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**COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT 2
APPEAL CASE NO. 2020AP001168**

Dawn M. Quartana,
Petitioner-Appellant,

v.

Michael J. Quartana,
Respondent-Respondent.

Date: May 19, 2021
District: 2
Appeal No. 2020AP001168
Circuit Court No. 2018FA001043
Three-Judge Appeal

**APPEAL FROM THE ORDER OF THE
HONORABLE LEE S. DREYFUS, JR., CIRCUIT COURT
JUDGE WAUKESHA COUNTY CIRCUIT COURT
CASE NO. 2018-F-001043**

REPLY BRIEF OF PETITIONER-APPELLANT DAWN QUARTANA

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ARGUMENT

The primary issue on appeal is whether the circuit court abused its discretion by ordering a very limited five-year maintenance awarded between Dawn Quartana (“Dawn”) and Michael Quartana (“Michael”). Dawn’s moving brief asserts that this five-year term under the guiding precedent of *LaRocque*, *Hefty*, and statutory considerations under Wis. Stat. §767.56 was erroneous and a longer term of maintenance is clearly justified based on the factual record. Michael’s response brief does little to attack this argument or explain why the circuit court departed from the reasoning and analysis provided by *LaRocque* and *Hefty*.

Dawn is presently 52 and with retirement age fast approaching and her earning capacity window is quickly diminishing. The circuit court further based the term and amount of maintenance on the flawed assumption that Dawn would be able to successfully invest cash assets to sustain her lifestyle:

There's a reasonable likelihood that the -- um, that if properly and appropriately invested that that kind of sum would be able to produce an income stream somewhere, um, somewhere in the range of 35 to \$40,000 per year, without having to invade the principal at all. But that would be up to Ms. Quartana, whatever she does with the money.

But the reality is, she's going to have substantial cash assets. They'll be able to produce income for her, understanding that may take a while, understanding we have reduced income rate environment, the likelihood is that's going to change over time, all of which will accrue to Ms. Quartana's benefit.

(App. p., 75) (emphasis added). In determining the term and amount of maintenance, the circuit court tried to predict future investment returns and used this reasoning to limit Dawn’s maintenance term. *Id.* Such analysis has no basis in the law and should not become a new standard where courts expect parties in a divorce to play the market successfully in

order to become self-sustaining. The Court even acknowledges that such investment gains may take “a while” then turns around and limits the maintenance term to an aggressively short 5 years. *Id.*

The standards expressed in *LaRocque* and *Hefty* entitle Dawn to the same lifestyle she held but for the divorce. As Dawn has limited retirement savings, she would have to rely heavily on the \$484,801.50 equalization payment to subsidize her retirement years. Reversal is necessary as the circuit court abused its discretion in the length of the maintenance term and the amount.

The circuit court’s explanation for a short five-year maintenance term is circular and contradictory:

What I'm going to do is I am going to appoint a period of five years. I'm satisfied that's appropriate. That will give Ms. Quartana an opportunity one, if she chooses to, go back to school, get an additional education. That would give her time to do that, if she chooses. This will give her time to in that respect, get her finances in order. (App., p. 76)

...

I would note that Ms. Quartana, for the purpose of doing maintenance calculations, as a practical matter, she's not employed, hasn't been employed, really, for the marriage. Um, there would appear to be real questions at this point in terms of her ability to be employed in any significant capacity. (App., p. 66)

....

One, there don't appear to be any significant skills or training or education that -- in order for her to be anything much above a minimum wage kind of employment. Would require very specific -- May require development of skills or other education that will take some time. Um, she's almost 51 years old -- of age. And that doesn't mean it can't occur, but it also has not been history, the pattern of this family. There appears to be health issues that may very well play into that. (emphasis added) (App., p. 67)

The court abused its discretion when it undertook the assumption that Dawn will be able to make undefined, hypothetical investments of cash assets to supplement her income.

Michael's Brief attempts to defend this analysis but misapplies the controlling case law. Reversal and remand are necessary.

In finding for a five-year limited term maintenance, the circuit court engaged in analysis contrary to case law and Wis. Stat. §767.56 by assuming Dawn can supplement income by prudently investing cash assets to become self-sustaining.

Dawn does not contend that an open-ended or permanent award of maintenance is necessary, simply that five years is too short a time for a 52-year-old, with limited education, minimal retirement funds, and non-existent financial management skills to realistically become self-sustaining to the level she enjoyed during her marriage. See *LaRocque v. LaRocque*, 139 Wis. 2d 23, 406 N.W.2d 736, 740 (1987). Michael's responsive argument that the estate funds are significant enough to support the limited maintenance is premised on the circuit court's assumption that Dawn will simply be able to invest this money to become self-sustaining. See Respondent Brief, p. 25; Petitioner's Appendix ("App."), p. 75. This "invest and you'll be fine" argument has no basis in law and is easier said than done. Michael was a mortgage broker and managed the family finances and investments for the entirety of the marriage. (App., p. 21). Dawn has no investing experience, limited education, and relied entirely on Michael for financial planning. Yet with these facts, the circuit court noted that \$770,000 invested prudently could generate "[§]35[,000] to \$40,000 per year, without having to invade the principal at all." (App., p. 75). The problem with this analysis is that this future "income" is purely hypothetical, and these unsupported figures were inappropriately used to limit the term of maintenance.

The response brief attempts to support the court's erroneous finding by citing *Hommel v. Hommel*, Wis. 2d 782, 471 N.W.2d 1 (1991). The court in *Hommel* found that "investment income from assets awarded to a spouse as part of an equal division of property pursuant to a divorce settlement generally can be included in calculating that spouse's income for purposes of revising a maintenance award..." *Id.* at 793. The *Hommel* court was concerned with investment income that was actually generated and tangible, not a random guess as to how prudently invested monies would fair in the stock market. *Id.* *Hommel* clearly holds that if, and only if, Dawn invests her assets can any interest gained used to subsequently seek revision to a maintenance award. *Id.*, at 796 ("We hold that investment income from assets awarded to a spouse as part of an equal division of property pursuant to a divorce settlement can be included in calculating that spouse's income for purpose of request to revise a maintenance award to the other spouse"). The circuit court's analysis is not supported and in fact, contradicted by *Hommel*.

Additional case law on this matter is clear. It is recognized that an asset may not be considered both as marital property subject to division and as a factor in a party's future income for the purpose of determining maintenance. *See Kronforst v. Kronforst*, 21 Wis. 2d 54, 64, 123 N.W.2d 528 (1963); *In re Marriage of Kennedy v. Kennedy*, 145 Wis. 2d 219, 225-26, 426 N.W.2d 85 (Ct. App. 1988); *Overson v. Overson*, 125 Wis. 2d 13, 20, 370 N.W.2d 796 (Ct. App. 1985); *In re Marriage of Mack v. Mack*, 108 Wis. 2d 604, 609, 323 N.W.2d 153 (Ct. App. 1982). The circuit court here assumed future investment income of marital property in limiting a maintenance, such considerations have no legal basis and was in clear error.

Again, maintenance awards are founded in fairness and the intention of both parties to eventually become self-supporting to the level the parties enjoyed in the years immediately before the divorce. *LaRocque*, 139 Wis.2d at 35-36. Creating a new prudent investor standard should not be allowed when a clear precedent already exists:

It is difficult to understand why, and the circuit court does not explain why, Mrs. LaRocque should liquidate her capital to obtain funds to pay living and retraining expenses, while Mr. LaRocque retains full use of his \$ 60,000 a year salary and keeps his retirement fund (the property he received in the property division) untouched and secure for his retirement years. The property division should provide Mrs. LaRocque as well as Mr. LaRocque with a nest egg for retirement or a reserve for emergencies.

Id. at 34-35. Why should Dawn be required to actively invest assets to maintain living, retraining, and educational expenses. See *Kennedy v. Kennedy*, 145 Wis. 2d 219, 426 N.W.2d 85 (Ct. App. 1988) (the appellate court held that one party in a divorce proceeding should not be obliged to invade or exhaust her property division to support herself if the other party's income is sufficient to provide maintenance meeting the *LaRocque* standard). The property division assets here should be viewed just as the *Kennedy* court found. The circuit court expecting Dawn to invest these assets successfully is contrary to the well-established considerations of *LaRocque* and *Kennedy* rulings. The circuit court's expectation that Dawn prudently invest \$770,000 of her property division award to maintain her lifestyle is contrary to prevailing case law and has no basis under the factors of Wis. Stat. §767.56. The court's consideration of this improper factor directly applies to both the term of maintenance and the amount of maintenance awarded. As Dawn's moving brief has stated, both of these awards were in error and demand reversal.

The facts of this case clearly call for an extended limited-term maintenance award under the factors of Wis. Stat. § 767.56 and the referenced case law. As a result of these

factors and the strong likelihood that Dawn cannot become self-supporting on her modest salary, age, and non-existent financial skills within five years, the court should reverse and remand to the circuit court to extend the time frame for maintenance payments. The circuit court abused its discretion by limiting the term of maintenance to only five years and remand is necessary.

CONCLUSION

For the reasons stated in Dawn's moving brief and herein, this matter should be reversed and remanded back to the circuit court for further proceedings.

Dated this May 19, 2021 in Wauwatosa, Wisconsin.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief and appendix produced with proportional times new roman font. This brief is 1,842 words, calculated using the Word Count function of Microsoft Word 2010.

Dates: May 19, 2021

Electronically signed by: David J. Lang

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated: May 19, 2021

Electronically signed by: David J. Lang