

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2004

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. 03-2838
STATE OF WISCONSIN**

Cir. Ct. No. 01FA007764

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

BETHANN BURAZIN ZAFFIRO,

PETITIONER-RESPONDENT,

v.

RICHARD LAWRENCE ZAFFIRO,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Richard Zaffiro appeals the maintenance and child support components of his divorce judgment. He also appeals an order denying his motion for reconsideration. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Richard and BethAnn Zaffiro were married for over sixteen years and had three children together. At the time of the divorce, BethAnn was 43 years old, unemployed, and disabled due to mental health problems, although she did have a college degree. Richard was 47 years old, in relatively good health, and had a law degree. The trial court found that Richard had income of \$80,200 per year from his employment at American Family and the capacity to earn another \$40,000 on the side from private practice. BethAnn was receiving \$1,000 per month in social security disability benefits, with an ability to add an additional \$800 per month to her income after the first two years post-divorce in anticipation of some improvement in her health. The trial court found that Richard had a reasonable budget of \$3,900 a month and BethAnn had a reasonable budget of \$2,360 a month.

¶3 Richard was awarded primary physical placement of the children pursuant to the parties' stipulation. A court-appointed psychological evaluator testified that the children had special needs that required whichever parent was exercising physical placement to be home from the time the children got home from school until bedtime. The trial court acknowledged that the children were troubled, but noted that had been the case for many years, long before the divorce started.

¶4 The trial court ordered Richard to pay \$1,900 per month in maintenance for two years, and \$1,200 per month in maintenance indefinitely, terminating upon BethAnn's death or remarriage. The court held child support open.

DISCUSSION

¶5 Richard challenges the amount and duration of the maintenance award and the trial court's failure to award child support. We review each of those issues under the deferential standard applicable to discretionary determinations. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789; *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996).

Maintenance

¶6 Richard argues that the trial court erroneously exercised its discretion by basing the maintenance award on his earning capacity at a second job; failing to leave him enough income to meet his stated budget without working a second job; including unreimbursed health care expenses and COBRA payments in BethAnn's budget; admitting and relying upon expert opinion that BethAnn was currently incapable of working; and setting the maintenance award for an indefinite period.

Richard's Second Job

¶7 Richard first argues that the trial court erred by setting maintenance based on his full earning capacity working two jobs rather than his actual earnings, without making a shirking determination. The record does not support Richard's assertion, however, that the maintenance award was based on the trial court's estimate of Richard's full earning capacity of \$120,000. Rather, the trial court explicitly stated that it was calculating maintenance based on Richard having an annual income of \$100,000. The trial court's statement is borne out by its calculation that Richard would have monthly disposable income of \$4,729, since that is the figure that the Mac Davis program shows given annual income of

\$100,000 for Richard with exemptions for two of the three children, property taxes of \$2,827, home interest of \$4,253, and a maintenance award of \$22,800 (i.e., \$1,900 a month).¹

¶8 Richard's financial disclosure statement filed on April 10, 2003, indicated that he earned \$6,000 a month from American Family and \$3,600 a month from his private practice, which would result in an annual income of \$115,200. Richard also presented a year-to-date exhibit showing income of \$2,221 a month from his private practice in 2003, which, combined with an annual salary of \$80,200 from American Family, would result in an annual income of \$106,852. That evidence was more than sufficient to establish that Richard had an actual income of at least \$100,000 a year at the time of the divorce.

¶9 Richard also argues that it was fundamentally unfair to require him to continue working two jobs in order to meet his budget while BethAnn was not working at all—particularly when there was evidence that it would be in the children's best interest to have the custodial parent home and available to them after school. We are not persuaded that that is a fair characterization of the trial court's decision, however. While it is true that the trial court made some comments indicating that it might not look favorably upon Richard reducing his

¹ Richard complains that the trial court failed to place in the record a printout of its run of the Mac Davis program for calculating the tax consequences of maintenance and child support awards. The trial court did, however, explain the income figures it had plugged into the program and the resulting disposable income calculations, and stated that the program was readily available if someone wanted to rerun it. We see no erroneous exercise of discretion here.

hours in the future,² that issue was not squarely before the court.³ Indeed, the trial court explicitly refused to address the issue of shirking.

¶10 What Richard ignores is the trial court's other statements such as, "It's apparent to me that Richard is a very hard working person," and "I believe he will continue to work in that practice." The trial court further noted that Richard's assertion that he would be taking on new custodial responsibilities by having primary placement was inconsistent with his claim that he had been performing most of the homemaking and child-rearing duties since the mid-1990's. We take the trial court's remarks to mean that it rejected Richard's contention that he would be drastically reducing or eliminating his private practice hours, regardless whether it would be in the children's best interest to do so. Richard's work history throughout the marriage, even while BethAnn was disabled and the children were already in need of extra attention, supports the trial court's finding.

¶11 In other words, the trial court properly found that Richard's actual income would be enough to support a reasonable budget. The trial court was not requiring Richard to take a second job, but merely acknowledging the extent of his actual income.

² For instance, the trial court stated, "I don't think that in the context of the divorce, [Richard] should be allowed to change his style of living," and indicated that, so long as Richard continues to "bust [his] back in that private practice and do the best [he] can to [maximize earnings]," the court would not find him in contempt.

³ We see no reason why Richard could not move to modify the maintenance award when and if he does stop taking private cases and his income actually does drop significantly below \$100,000.

BethAnn's Health Care Expenses

¶12 Richard challenges the inclusion of \$600 for unreimbursed medical expenses in BethAnn's monthly budget because, he contends, she could eliminate or greatly reduce those payments if she applied for Medicare and Badgercare. He cites no authority, however, that would require the trial court to calculate BethAnn's budget based upon potential eligibility for public assistance benefits. The trial court explained that it found the unreimbursed expenditures reasonable, given that the potential benefits were speculative and that Richard could have filled out the necessary forms on BethAnn's behalf while he was handling finances during the marriage, but did not. We see no misuse of discretion.

BethAnn's Ability to Earn Income

¶13 Richard challenges the trial court's finding that BethAnn is not currently capable of working on the ground that her expert was not qualified to give such an opinion in support of her position. We are satisfied, however, that the trial court could properly admit and weigh the relative weight of conflicting expert opinions from different fields on the issue of BethAnn's ability to work, and find her current income to be \$12,000.

Indefinite Maintenance

¶14 Richard argues that the indefinite term of maintenance in this case undermines the general policy of encouraging dependent spouses to become self-supporting. However, the trial court imputed an additional \$800 a month to BethAnn's income after two years, encouraging her to gradually reenter the workforce. Moreover, the trial court indicated that its decision to award maintenance for an indefinite period was based on BethAnn's health, which

suggests that an improvement in BethAnn's health could warrant a future reduction or elimination of the maintenance award. Again, we are satisfied that the trial court properly exercised its discretion.

Child Support

¶15 Under the percentage guidelines, BethAnn would owe \$290 a month for child support for three children (29% of her annual income of \$12,000, divided by 12 months). WIS. ADMIN. CODE § DWD 40.03(1)(c). Richard argues that the trial court erroneously exercised its discretion by failing to discuss all of the factors set forth in WIS. STAT. § 767.25(1m) (2001-02)⁴ and to consider the adverse effect a lack of child support would have on the children's standard of living. We note, however, that Richard did not request child support, and that he signed a stipulation, approved by the court prior to the final hearing, indicating that child support would be held open. In any event, we agree with the trial court that it was not required to set child support payments to Richard when it is apparent from the court's discussion of circular payments that it would then merely have set them off by increasing the maintenance award from Richard.

By the Court.—Judgment and order affirmed.

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

⁴ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

