STATE OF WISCONSIN
SUPREME COURT

In re the marriage of:

DOUGLAS S. BUCK,

Petitioner-Respondent,

Appeal No. 2023-AP-001569

-v-

Circuit Court Case No. 22-FA-272

EMILY W. BUCK,

Respondent-Appellant.

APPEAL FROM THE DECISION OF THE
WISCONSIN COURT OF APPEALS, DISTRICT IV

RESPONDENT-APPELLANT'S PETITION FOR REVIEW

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INTRODUCTION

Wisconsin has a significant population at or approaching retirement age. Indeed, 26.2% of Wisconsin's population is aged 45-64 and 15.8% is aged 65-84.[1] Statistically, many of these couples will divorce as they approach retirement or once they are in retirement.[2]

Such cases raise unique issues. When can the payor of "maintenance" retire? Can maintenance continue after the payor retires? It is an easy question when considered by a court at the time of retirement. In that snapshot in time each party's current income and expenses can be considered, along with the need and fairness objectives of maintenance.

But more problematic is a court *prospectively* guessing when a payor of maintenance will retire and then prospectively terminating maintenance at that point. In that case the payor can either keep working and maintain 100% of the income stream created during the marriage. Such a result frustrates the settled caselaw that marriage is an economic partnership and

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[1] Exploring Age Groups in the 2020 Census, U.S. Census Bureau, *available at* https://www.census.gov/library/visualizations/interactive/exploring-age-groups-in-the-2020-census.html

[2] Marriages and Divorces, Wisconsin Department of Health Services, *available at* https://www.dhs.wisconsin.gov/stats/marriages.htm

that one party should not be able to leave the marriage with all of the income stream accumulated during the partnership. When a homemaker-spouse contributes to the working-spouse's high income during their marriage, the income-stream is a vital tool, in addition to property division, to compensate the homemaker-spouse and share for the contributions made during the partnership. *See Bahr v. Bahr*, 107 Wis.2d 72, 318 N.W.2d 391 (1982); *LaRocque v. LaRocque*, 139 Wis.2d 23, 406 N.W.2d 736 (1987), App.66-73; *Hefty v. Hefty*, 172 Wis.2d 124, 493 N.W.2d 33 (1992).

In the coming tsunami of older adults and baby-boomers retiring and divorcing, this flawed logic of predicting a future cutoff date for maintenance because a payor might retire creates a torrent of decisions that are anathema to decades of Wisconsin caselaw. A wave of appellate litigation is sure to follow these lopsided results.

For future divorce cases, this petition presents two issues of paramount importance: (1) how does fundamental fairness and basic public policy, as enshrined in decades of caselaw, allow a court to predict a payor's potential future retirement date and use that date to arbitrarily end spousal support regardless of whether the payor actually retires or keeps working; and (2), can a circuit court base a current maintenance amount without making a finding of fact as to the payor's current income?

The stakes are quite clear. At risk is Wisconsin's fundamental concept of marriage as a marital partnership, and spousal support as a meaningful way to fairly compensate a homemaker when the other spouse leaves the marriage with their high-income stream intact.

ISSUES PRESENTED FOR APPEAL

The parties to this long-term marriage presented two issues for determination by the circuit court:

(1) the amount of maintenance payable by the Petitioner-Appellant (Douglas) to the Respondent-Appellant (Emily);

(2) the length of the term Douglas would pay maintenance.

The parties' proposals to the circuit court found common ground, but disagreed on the amount of Douglas' income. The circuit court did not make a specific finding as to Douglas' income. Its decision is not clear if the parties' net income is divided equally or unequally. It is clear that the circuit court failed to use Douglas' current income in making its determinations and utilized some form of an "average" income for Douglas despite caselaw prohibiting such an approach. *LaRocque*, 139 Wis.2d at 36; App.70 ("a reasonable maintenance award is measured not by the average annual earnings over the duration of a long marriage").

Rather, the circuit court determined a monthly amount of maintenance that fell between the amounts proposed by each of the parties and found that the amount was a fair number, without articulating a sound rationale as to how it arrived at that monthly amount. The Court of Appeals affirmed the circuit court's decision and tried to "reverse engineer" the circuit court's math to justify the outcome. However, the Court of Appeal's conclusion that Douglas' income is $430,000 cannot be found anywhere in the record and is well below the $583,000 he disclosed as his income. R.44:1.

Furthermore, the circuit court ordered a short term of maintenance (six years) on a long-term marriage (25 years) based on its speculation that Douglas will retire from his law firm by age 62 and that Emily can "recover" in this six-year time period while Doug may maintain the income stream beyond the termination date. The Court of Appeals affirmed the circuit court's decision as to the limited term of maintenance.

STATEMENT ON CRITERIA FOR GRANTING REVIEW

For the reasons below, Emily seeks review under *Wis. Stat. §809.62*:

1. **This Court should exercise its superintending authority to require that circuit courts set forth with specificity the necessary factual findings that support its decisions** (*Wis. Stat. §809.62(1r)(b)*).

A fair portion of this appellate litigation focuses on many unanswered questions left open by the circuit court. The circuit court never explained the income it used for Douglas, nor how it divided the parties' incomes. The Court of Appeals tried to "reverse engineer" the math to determine what the circuit court may have done.

Parties, lawyers, appellate courts, and future circuit courts modifying a divorce award should not have to guess at these critical questions. They should not have to reverse engineer what the circuit court did. In a future post-judgment motion a circuit court is tasked with seeing if the parties' financial circumstances substantially changed from divorce to that time. *Kenyon v. Kenyon*, 2004 WI 147, ¶¶12-13, 277 Wis.2d 47, 690 N.W.2d 251. How can a future motion to modify support be decided by a

court when the court is not equipped to have a good comparison of whether a party's income changed? Even if the court knows the income, how will it divide the percentage of net disposable income if the initial determination is nebulous?

There is an easy fix to this. The circuit court needs to make a finding of each party's income based on the financial information before it. This is already the law. *Woodard v. Woodard*, 2005 WI App. 65, ¶9, 281 Wis.2d 217, 696 N.W.2d 221. Based on those incomes the circuit court then needs to explain *how* it calculated maintenance.

This is a low bar to implement that will yield high results.

2. **The Court of Appeals' decision is in conflict with past Supreme Court and Court of Appeals decisions leaving uncertainty about the future** (*Wis. Stat. §809.62(1r)(d)*).

The Court of Appeals' decision is in conflict with controlling opinions of the Wisconsin Supreme Court and other Court of Appeals decisions. Review by the Supreme Court is required to rectify the conflict with controlling opinions.

One of the most seminal family law decisions ever decided is *LaRocque v. LaRocque,* 139 Wis.2d 23, 406 N.W.2d 736 (1987); App.66-73. That case sets forth many key guidelines that family law attorneys and judges use every day in cases like this, and a cursory review shows that

LaRocque has been cited hundreds of times by other Wisconsin courts.[3] If there is a "bible" or "rulebook" of black-letter family law, *LaRocque* is surely among the most-influential Wisconsin Supreme Court decisions. This Court in *LaRocque* set forth many clear rules, many of which are under clear attack by the lower courts in this matter:

- The factors in *Wis. Stat. §767.56* are the touchstone of analysis in determining or reviewing a maintenance award and are designed further the objectives of maintenance: to support the recipient spouse and to ensure a fair and equitable financial arrangement. *LaRocque*, 32-33; App.69.
- "While the circuit court should consider the property division in awarding maintenance . . . we disagree with the circuit court's implication that Mrs. LaRocque use the proceeds from the sale of the house, her share of the property division, to support herself." *LaRocque*, 34; App.69.

[3] Google Scholar, Citations, *available at* https://scholar.google.com/scholar_case?about=10565363054054131639&q=larocque&hl=en&as_sdt=4,50

- "The property division should provide Mrs. LaRocque as well as Mr. LaRocque with a nest egg for retirement or a reserve for emergencies." *LaRocque*, 35; App.70.
- "**the goal of maintenance is to provide support at pre-divorce [living] standards**." *LaRocque*, 35; App.70 (emphasis added).
- "Where a spouse has subordinated his or her education or career to devote time and energy to the welfare, career or education of the other spouse or to managing the affairs of the marital partnership, maintenance may be used to compensate this spouse for these nonmonetary contributions to the marriage." *LaRocque*, 37; App.71.
- "This court has said that when a couple has been married many years and achieves increased earnings, it is reasonable to **consider an equal division of total income as a starting point in determining maintenance**." *LaRocque*, 39; App.71 (emphasis added).

The circuit court and Court of Appeals ignored or misapplied many of the above rules. Maintenance payments terminate in only six years, which fails to compensate Emily for the 25-year marriage in which she subordinated her career in order to raise the family and support Douglas' career as a successful law partner. More egregious is that Douglas and Emily worked as a partnership striving to increase his income as a seasoned law partner – but now Douglas leaves the marriage with that

income intact and is able to keep all of his income should he keep working after his age 62 which is when maintenance terminates.

Current caselaw provides that maintenance may continue even after a party retires in order to replicate the wife's standard of living. *Heppner v. Heppner*, 2009 WI App 90, 319 Wis.2d 237, 768 N.W.2d 261; App.74-79. The circuit court sanctions a rule that enables a payor of maintenance (who was 56 at the time of trial) to speculate that they wish to retire in their early 60s because they have a stressful job and the circuit court to accommodate that request. The Court of Appeals narrowly reads *Heppner* to create uncertainty about *Heppner*'s holding.

The recipient's standing of living is a critical consideration of maintenance. *Wis. Stat. §767.56(1c)(f)*; *Heppner*, ¶15; App.77. The lower courts fail to place appropriate weight on one of the most critical maintenance factors in a long-term marriage, particularly for a semi-affluent couple. Whether Emily, the recipient of maintenance in this case, can ever reach a level of self-support comparable to that of the marriage was not substantively addressed. The failure to consider the actual marital standard of living and, instead, apply a standard of living that is based the potential decreases in income is in conflict with the controlling statute and case law. *Wis. Stat. §767.56(1c)(f)*; *Ladwig v. Ladwig*, 2010 WI App. 78, ¶5, 325 Wis.2d 497, 785 N.W. 2d 664.

Another tenant is that a circuit court cannot require a recipient of maintenance to deplete her property division to meet her needs and budget. *Ladwig*, ¶6; *Dowd v. Dowd,* 167 Wis.2d 409, 417, 481 N.W.2d 504 (Ct. App. 1992); *Kennedy v. Kennedy,* 145 Wis.2d 219, 226-27, 426 N.W.2d 85

(Ct. App. 1988). The circuit court considered that Emily could use her property division to buy a home and generate investment income to support herself. The Court of Appeals used the apparent substantial property division in this matter to distinguish similar caselaw. The law is clear those are not appropriate considerations. *LaRocque*, 35; App.70 (discussing how each party needs "nest egg for retirement or a reserve for emergencies.").

3. **A decision will help develop, clarify, or harmonize the law and address the issues likely to recur with statewide impact with maintenance payors at or nearing retirement age** (*Wis. Stat. §809.62(1r)(c)*).

A decision in this case will help clarify or harmonize the law whether maintenance should terminate on a prospective desire to retire. *See Heppner,* 2009 WI App 90; App.74-79. The Court of Appeals narrowly interprets *Heppner* as applying to limited circumstances The case at bar and *Heppner* are in conflict. This Court needs to be clear on the effect of *Heppner* for future cases for parties at or nearing retirement age.

STATEMENT OF THE CASE AND THE FACTS

1. Background facts

In 1997 Douglas and Emily married. R.53:2, App. 30. At that time, Emily was age 28 and Douglas was age 30. R.57:54. Emily left the workforce in 1997 to become a homemaker. R.37:2; R.57:55-56. Douglas had a law degree, and the Bucks moved to Wisconsin to support his career

at Foley & Lardner law firm. R.57:9, 55. Later Douglas became a partner at Quarles & Brady law firm in the commercial real estate group. R.57:9.

The parties had two daughters born in 1999 and 2001. R.57:56. It is not disputed that Emily provided the majority of childcare and homemaking as a stay-at-home mother. R.57:57. It is also not disputed that Emily supported Douglas' career. Douglas agreed that Emily's contributions to the marriage were "substantial." R.57:29. He agreed she helped his career because her contributions allowed to him to "work late when other people that had two working spouses couldn't do so" and that Emily's efforts "allowed Doug advantages at work that contributed to the success of his law practice." R.37:2; R.57:29. Emily consistently participated in law firm social events, dinners and client entertainment. R.57:65.

The circuit court praised Emily's contributions to the marriage and to Douglas' career. R.57:108-109; App.50-51.

Douglas' law career was very successful. According to his own trial exhibit, his income was $581,987 in 2019, $555,761 in 2020, and $555,761 in 2021. R.46 (trial exhibit 4).

Douglas' career as a successful law partner at a reputable major law firm enabled the parties to enjoy an elevated standard of living. Douglas described their lifestyle as "upper middle class," which included a big five-bedroom paid-off home in Middleton, cleaning service, two cars, many vacations to destinations ranging from Italy and England to Australia and China, and private club memberships. R.57:16, 31, 63, 68-69. They also were able to save and invest. R.57:31. Douglas testified that his budget of $18,175 per month fairly reflected the marital standard of living. R.57:39.

2. Facts at divorce and procedural history

On February 24, 2022 Douglas Buck filed this divorce. R.2. During the case, the parties resolved most financial issues, including property division, in a Partial Marital Settlement Agreement. R.53:8-17; App.36-45. The property division to each party was a mix of retirement accounts, investments, home sale proceeds, small business interest, and vehicles. R.44:5 (property division worksheet); R.53:8-10; App.36-38.

The parties could not agree on the *amount* and *term* of maintenance, and so those issues were reserved for trial. R.53:2 ¶10; App.30.

At the time of trial, each party was in their 50s. Emily was age 53 and the parties agreed she would be imputed $47,000 per year as her earning capacity. R.73:3, ¶6; App.6. Douglas was age 56, and as a law partner, he disclosed his income at $48,628 per month which is $583,536 per year. R.44:1; R.73:3, ¶7; App.6.

Prior to trial, each party filed briefs setting forth their positions on maintenance. R.37-38. The parties' positions found commonality in several regards. This included agreeing on the amount of $47,000 to impute as Emily's earning capacity and that a maintenance award could divide their net income be 55:45 division in Douglas' favor. R.37:3; R.38:2-3; R.38:12 (Emily's calculation), R.48 (Douglas' calculation).

The parties disputed Douglas' income. Despite earning over $550,000 for years (*see* R.46) and despite having income at trial of $583,000 (*see* R.44), Douglas argued that his income should be $360,000 based on his

average income during about 20 years of marriage. R.37:3; R.46; R.48. Emily contended Douglas' income was $547,000 based on tax returns. R.38:8.

On June 20, 2023, the circuit court held a one-day trial regarding maintenance. R.57; App.46-65. Each party testified during the trial. R.57. At the conclusion of the trial, the circuit court gave an oral ruling. R.57; App.46-65. It ordered that Douglas pay Emily $8,000 per month for six years. R.53:2-3; App.30-31. The court noted that Douglas and Emily put forth dueling maintenance proposals of $11,656 per month versus $6,602 per month which it suggested was each party's "best case scenarios" so the $8,000 appears to be a compromise. R.53:2-3; App.30-31. The circuit court also discussed Mr. Buck's career horizon and career risks. R.57:109-113; App.51-55. The circuit court framed the six year term as when Douglas wishes to retire and by when it believed Emily could financially recover. R.57:113-116; App.55-58.

On July 3, 2024 the Court of Appeals affirmed the circuit court. The Court of Appeals did certain "reverse engineering" to attempt to pinpoint the very elusive question of how exactly the circuit court calculated maintenance. R.73:8-15; App.11-18. The Court of Appeals also distinguished *Heppner* to conclude that the limited term of maintenance is not offensive to Emily's ability to maintain her marital standard of living while Doug can continue to work and keep the stream of income. R.73:15-22; App.18-25.

ARGUMENT

I. As a matter of public policy, circuit courts must use current financial circumstances to determine maintenance.

As a general rule, circuit courts must consider the "parties' financial circumstances at the time the maintenance determination is made." *Woodard*, 2005 WI App. 65, ¶9. Another critical rule is for the circuit court to use a party's actual income, and this Court long ago rejected using "average" income over the course of the marriage. *LaRocque*, at 36; App.70. The underlying policy is readily apparent: circuit courts must stay in the realm of fact and avoid venturing into the land of fantasy (or indulging in the parties' fantastical predictions).

A. The circuit court did not use Douglas' current financial circumstances.

There was no need for the circuit court to speculate as to Doug's current income. The *current* financial circumstances were not disputed. The parties agreed to impute $47,000 as income for Emily. Douglas disclosed in his financial statement that his income was $583,000 at the time of trial. R.44:1. Douglas' trial exhibit showed that in the past several years his income was always over $550,000 per year. R.46. Emily cited to the tax returns for the proposition that Douglas' income was $547,000. R.38:12. These are all consistent for Douglas' income.

Confusingly and bafflingly, the circuit court placed its imprimatur on Douglas' financial statement (with his income at $583,000) by finding the financial statement to be "accurate" and adopting the contents "subject

to some things I'm going to say about maintenance". R.57:106-107; App.48-49. Thus, the court made an implicit finding of Douglas's income as $583,000 as reflected in his financial statement. Nowhere does the court specifically adjust that finding.

In a bizarre contrast, Douglas contended that the court should use $360,000 as his income – which is an average of his income as a lawyer over about 20 years. R.46. Again, this Court specifically rejected the use of such averages to lower one's income. *LaRocque*, 36; App.70 ("a reasonable maintenance award is measured not by the average annual earnings over the duration of a long marriage, but by the lifestyle") (emphasis added). Emily made this point in her pretrial brief and on appeal. R.38:8-9.

The circuit court, by its own admission, took a rough-midway point between the parties' dueling maintenance proposals. R.53:2-3; App.30-31. Despite finding the financial statement accurately disclosed $583,000 of income (*see* R.57:106-107; App.48-49), the Court of Appeals reverse engineered the circuit court's math to guess that the circuit court likely used $430,000 as Douglas' income. R.73:9, ¶20; App.12.

Both lower courts violated the *LaRocque* rule that prohibits using "average" income (because Douglas' proposal was tainted fruit as is relied on average income, and the court averaged his proposal with Emily's proposal to arrive at a maintenance amount). The failure of the circuit court to apply this essential rule and the Court of Appeals' acceptance of that laxity is in direct conflict with the foregoing controlling decisions to use current income and prohibiting using average income.

B. The circuit court relied on speculative predictions about future employment.

So why did the circuit court do this? The record demonstrates the circuit court engaged in a variety of predictions suggesting that Douglas' income just might decrease:

- The court queried whether Douglas' legal field in commercial real estate could experience a precipitous drop. R.57:109; App.51.
- The court queried whether Douglas would continue to earn the approximate $550,000 per year he earned or whether his employment would be affected by "external factors beyond his control". R.57:110; App.52.
- The court admitted that "it's an unknown trying to figure out what his future is going forward." R.57:110; App.52.
- The court opined that "it's likely that his income will be…somewhere between what actually both of you are asking for…it's just hard to say what his income is going to be." R.57:111; App.53.
- The circuit court thought it likely that Douglas would make more than the average, but maybe less that some years. "Again, I don't have a magic crystal ball…to say what he is going to make." R.57:117; App.59.

- "[M]aybe he'll work until he's 70 . . . my best estimate is [he'll retire] somewhere between 60 and 63." R.57:112; App.54.
- "Mr. Buck's career horizon is relatively short . . . meaning six, seven, eight years". R.57:113; App. 55.

The circuit court's comments have no evidentiary foundation. There was no actual proof at trial that Douglas' income had dropped or would drop. There is no proof when Douglas will actually retire. Indeed, the court found that continued employment at Quarles & Brady was likely. R.57:111; App.53. It also found that Douglas made "a nice salary so he'll be able to continue to do that." R.57:119; App.61. Douglas' own exhibit (R.46) showed his income historically has continued to *increase* consistently during the marriage, so why the circuit court's current angst that his income could *decrease*? To ignore the reality of his current income stream and establish maintenance based on a future potential lower income is clearly an erroneous application of the law.

Even if the court believed Douglas or sympathized with him, the law provides a remedy. By statute a payor can come back to court and ask to modify the amount of maintenance if circumstances substantially change. *Wis. Stat. §767.59.* If Douglas experiences any of the events which the court speculated about, his relief is to file such a motion. Therefore, speculation and conjecture now is unwarranted.

The implication of the circuit court's decision impacts a public policy issue best resolved by this court. Under current law, if the maintenance payor's retirement creates a substantial change of circumstances at that

time, then payor must seek a modification of the judgment to *stop* maintenance. *Wis. Stats. §767.59.* In this matter Emily has the burden to bring a modification to motion to *continue* maintenance if Douglas has not retired. But how does she do that? She will not know if Douglas retires. She has fewer financial resources to come back to court to continue, but Douglas, with more income, has more resources to come back to court to terminate the maintenance. This result should not be the public policy of this state and should be addressed by this Court.

C. The Court of Appeals created facts that are not in the record.

It is undisputed that appellate courts may search the record to support a circuit court's conclusion. *Finley v. Finley*, 2002 WI App 144, ¶19, 256 Wis. 2d 508, 648 N.W.2d 536. Axiomatic with this statement is that the record has something to reveal, for facts cannot be made up, invented, or inferred on appeal just to back into a circuit court's ruling.

The Court of Appeals determined that Douglas' income must be $430,000. R.73:12, ¶25; App.15. It reasoned that if the parties agreed that Emily could make $47,000 per year, if both parties proposed dividing incomes 55%:45% in Douglas' favor, and if the court used $8,000 per month as the maintenance outcome – then $430,000 would be the number required as Douglas' income to reach such a result. R.73:9, ¶20; App.12. There are several problems with this approach.

First, returning to *Finley*, there is no evidence in the record that Douglas' income was $430,000. There is no evidence in the record why his income disclosed at trial (of $583,000) should be reduced to $430,000. The income the Court of Appeals found is pure imagination. Further, the Court

of Appeals noted that $430,000 was how much Douglas earned back in 2018. R.73:11, ¶24, App.14. Why, in 2023, should lower income from 2018 be more relevant than the actual income earned from 2019-2023 all of which was well over $550,000?

Second, the Court of Appeals is correct that the parties agreed on Emily's imputed income of $47,000. But Emily's proposal to the circuit court of dividing the net incomes 55%:45% in Douglas' favor cannot be viewed in a vacuum. Her proposal contemplated using his current and accurate income, not income depressed by more than $100,000. If using such depressed income, a 55%:45% division of net income is particularly not fair.

Third, the circuit court never made a finding as to how it divided income. The Court of Appeals speculates the circuit court wished to do a 55%:45% calculation. R.73:9, ¶20; App.12. However, the record does not reveal the court applying the 55%:45% division of net income. Rather, the court selected a monthly amount somewhere between the two proposals. There is no discussion by either court how this is fair or appropriate given *LaRocque*'s command to begin with an equal division of income. *LaRocque*, 39; App.71.

Fourth – as argued above – Douglas' maintenance proposal is flawed because it used his average income in contravention of *LaRocque*. So his proposal was erroneous. When the circuit court used this mistaken proposal to average with Emily's proposal to arrive at a final maintenance number that is logically erroneous since it factored in average income.

In summary, we are left bewildered at how Doug with current income of $583,000 (and who has had income of over $550,000 for years) can be said by the Court of Appeals to reasonably have $430,000 as his income for current maintenance. *LaRocque*, 40; App.72 ("we are left…with the nagging question of why"); *Bahr*, 107 Wis.2d. at 82.

Such a massive downward deviation of Douglas' income for no reason is not – and cannot be – the law of this state.

II. The amount and duration of maintenance is inadequate to maintain Emily's marital standard of living and fairly share the income she contributed to as a marital partner.

A. Marital standard of living

As *LaRocque* commands, the "touchstone" analysis are the maintenance factors in *Wis. Stat. §767.56*. *LaRocque*, 32; App.69. One of these statutory factors is whether Emily "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." *Wis. Stat. §767.56(1c)(f)*. As this court made clear on at least two occasions, the marital standard of living is not the "average" standard throughout the marriage, but "by the lifestyle that the parties enjoyed in the years immediately before the divorce and could anticipate enjoying if they were to stay married." *Hefty*, 172 Wis.2d at 134, *citing LaRocque,* 36. In *Hefty*, this included a sharing of the husband's post-divorced higher income, because that is what the parties would have shared absent the divorce. *Hefty*, 134.

The Buck's standard of living is not in dispute. Douglas conceded the parties lived an "upper middle class" lifestyle, including a nice house in an affluent community, cleaning service, no debt, nice vacations, and private club memberships. R.57:16, 31, 63, 68-69. They also were able to invest. R.57:31. Douglas' trial exhibit showed that the Buck's income was over $500,000 for the last several years. R.46. Douglas testified that his budget of $18,175 per month fairly reflected his standard of living. R.57:39. Again, these are Douglas' descriptions.

The circuit court ordered that Emily receive $8,000 per month for six years. R.53:2-3; App.30-31. The circuit court attempted to soften the blow of its ruling by stating its "a very nice chunk of change. A lot of people would be happy to make that gross amount a year" and it is "a nice amount of money, a good amount of money." R.57:117; App.59. The standard of law in this state is not what a lot of people would be happy to receive. Indeed, "[t]he standard of living must be individualized for each case . . . [t]here is no requirement that maintenance is limited to an amount that will permit the recipient to enjoy an *average* standard of living." *Hubert v. Hubert*, 159 Wis.2d 803, 819, 465 N.W.2d 252 (Ct. App. 1990). The Bucks lived an "upper per middle class" life according to Douglas, supported by his massive income, and comfortably able to meet their sizable budget. That is the standard of living the circuit court needed to attempt to replicate as closely as possible for each party. *Johnson v. Johnson*, 225 Wis.2d 513, 518, 593 N.W.2d 827 (Ct. App. 1999) ("the trial court looked at the type of lifestyle the parties maintained during the marriage, considering such factors as home ownership, insurance coverage, vacation time and hobbies.

It then determined the amount necessary for [wife] to maintain a comparable lifestyle.").

The disparity in the parties' standard of living is even starker if we examine gross and net incomes. Douglas' financial statement put his income at $583,000 per year, less $96,000 of spousal support, leaves him with $487,000 of gross income to fund his post-divorce life. Emily, in turn, had $47,000 per year imputed to her and receives $96,000 of spousal support, which leaves her with $143,000 of gross income to fund her post-divorce life. Clearly, Douglas is left with the lion's share of income and has the ability to afford a comparable standard of living to that of the marriage. A comparison of their net income yields a similar disparity.[4] Both parties are entitled to similar standards of living post-divorce and both should equally sacrifice. *Johnson*, 225 Wis.2d at 593.

The circuit court commented that the purpose of maintenance is to "try to keep the person . . . not exactly in the position that they were in

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[4] This argument uses gross income for simplicity. But even if these incomes are inputted into the same TaxCalc program available to all judges in this state, Douglas has after-tax income of $247,826 and Emily has after-tax income of $133,983. Again, Douglas' net income is nearly twice that of Emily. ***Bisone v. Bisone***, 165 Wis.2d 114, 122-123, 477 N.W.2d 59 (Ct. App. 1991) (use of a computer program was appropriate to present parties' incomes).

previously, but in a lifestyle that is similar or comfortable . . . to what they had experienced before." R.57:113; App.55. It explained that the term of maintenance was intended to give Emily time to "recover from this process" and to get back into the workforce or obtain further education, to "give her a little time to do that." R.57:114-115; App.56-57. What the circuit court neglected to find or explain, however, is how Emily would reach a level of self-support in six years that would be reasonably comparable to lifestyle she enjoyed in the years immediately prior to the divorce. This critical failure is endorsed in the Court of Appeals decision.

Emily contends that the amount of maintenance awarded by the circuit court and affirmed by the Court of Appeals is inadequate and fails to meet purposes of maintenance established by both statute and caselaw. Although the circuit court found the facts of this case to present a "classic" case for maintenance, it failed to address or make findings as to one of the most basic considerations – the standard of living – for a maintenance award in a long-term marriage. The affirmance by the Court of Appeals of the amount and term of maintenance set by the circuit court completely minimizes this tenant of law.

B. Impact of property division on maintenance

One consideration in awarding maintenance is to consider the property division. *Wis. Stat. §767.56(1c)(c)*. Property is presumed to be divided equally between the parties, which is true in this case. *Wis. Stat. §767.61(3)*.

In this matter, the parties had a healthy estate commensurate with what one would expect given Douglas' success as a law partner. The

property division worksheet attached to Douglas' financial statement shows that each party received $1,683,230 through a mix of retirement accounts, investments, home sale proceeds, small business interest, and vehicles. R.44:5 (property division worksheet). Of note is that Emily received $1.1 million of retirement assets, $135,000 of investments, $357,000 of home sale proceeds, her $22,000 car, and $33,000 of business investments. *Id.* Douglas received virtually identical assets. *Id*. At the end of the day both parties were rewarded equally in the property division for their respective marital roles. The circuit court acknowledged each party's hard work to accumulate these assets. R.57:114; App.56.

As discussed, the circuit court emphasized the significant nature of the retirement funds that Emily receives. R.57:113-114; App.55-56. So too did the Court of Appeals emphasize the Bucks' retirement savings. R.73:13-14, ¶¶28-29, App. 16-17. It suggested that Emily has been adequately compensated by the property division sufficiently to justify the maintenance order. *Id*.

To suggest that Emily is entitled to *less maintenance* because she received a property division *equal* to that of Douglas offends the notion of a marital economic partnership where both parties are equally rewarded in property division with the assets developed during the partnership. This rationale by the circuit court and Court of Appeals denigrates the role and value of a homemaker that has long been valued and recognized by statute and case law. This court recognized that "in a long marriage, particularly as to property acquired by the parties during the marriage, a fifty-fifty division may well represent the mutuality of the enterprise."

Bahr, 107 Wis.2d at 81. Similarly, this court explained that "[w]here a spouse has subordinated his or her education or career to devote time and energy to the welfare, career or education of the other spouse or to managing the affairs of the marital partnership, maintenance may be used to compensate this spouse for these nonmonetary contributions to the marriage." *LaRocque*, 37; App.71.

Bahr and *LaRocque* are crystal clear, a 50:50 property division is appropriate for the Bucks to fairly divide what they accumulated for decades together, and maintenance is a restorative tool to promote fairness. The Court of Appeals' logic is at odds with these decisions.

Further, this Court views the property division in terms of a nest egg and emergency fund. *LaRocque*, 35; App.70. At some point, maintenance will stop or be reduced, either by court order or if Douglas dies. Then Emily would need to marshal all of these financial resources as her "safety net" to support herself through the rest of her life. According to the Social Security Administration, Emily's life expectancy is another 30.9 years.[5] R.57:116; App.58. Given the rising costs of all basic necessities, not to

[5] Retirement & Survivors Benefits: Life Expectancy Calculator, Social Security Administration, *available at* https://www.ssa.gov/cgi-bin/longevity.cgi

mention healthcare and skilled care, Emily will need all available funds to care for herself during her lifetime.

While $1.1 million of retirement funds is desirable and seems impressive to the Court of Appeals, many retirement commentors and experts push for this level of savings for retirement age.[6] Quite simply, these assets are healthy but also what many ordinary, semi-affluent, and affluent couples in Wisconsin have saved for retirement. Seizing on such retirement savings to preclude continued maintenance is a stretch and should not be the public policy of this state.

Finally, requiring Emily to tap into these retirement reserves when she is age 59 ½ (which is when maintenance ends) is the very type of invasion of a property division long frowned upon by appellate courts. *See Dowd*, 167 Wis.2d at 417; *Kennedy*, 145 Wis.2d at 226-27. While the circuit court is correct such withdrawals are without penalty, such withdraws are taxable to Emily (and thus not a trade off for *tax free* spousal support).

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[6] *See* Can you retire with a million dollars?, Empower, *available at* https://www.empower.com/the-currency/money/can-you-retire-a-million-dollars How much do you really need to save for retirement?, Merrill Lynch, *available at* https://www.merrilledge.com/article/how-much-do-you-really-need-to-save-for-retirement

Even assuming the income imputed to Emily and the speculative potential for interest earnings from some of her property division attributed to her by the circuit court, it is simply not reasonable to conclude that Emily will ever earn enough to approximate the standard of living enjoyed during the marriage. To conclude that she can do so in six years without further support from Douglas ignores the purpose of maintenance and the specific statutory criteria.

C. Income is also an "asset"

Wisconsin law is clear in treating marriage as an economic partnership. *Bahr*, 107 Wis.2d at 81. This partnership is not dissolved at divorce like with two business partners. *Id*. Instead, the court considers both *need/support* and *fairness* when setting maintenance. *LaRocque*, 33; App.69. These further the statutory objectives of standard of living and also compensation for contributing to the education, training or increased earning power of the other party. *Wis. Stat. §767.56(1c)*.

Of particular note, is this court's poignant realization that in situations like this – where one party is a homemaker and the other party is a high-income professional – the latter is economically advantaged because of their experience in the workforce and high income:

> Because the wife's contribution in this marriage was as homemaker and the husband's as wage-earner, the husband leaves the marriage with the 'asset' of a stream of income which the wife's contributions helped him to develop. The wife, however, does not leave the marriage with a stream of income; a career as homemaker—although of economic value to the family and society—all too frequently does not translate into money-making ability in the marketplace.

LaRocque, 38; App.71 (emphasis added). The law recognizes that Douglas' income was created not only by his efforts but also by Emily's support during a long-term marriage. Douglas will always be able to enjoy lucrative economic and non-economic benefits by virtue of his employment which will always leave him better off than Emily.[7] The Court of Appeals rejected this specific portion of *LaRocque*, stating, confusingly, that Douglas somehow does not walk away with high income because Emily is compensated by getting retirement funds. R.73:14, ¶28; App.17.

Douglas' own trial exhibit shows that his income as a law partner has steadily increased over time. R.46. While the court strangely analogized him to an aging professional athlete, that analogy is mistaken. R.73:11, ¶24; App.14. There is a reason that Douglas' income has increased and it is because now at age 56 he is a seasoned law partner who can charge more every year, and who is also able to financially benefit from the work of non-partners at the firm whether they be associate attorneys or

[7] For example, Douglas has access to employer-provided health insurance, and workplace retirement accounts enabling him to continue to save and invest for his retirement. This is again in stark contrast to the circuit court's suggestion that Emily should start depleting her assets after she reaches age 59 while the order enables Douglas to continue to grow his assets for as long as he chooses.

paralegals. The notion that he is a washed-up professional athlete is contradicted by his own exhibit showing his upward income trajectory.

The current order allows Douglas to reap a windfall in six short years. Despite this Court's realization about the economic reality of divorces on homemakers like Emily, the circuit court's ruling enables Douglas to retire at age 62 if he wishes, but unfairly Douglas can keep working and pay $0 of spousal support after he reaches age 62. The circuit court concluded that it believed Douglas would retire around age 62, but also recognized that he might work until he is age 70. R.57:112; App.54. This makes zero sense.

This outcome shocks the conscience, offends basic notions of fairness, and violates the *LaRocque* command to consider the vital importance of Douglas' stream of income as an asset to be divided.

Perhaps the Wisconsin Supreme Court said in best in *LaRocque*: "Because limited-term maintenance is relatively inflexible and final, the circuit court must take particular care to be realistic about the recipient spouse's future earning capacity." *LaRocque*, 41; App.72. Subsequent courts reiterated that "trial courts must act carefully when determining a maintenance termination date." *Plonka v. Plonka*, 177 Wis.2d 196, 202, 501 N.W.2d 871 (Ct. App. 1993).

III. The maintenance term of six years accommodates Douglas' desire to retire early when he is only age 62 and violates *Heppner*'s command that maintenance can be paid even after retirement.

It is well-established that maintenance is a tool to afford the recipient the ability to maintain a standard of living reasonably comparable to that enjoyed during the marriage. *Wis. Stat. §767.56(1c)(f)*. It is also well-settled that this means a recipient has, what one appellate court characterized as, "her right — to enjoy the lifestyle that the parties could anticipate enjoying if they stayed married." *Heppner*, 2009 WI App 90, ¶14; App.77 (*citing Hefty*, 172 Wis.2d. 124, 134). So significant is this right that the *Heppner* court concluded that a recipient is entitled to maintenance even if a payor retires. *Heppner*, ¶15; App.77.

The circuit court's ruling stands in opposition to *Heppner*. The circuit court ordered a six-year year term of maintenance, which means that spousal support ends when Emily is age 59 and Douglas is age 62. R.73:5, ¶12; R.73:15, ¶32. This is regardless of whether he retires or not.

One is immediately struck by the abrupt end of spousal support when both parties are so still so young and years before their ordinary social security retirement ages. One is also struck by the upside for Douglas – for he can choose whether to retire at age 62 (because he no long has to pay spousal support) or whether he decides to keep working after his age 62 and can keep 100% of his income (because he no long has to pay spousal support). One is left wondering what happened to the standard of living and *Heppner*'s command that retirement cannot be used to defeat an entitlement to maintenance. What about *LaRocque's* critique that the

husband's high-income stream should be shared because that is an asset both parties contributed to creating?

The Court of Appeals attempts to steer clear of *Heppner* by suggesting that the differences to this case outweigh the similarities. R.73:20, ¶42; App.23. It correctly noted that both *Heppner* and this case involved long-term marriages with the husband being a high wage earner and the wife being a homemaker. *Id*. However, the Court of Appeals here reasons that in *Heppner* the wife's earnings were nonexistent while the husband's earnings were $800,000. *Id*. Surely, posits the Court of Appeals, this is much different than here in Buck, where Emily was imputed $47,000 as her earning capacity and Douglas earns over $500,000 per year. *Id*. The Court of Appeals goes further to suggest that *Heppner* relied on the husband's spurious claim that he would have no income after he retired – which did not seem to fit given he was an executive at a major company. *Id*.

The Court of Appeals read *Heppner* too narrowly and creates artificial distinctions that miss the clear holding of that case. Off the bat, the income differences between the parties in *Heppner* and the Bucks in this case are similar and demonstrate the clear economic imbalance in both these successful long-term marriages. But the bigger point is that *Heppner* chastised the circuit court for "obliterate[ing]" the wife's expectations and ability "to enjoy the lifestyle that the parties could anticipate enjoying if they stayed married." *Heppner*, ¶14; App.77. The *Heppner* court did not care what Mr. Heppner's income would be or would not be when he retired, instead the court concluded that "If Ms. Heppner is to be able to

enjoy the life she would have enjoyed if the parties had not divorced, as *Hefty* teaches is the rule, *she is entitled to maintenance even though Mr. Heppner is retired*." *Heppner*, ¶15; App.77 (emphasis added). Therefore, the clear command is that in order to fairly compensate a homemaker and ensure she has a proper standard of living commensurate with a successful marriage, a few years of maintenance is not enough, and both parties' resources must be considered even after one party retires.

The Court of Appeals also distinguishes *Heppner* by suggesting that that case did not involve a significant property division, whereas the Bucks have a significant marital estate. R.73:20, ¶43; App.23-24. There is not any discussion in *Heppner* that the property division affects its maintenance analysis. Indeed, the Court of Appeals is plainly mistaken when it suggests that Emily is already compensated by the "significant" property division. R.73:20-21, ¶43; App.23-24. The property division worksheet shows that each party received $1,683,230 comprised of different types of assets. R.44:5. Consistent with *Wis. Stat. §767.61,* the property division was equal between the parties. Depleting her property division to make up for lost maintenance has been rejected by appellate courts. *Ladwig*, 325 Wis.2d 497, ¶6.

In sum, the circuit court's ruling and Court of Appeals' rationale leaves one scratching one's head in disbelief. The termination of maintenance in six short years when Douglas turns age 62 is anathema to *Heppner* because it deprives Emily of vital support because of Douglas' apparent desire to leave the paneled hallways of his law firm to "find something a little more mellow like work in a kitchen or be a UPS guy".

R.57:27. We are left with the "nagging question" of why Douglas can unilaterally decide to retire in six years or keep working after six years while keeping 100% of his income. This deprives Emily of the lifestyle she enjoyed during the marriage and which she should be able to enjoy in the future.

CONCLUSION

Despite being a long-term marriage that was devoted to enhancing Douglas' career and earning power, Emily's decades-long absence from the workforce to support Douglas and the family, and the parties' healthy standard of living, the circuit court's order departs from well-established principles to leave Douglas considerably better off in the future. He leaves the marriage at the height of his earning power commanding an income over $550,000 per year. Once maintenance ends after six short years, he can either retire early or keep working while keeping 100% of his income. Such a limited maintenance order under these specific facts is unfair and inequitable.

The amount and term of maintenance awarded by the circuit court in this case and affirmed by the Court of Appeals is wholly inadequate under the facts and circumstances of this case. The erroneous, unsupported determination of Douglas' income and failure to utilize his current income leads to an inadequately low amount of maintenance. Further, the failure to acknowledge current income and standard of living resulted in a shockingly short term of maintenance given the length of this marriage and the contributions of Emily to Douglas' career. The prediction of when Douglas will retire is equally erroneous.

Despite the circuit court calling this a "classic" maintenance case, the result was anything but classic. *Bahr* and *LaRocque* are not dead letters. Emily seeks review by the Wisconsin Supreme Court to rectify the conflicts with the controlling cases in Wisconsin.

Respectfully submitted this 2nd day of August, 2024.

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STATE OF WISCONSIN
SUPREME COURT

In re the marriage of:

DOUGLAS S. BUCK,

Petitioner-Respondent,

District: 4

-v-

Appeal No. 2023-AP-001569

EMILY W. BUCK,

Respondent-Appellant.

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b), (bm), and (8g), and 809.62(4) for a petition produced with proportional serif font:. The length of the petition is 7,850 words.

Respectfully submitted this 2nd day of August, 2024.

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APPENDIX CERTIFICATION

Appendix Form and Content Certification

I hereby certify that filed with this petition is an appendix that complies with s. 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision of the court of appeals; (3) the judgment, orders, findings of fact, conclusions of law and memorandum decision of the circuit court necessary for an understanding of the petition; (4) portions of the record necessary for an understanding of the petition; and (5) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the

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Respectfully submitted this 2nd day of August, 2024.

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