COURT OF APPEALS DECISION DATED AND FILED

August 18, 2015

Diane M. Fremgen
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. 2014AP2423

Cir. Ct. No. 2013FA589

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

IN RE THE MARRIAGE OF:

THOMAS F. CAMPBELL,

PETITIONER-APPELLANT,

V.

ANDREA J. CAMPBELL,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN ZAKOWSKI, Judge. *Affirmed*.

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Thomas Campbell appeals the maintenance portion of a judgment dissolving his marriage to Andrea Campbell and the order denying his motion for reconsideration. Thomas argues the circuit court erroneously

exercised its discretion in awarding maintenance. We disagree and affirm the judgment and order.

BACKGROUND

¶2 Thomas and Andrea were married in 1989. The marriage was neither party's first and no children were born of this marriage. In May 2013, Thomas petitioned for divorce. It is undisputed that at the time of the divorce hearing, the only issue remaining was that of maintenance. The circuit court ultimately awarded Andrea indefinite monthly maintenance of $600 to be funded for five years. Thomas's motion for reconsideration was denied and this appeal follows. Additional facts will be developed as necessary below.

DISCUSSION

¶3 The determination of maintenance is a matter entrusted to the circuit court's sound discretion. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). WISCONSIN STAT. § 767.56 provides that upon a judgment of divorce, "the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering" several delineated factors.[1]

[1] WISCONSIN STAT. § 767.56(1c), provides:

> Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time, subject to sub. (2c), after considering all of the following:
>
> **(a)** The length of the marriage.
>
> **(b)** The age and physical and emotional health of the parties.
>
> **(c)** The division of property made under s. 767.61.

(continued)

On review, the question is whether the circuit court's application of the factors advances both the support and fairness objectives of maintenance. ***Forester v. Forester***, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993). The first objective is to support the recipient spouse in accordance with the needs and earning capacities of the parties. *See* ***Ladwig v. Ladwig***, 2010 WI App 78, ¶17, 325 Wis. 2d 497, 785 N.W.2d 664. "The goal of the support objective of maintenance is to provide the recipient spouse with support at pre-divorce

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> **(d)** The educational level of each party at the time of marriage and at the time the action is commenced.
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> **(e)** 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.
>
> **(f)** 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.
>
> **(g)** The tax consequences to each party.
>
> **(h)** 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, if the 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.
>
> **(i)** The contribution by one party to the education, training or increased earning power of the other.
>
> **(j)** Such other factors as the court may in each individual case determine to be relevant.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

standards." ***Fowler v. Fowler***, 158 Wis. 2d 508, 520, 463 N.W.2d 370 (Ct. App. 1990). The fairness objective "ensures a fair and equitable arrangement between the parties in each individual case." ***Finley v. Finley***, 2002 WI App 144, ¶10, 256 Wis. 2d 508, 648 N.W.2d 536.

¶4 Here, Thomas raises several challenges to the maintenance award. Citing ***King v. King***, 224 Wis. 2d 235, 590 N.W.2d 480 (1999), Thomas contends the circuit court erroneously exercised its discretion by assuming Andrea was entitled to maintenance based solely on the length of the parties' marriage. In ***King***, our supreme court held that a spouse is not automatically entitled to maintenance, and reiterated that circuit courts are to determine the amount and duration of maintenance through analysis of the applicable statutory factors and consideration of the twin goals of support and fairness. ***Id.*** at 250. In the present matter, the court stated:

> And so we're left with this issue of maintenance. So what does the Court do? It goes to the statutes and the statutes are—I think it's [Wis. Stat. §] 767.56, and there are all these factors you're supposed to look at. And some of them are applicable in the case and some aren't. But you start with the length of the marriage. And when you have 25 years of marriage, that's probably—I guess you start with the assumption there's going to be some period of maintenance because if it's a short-term marriage, five years or less, a lot of times we say, well, this isn't a maintenance case. It's a second or third marriage, and that mitigates a little bit.

¶5 The circuit court then proceeded to address other applicable factors delineated in WIS. STAT. § 767.56. The court considered the parties' ages at the time of the divorce—Thomas and Andrea were seventy-four and sixty-seven years old, respectively. The court also considered their physical and emotional health, acknowledging that Thomas had more physical maladies than Andrea. The court, however, noted that Thomas was active and that any physical maladies did not

affect his ability to work.[2] The court stated that the parties' educational level "hadn't really changed" during the marriage, and neither party contributed to the other's education, training, or increased earning power. The circuit court acknowledged that property division under the marital settlement agreement seemed "more than reasonable," noting that although Thomas had assumed the marital debt, it was recent debt that Thomas had incurred for his benefit.

¶6 The circuit court heard testimony that when the couple first married, Thomas owned and operated a framing business, but he closed the business in the late 1990s due to "economic reasons." In 1999, Thomas began working full-time at Home Depot, but had worked only part-time for the last few years of the marriage, with hours fluctuating anywhere between twenty and thirty-five hours per week, with an hourly rate of $13.29. Andrea worked as a childcare provider out of the couple's home, earning between $200 and $300 per month, but stopped providing childcare in approximately 2008. Andrea added that she would "not be able" to provide childcare now because of where she resides and because she had "lost patience with it." During the marriage, the couple did not commingle their incomes. Andrea paid the couple's phone bill and Thomas paid the remainder of the household bills, including the mortgage, real estate taxes and insurance.

¶7 The circuit court credited Thomas's work ethic and, when addressing Andrea's decision to cease providing childcare, recognized that

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[2] Thomas testified he was diagnosed with Gardner Syndrome, which he described as a "hereditary, familial polyposis of the colon." Thomas also indicated that in 2008, he had heart surgery and now has a pacemaker. When asked whether his physical maladies impacted his day-to-day life, Thomas answered, "not really," adding: "I still go to the gym two or three times a week and work out for an hour and a half or two hours. And I am aging a little bit. Going up and down the steps isn't like it was 20 years ago, but I've learned to handle it."

although Andrea "obviously has been good with kids and dealt with the kids all those years," sometimes "you just can't do what you used to do." The court addressed Andrea's earning capacity, ultimately imputing monthly income to her before setting the maintenance amount.

¶8 Based on our review of the record, we are not persuaded that the circuit court awarded maintenance based on an assumption that the length of the marriage created an entitlement to maintenance. Rather, the record suggests the court addressed that factor first because it is the first consideration listed in WIS. STAT. § 767.56. The court considered the length of the marriage as only one of several statutory factors impacting its determination of maintenance. We therefore reject Thomas's claim that Andrea was awarded maintenance based solely on the length of the couple's marriage.

¶9 Thomas also argues the circuit court erroneously exercised its discretion by "mechanistically" equalizing the parties' net disposable monthly income with no regard for the support and fairness objectives of maintenance. Specifically, Thomas contends that in spite of Andrea's "comparative youth, admittedly better health, and [Thomas]'s assumption of all marital debts, the circuit court still imposed a maintenance obligation" that would require Thomas to continue working. As noted above, the court found that Thomas's health did not affect his ability to work. Further, Thomas testified that the assumed "marital" debt was recently incurred by him.

¶10 When determining the appropriate maintenance award, circuit courts are instructed to start with "the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties" and then make any needed adjustments after considering the WIS. STAT. § 767.56 factors. ***Bahr v.***

Bahr, 107 Wis. 2d 72, 85, 318 N.W.2d 391 (1982); *see also* ***Heppner v. Heppner***, 2009 WI App 90, ¶12, 319 Wis. 2d 237, 768 N.W.2d 261. Here, the circuit court was within its discretion when it compared Thomas's actual monthly income to a combination of Andrea's actual and imputed income, and determined that $600 was "fair and appropriate under the circumstances." Ultimately, the income percentage resulted in 52.15% for Thomas and 47.85% for Andrea.

¶11 Thomas nevertheless asserts that the court erred when imputing only $9,564 in annual income to Andrea. The court utilized a $9 per hour income rate, which it arrived at by splitting the difference between the hourly wage Thomas argued should apply to her field of work and the minimum wage.[3] However, the court did not indicate how many hours per week it imputed to Andrea. Dividing the annual sum over fifty-two weeks, Thomas deduces that the court based the imputed income on a twenty-hour work week. Thomas thus claims the circuit court erroneously exercised its discretion by failing to explain "why the younger and healthier" Andrea was imputed income based on a twenty-hour week while Thomas "remains obligated to work" thirty hours per week.

¶12 "Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Our review of the record leads us to conclude that based on Andrea's education level, relative

[3] Although Thomas argued that a daycare operator would make at least $11 per hour, the court noted that looking at Andrea's past employment, she "basically helped take care of some children, but it was not as a full-time day care center." The court therefore arrived at $9 per hour by "splitting the difference" between $11 and the current minimum wage of $7.25.

work experience and length of absence from the job market, it was within the circuit court's discretion to impute income to her based on a twenty-hour work week, regardless of the hours Thomas actually worked.

¶13 Thomas also contends the circuit court ignored the statutory factor requiring it to consider the feasibility of Andrea becoming self-supporting at a standard of living reasonably comparable to that enjoyed during marriage. *See* WIS. STAT. § 767.56(1c)(f). The court stated:

> I think the facts of this case say … to impute a $9 an hour job because if she has to, she's got to be able to at least get a job that pays $9 an hour. I think she's smart enough. And at some point, Andrea, you might have to do that.

By imputing income and acknowledging the reality that Andrea might have to obtain employment paying at least $9 per hour, the court implicitly considered the feasibility of Andrea becoming self-supporting before awarding five years of maintenance. This imputation also otherwise accounts for Andrea's not working.

¶14 Finally, to the extent Thomas contends the circuit court failed to account for the division of property or for Thomas's other contributions to the marriage, the record shows otherwise. As noted above, the court acknowledged the property division as set forth in the marital settlement agreement, stating it seemed "more than reasonable." The court also considered Thomas's health and his history of payments in the marriage, acknowledging that if there were a change in circumstances "given the age of the parties," either party could return to court and seek a modification of the maintenance award. Moreover, Thomas's significant monetary contributions during the marriage actually support a maintenance award that permits Andrea to maintain a standard of living reasonably comparable to that enjoyed during the marriage. Based on the record,

we conclude the circuit court properly exercised its discretion when ordering the maintenance award. Therefore, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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