COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2009

David R. Schanker
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. 2009AP758 **Cir. Ct. No. 2008FA4**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

KATHY ANN MEISNER,

PETITIONER-APPELLANT,

V.

MICHAEL FREDRICK MEISNER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Kathy Meisner and Michael Meisner divorced after a seventeen-year marriage. Kathy appeals from the maintenance portion of the judgment of divorce, challenging both the amount and the duration. We conclude that the award reflects a proper exercise of the trial court's discretion. We affirm.

¶2 Kathy is a pharmacy technician who earns approximately $24,500 a year. Michael, a deputy warden at the Waupun Correctional Institution, makes about $76,700 a year. At the time of the bench trial, the parties had two minor children, a seventeen-year-old high school senior and a fourteen-year-old freshman. Three issues were contested: award of the marital residence, division of pension/retirement plans, and maintenance.

¶3 The court ordered Michael to pay child support consistent with the child support guidelines and awarded the marital residence to Kathy and Michael's Wisconsin Retirement System (WRS) pension to him. The court concluded that Kathy had no need for maintenance while she received child support for both children. It also ordered, however, that when child support dropped to one child in August 2009,[1] Michael was to pay $400 per month. When his child support obligation terminated, anticipated to be in June 2014, maintenance would increase to $1,000 per month for sixty months, at which point maintenance would end.

¶4 On appeal, Kathy objects to the maintenance portion of the judgment in three respects: (1) in setting initial maintenance at $400 per month; (2) in setting a prospective $1000 per month once Michael's child support obligation

[1] The court ordered the $400-per-month maintenance to begin when the parties' eldest child "attains the age of 18 or graduates from high school, whichever occurs later." He turned eighteen in August 2009.

terminates in June 2014; and (3) in limiting maintenance to sixty months from June 2014. She contends the court's factual findings and legal conclusions were flawed, resulting in an erroneous exercise of discretion.

¶5 The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of discretion. ***Wolski v. Wolski***, 210 Wis. 2d 183, 188, 565 N.W.2d 196 (Ct. App. 1997). A 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. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We accept all findings of fact made by the trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).[2]

¶6 Kathy first challenges the amount of the maintenance award. The touchstone of analysis in determining or reviewing a maintenance award is the statutory factors set forth in WIS. STAT. § 767.56. *See* ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32, 406 N.W.2d 736 (1987). The dual objectives of maintenance are support and fairness. *See* ***id.*** 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.***

¶7 Kathy contends the award is based on factual errors. For example, she asserts that the court erred in reducing her budgeted housing expense to $600

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

because it did not add in real estate taxes and insurance. "Manifest errors" such as those of a mathematical or accounting nature first must be first raised in the trial court. *See* ***Schinner v. Schinner***, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988). Kathy did not; it is waived on appeal. *See* ***id.*** at 93.[3]

¶8 The court made the following findings with respect to the WIS. STAT. § 767.56 factors: it was a "longer medium" marriage; both forty-two, the parties are in relatively good health and Kathy's back surgery some years ago does not interfere with her current employment; Kathy received just over fifty percent of the marital estate, none of it income-producing; Kathy will have to set aside money for retirement but the marital residence has significant equity and a reasonable mortgage; Kathy has a high school diploma, Michael achieved a two-year associate's degree before the marriage; neither measurably advanced his or her formal education during the marriage; Kathy's earning capacity is approximately what she now earns, $11.78 per hour; the time and expense of Kathy furthering her education would eclipse the modest return on potential higher earnings; Kathy's adjusted budget roughly reflects the marital standard of living making maintenance unnecessary while receiving child support for both children; and it considered the tax consequences using TaxCalc 2007 spreadsheets. In addition, the court found that refinancing the home, as Kathy testified she already had explored, would replace a "fairly aggressive" repayment schedule with a more affordable $560 monthly payment; and Michael resides in Kiel by choice, not necessity, rendering his commuting expenses artificially high.

[3] Kathy's counsel asserts that he thought "long and hard" about filing a motion for reconsideration but did not because he did not think that correcting the mistake of fact would result in an answer to the "nagging question" of why the maintenance award, as structured, was proper.

¶9 These findings are not clearly erroneous. The court heard the testimony of both parties, reviewed the budgets they presented, considered their post-trial briefs, and supported its findings with calculations. Furthermore, its reasoning is beyond reproach. The court explained how the amount and duration of maintenance related to the property division determination, which left each with a need but was fair to both. It gave Kathy a house with a workable mortgage, but "not … a lot of money for retirement." Michael got his retirement plan, but would have to "pretty much start from scratch" if he wanted to buy a house.

¶10 The court then observed that, despite Michael's current housing needs,[4] he still would have to pay maintenance to help equalize the "significant disparities" in the parties' earning capacities. Using calculations based on the parties' incomes and budgets, the court concluded that Kathy would require $400 monthly maintenance once child support dropped from two children to one and that, once all child support terminated, the length of the marriage entitled her to $1,000 a month for sixty months "to get her living arrangements in order." The court considered the statutory factors and the support and fairness objectives and reached a reasoned conclusion, demonstrating a proper exercise of discretion in setting the amount of maintenance.

¶11 Kathy also objects to the limited term of maintenance. She contends the "well[-]established law in this state" is that a maintenance award "must be for an indefinite period of time, unless the trial court can identify, with certainty, a point in time in the future when the recipient spouse will become self-supporting

[4] The parties' placement agreement was that Michael would not have his children for overnight visits in his two-bedroom apartment until he obtained "better living facilities."

at a standard of living reasonably comparable to that enjoyed during the marriage." She asserts that the trial court's failure to "tell us how [it] knows what Kathy's budget will be, what her earnings will be or what [Michael's] earnings … or … expenses will be" constitutes a misuse of discretion. We disagree.

¶12 Ordering limited-term maintenance clearly falls within a court's discretion. *See* WIS. STAT. § 767.56. Kathy is correct that if a court limits the term, it must explain why. *See* ***Parrett v. Parrett***, 146 Wis. 2d 830, 840, 432 N.W.2d 664 (Ct. App. 1988). She overstates, however, the level of certainty necessary to set an endpoint. Courts often base maintenance decisions, to some degree, on predictions. ***Woodard v. Woodard***, 2005 WI App 65, ¶14, 281 Wis. 2d 217, 696 N.W.2d 221. That is permissible as long as the court's assessment is based on facts of record, not on unfounded assumptions. ***Id.***

¶13 Here, the court examined the statutory and other relevant factors. Both parties came to the marriage with the same earning power they have now. Kathy testified she did not forego career advancement and is not a candidate for college. She confirmed that she based her maintenance request on expenses budgeted for keeping the marital residence and that some of her expenses would decrease if she sold it, which she may do when the youngest child finishes high school. The court's conclusion that Kathy may choose to downsize from the three-bedroom tri-level when the children are gone is supported by the record. The court concluded that at that point maintenance no longer would be necessary and it thus would be unfair to require Michael to continue paying it.

¶14 Michael also objects to a part of the court's ruling. He did not file a cross-appeal, however, because he urges that we affirm the judgment. *See* WIS. STAT. RULE 809.10(2)(b). We briefly mention this point because it underscores

the trial court's effort to be fair. Michael contends the court erred in declining to factor in his commuting expenses from his apartment in Kiel to his job in Waupun, a roundtrip of about 100 miles. Michael claimed that, based on the current IRS mileage reimbursement rate, the commute costs him about $1,146 a month. The court allotted him $325 as a monthly mileage allowance, however, just as it did for Kathy who works three minutes from home. The court reasoned that, since the testimony showed that Michael does not exercise significant placement with the children and has few current ties to the Kiel community, it is his choice to make the lengthy commute and it would be unfair to penalize Kathy for that decision.

¶15 The court's determination is solidly grounded in the relevant law and the facts of record. The court tailored the maintenance award to the amount of money available while still striving to satisfy the dual aims of support and fairness. We see no misuse of discretion.

By the Court.—Judgment affirmed.

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