairness objective of maintenance, that Kenneth should pay Barbara maintenance for four years which, the court reasoned, was long enough to permit her to complete her master's degree and to become self-supporting at a standard of living reasonably comparable to when the parties were married. The trial court then ordered Kenneth to pay Barbara \$992 per month in maintenance. To determine this amount the trial court equalized the parties' income. Kenneth appeals.

DISCUSSION

¶10 Kenneth argues that Barbara's school loans are not marital debt because Barbara never used her education for the benefit of the family and because there is no proof that any part of the loans was used for family living expenses. "Marital assets and debts (collectively, the marital estate) include all of the property and obligations of either party that were acquired before or during the marriage unless specifically exempted by statute." *McLaren v. McLaren*, 2003 WI App 125, ¶8, ___ Wis. 2d ___, 665 N.W.2d 405. *See also* WIS. STAT. § 767.255 (2001-02).¹ The division of the marital estate lies within the sound discretion of the trial court. *McLaren*, 2003 WI App 125 at ¶8. We must sustain discretionary determinations if we find that the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.*

¶11 Here, the trial court did not misuse its discretion when it found the student loans to be marital debt. WISCONSIN STAT. § 767.255(3) provides that all

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

property not inherited or gifted is to be divided equally between the parties. The trial court may alter this distribution without regard to marital misconduct after considering all of the following:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) Whether one of the parties has substantial assets not subject to division by the court.
- (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and childcare services.
- (e) The age and physical and emotional health of the parties.
- (f) The contribution by one party to the education, training or increased earning power of the other.
- (g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
- (h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
- (i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.
- (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
- (k) The tax consequences to each party.
- (l) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be

binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(m) Such other factors as the court may in each individual case determine to be relevant.

¶12 In the present case, the trial court stated

[The] [s]chool debt of \$34,391.00 is marital. The parties used some of the [student loan] money for living expenses, so [Barbara] could attend college instead of work. It is common for adults to get school loans for tuition, room and board, so they can go to school and get a degree. However, all benefits from these loans will accrue to [Barbara] after the divorce.

While the trial court did not use the “magic words” of WIS. STAT. § 767.255(3), it did indicate that both parties used the student loan money for mutual living expenses. A trial court need not consider all the § 767.255(3) factors. *McLaren*, 2003 WI App 125 at ¶9. Also, at the time the student loans were incurred, both parties assumed Barbara’s education would be mutually beneficial and there is evidence that some of the student loan money was placed in a joint checking account and used for family purposes. The trial court’s conclusion that the student loans were marital debt was a proper exercise of discretion.

¶13 Kenneth also argues the trial court erred in determining the amount of maintenance based on Barbara’s expert witness, Jim Caven’s, tax analysis which assumed Barbara will earn \$12,000 per year, Kenneth will earn \$50,000 per year and Kenneth will incur unreimbursed employee business expenses of \$12,000 per year. Kenneth contends the evidence of record does not support any of Caven’s assumptions. Kenneth further argues the record does not support the trial court’s finding that it would take four years for Barbara to obtain her master’s degree and to establish herself in her chosen field of educational counseling. We agree that the trial court erroneously exercised its discretion by determining the

amount of Kenneth's out-of-pocket business expenses as \$1,000 per month. We conclude, however, that the record contains sufficient evidence to support the trial court's maintenance decision in all other respects.

¶14 A trial court is to consider factors set forth in WIS. STAT. § 767.26² to determine whether maintenance is to be awarded, how much and for how long.

² WISCONSIN STAT. § 767.26 states:

Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.

(continued)

The purpose of maintenance is to achieve two objectives: support and fairness. *Hokin v. Hokin*, 231 Wis. 2d 184, 200-01, 605 N.W.2d 219 (Ct. App. 1999). The first objective is to ensure the spouse is supported in accordance with the needs and earning capacity of the parties. *Id.* The second objective ensures a fair and equitable arrangement between the parties in each individual case. *Id.*

¶15 The determination of maintenance is a decision entrusted to the discretion of the trial court and will not be disturbed on review unless there has been an erroneous exercise of discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Again, “a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Id.* A trial court’s discretionary decision is upheld as long as the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.* If a trial court fails to adequately set forth its reasoning in reaching a discretionary decision, we will search the record

(8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(9) The contribution by one party to the education, training or increased earning power of the other.

(10) Such other factors as the court may in each individual case determine to be relevant.

for reasons to sustain that decision. *Long v. Long*, 196 Wis. 2d 691, 698, 539 N.W.2d 642 (Ct. App. 1995).

¶16 The trial court found Barbara's earning capacity was \$12,000 per year, stating:

I find that Barbara has been working full time for the American Trust and Savings Bank for four or five weeks, and that she has been earning \$9.00 per hour or \$360 per week. This is the equivalent of \$18,000 per year. She has also worked for a plumber for \$7.50 per hour and has earned as much as \$10.00 per hour. But I also consider that these are temporary employments, and may not continue indefinitely. Thus, I do not consider her earning capacity as \$18,000 per year. Barbara testified that she is seeking full time employment and would accept full time employment if offered. Taking into consideration the temporary nature of her employment, her present wage and her desire for full time work, I find that Barbara's earning capacity is presently \$12,000 per year.

¶17 On October 25, 2002, Barbara had been working at American Trust and Savings Bank for the four or five weeks prior to trial and was earning \$9.00 per hour. Previously, she had worked as office help for a plumber for two weeks, earning \$7.50 per hour. She was working for Sedona Staffing Services, a temporary help agency, and had worked earlier that year for Chesney Heart and Nordstroms. She worked for Farm and Fleet in 2001 earning approximately \$6.00 per hour. From January 1, 2002 through January 20, 2002, Barbara had earned approximately \$1,200, the equivalent of \$400 per week or \$10.00 per hour.

¶18 The trial court awarded Barbara \$992 per month in maintenance, assuming her income was \$12,000 per year. Trial courts are entitled to make inferences from undisputed or found facts. *State v. Drogsvold*, 104 Wis. 2d 247, 256, 311 N.W.2d 243 (Ct. App. 1981). Here, the trial court could reasonably conclude that even if Barbara worked for minimum wage, \$5.15 per hour, she

would earn \$10,300 per year. The record shows that Barbara's employment always paid in excess of the minimum wage. The question the trial court struggled with was not what income Barbara had earned in the past but what she reasonably could be expected to earn in the future. Common sense tells us that regardless of past performance, future support or maintenance will almost always be paid from future earnings. It is not irrational or unreasonable for the trial court to conclude that Barbara, who had worked for \$6.00, \$7.50, \$9.00 and \$10.00 per hour in the past year, would be able to earn \$12,000 in the coming year. To do so, she would need to find work paying \$6.00 per hour. She had never earned less. Barbara testified she was looking for full-time work and if there was a full-time job available, she would apply for it. The trial court was entitled to believe that Barbara could earn \$12,000 in the coming year.

¶19 We have dealt with the issue of future earnings before. In *Finley v. Finley*, 2002 WI App 144, ¶12, 256 Wis. 2d 508, 648 N.W.2d 536, we noted that a “court may consider a party’s earning capacity rather than actual earnings when determining a party’s obligation for maintenance and child support.” In *Finley*, the parties stipulated that the husband had averaged 624 hours per year moonlighting as an electrician. Despite this past history, the trial court refused to include income from moonlighting in its maintenance award, giving a number of reasons why the moonlighting might not continue in the future. We affirmed, concluding that future considerations permitted the trial court to set maintenance on expected future earnings.

¶20 We sustained a maintenance award that tied maintenance payments to future earnings in *Siker v. Siker*, 225 Wis. 2d 522, 542, 593 N.W.2d 830 (Ct. App. 1999). We affirmed a no-maintenance award in *Sellers v. Sellers*, 201 Wis. 2d 578, 590, 549 N.W.2d 481 (Ct. App. 1996), in which the trial court used

decreased future earnings as a reason not to award maintenance. These cases tell us that while present earnings can be a predictor of future earnings, it is the trial court's determination of future earnings that we examine for erroneous exercise of discretion.

¶21 Barbara's attorney asked his expert witness to provide information based on three assumptions as to Barbara's income: No income, \$12,000 per year income and \$15,000 per year income. The expert did so. Kenneth introduced no evidence as to Barbara's income or earning capacity, leaving the trial court with only Barbara's expert's calculations which in turn were based on directions from Barbara's attorney. This left the trial court with precious little from which to craft a maintenance decision. The court did so by invoking waiver. It found that "Kenneth had failed to refute Barbara's maintenance calculations and did not introduce any evidence of his own as to the net after-tax disposable income that the parties would have as to any amounts of maintenance payments by [Kenneth] to [Barbara]."

¶22 The trial court invoked waiver in order to reach a decision. While the evidence itself is sufficient to sustain the trial court's decision to assume a \$12,000 per year income for Barbara, we also conclude that when Kenneth failed to provide evidence showing Barbara's earning capacity, the trial court could invoke waiver to make such a determination.

¶23 Furthermore, the four-year duration of maintenance is sustainable as well. The trial court found that it would take Barbara three years to obtain her certification and complete her education because of the disciplinary action against her. Once clinically certified, Barbara's earning capacity will be greatly enhanced as she will be eligible to receive third-party reimbursement from insurance

carriers. The trial court then allowed Barbara an extra year to get back on her feet. This is an appropriate exercise of discretion.

¶24 The trial court properly exercised its discretion by determining that Kenneth's earning capacity was \$50,000. The trial court found Kenneth's gross income for the last six taxable years to be \$263,910, for an annual average of \$43,985. In addition, evidence was presented that Kenneth was able to work year-round but had chosen not to work in the winter. The record shows Kenneth preferred to travel during the off-season with Barbara. The record also shows Kenneth did not expend much effort to obtain winter employment. Kenneth conceded during his testimony that in 2001 he earned almost \$51,000 and in 1999 he earned approximately \$50,000. The trial court acted reasonably and rationally by finding Kenneth's earning capacity to be \$50,000 per year.

¶25 However, we do not find in the record support for the trial court's finding that Kenneth's monthly-unreimbursed business expenses were \$1,000. In its written decision, the trial court referenced the tax analyses of disposable income prepared by Barbara's expert, Craven. In all of Craven's analyses, he assumed, as instructed by Barbara's attorney, that Kenneth had either no unreimbursed employee business expenses or \$1,000 per month of unreimbursed employee business expenses. The trial court then seemingly adopted Craven's figures without reference to any evidence that may exist in the record and assumed that Kenneth's unreimbursed employee business expenses were \$1,000 per month. We have not located any evidence in the record to support that determination. The only evidence found in the record of Kenneth's unreimbursed employee business expenses was that set forth in his Financial Disclosure Statement, which indicated that his unreimbursed employee business expenses were approximately \$1,405 per month. The difference between these two figures is not insubstantial, amounting

to over \$4,800 per year. Barbara did not introduce evidence as to Kenneth's out-of-pocket business expenses. Barbara makes no argument before this court regarding this issue and thus waives any objection she may have on this point.

¶26 We conclude the trial court erroneously exercised its discretion by basing its maintenance decision, in part, upon the assumption that Kenneth incurred \$1,000 per month for unreimbursed employee business expenses. On remand, the trial court is to re-calculate maintenance consistent with this opinion.

CONCLUSION

¶27 We conclude that the trial court properly exercised its discretion in ruling that Barbara's school loans were marital debt. However, we also conclude that the facts of record do not entirely support the trial court's conclusion on the issue of the amount of maintenance. We, therefore, affirm in part, reverse in part and remand for proceedings consistent with this decision.

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

Not recommended for publication in the official reports.

