

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1415

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

RICHARD G. BEDESSEM,

**PETITIONER-APPELLANT-CROSS-
RESPONDENT,**

V.

DONNA J. BEDESSEM,

**RESPONDENT-RESPONDENT-CROSS-
APPELLANT.**

APPEAL and CROSS-APPEAL from orders of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Eich and Vergeront, JJ.

EICH, J. Richard Bedessem appeals from an order increasing his maintenance obligation to his former wife, Donna J. Bedessem, from \$2,800 to \$3,500 per month. He argues that the increase was based on an improper imputation of additional income by reason of his ownership of shares of closely-held stock. Donna cross-appeals from a separate order declining to retroactively apply the maintenance increase to the date of the original divorce judgment.¹ We conclude that the court's earning-capacity imputation to Richard based on his stock ownership was in error. We also conclude that, under *Overson v. Overson*, 140 Wis.2d 752, 412 N.W.2d 896 (Ct. App. 1987), the circuit court has authority to make retroactive increases in maintenance payments, if certain requirements are met. We therefore reverse the orders and remand to the trial court for reconsideration.

Richard and Donna had been married for thirty-two years. The original judgment of divorce included an award of maintenance to Donna of \$2,800 per month. As part of its property division, the court also awarded Donna a one-third interest in 139 shares of stock in the Farmers State Bank. Richard is the bank's president, and had initially acquired the stock from his father, who formerly occupied that position. The court concluded that, even though the stock had been received by Richard as a gift, and thus would not normally be subject to division, Donna would suffer hardship if it was not divided. *See* § 767.255(2), STATS. (gifted property may be divided if not to do so would result in hardship to

¹ The original judgment, entered on August 1, 1996, was appealed and we reversed the property division, remanding the case to the circuit court for reconsideration of other determinations—including maintenance—which may have been affected by our decision. On remand, the court made the increase in maintenance effective as of its date, December 4, 1997, rather than the date of the original judgment, as Donna argued should be done.

the other spouse). Richard appealed that ruling and we reversed, concluding that Donna would not experience any hardship or other difficulties if the stock was not divided. Accordingly, we remanded the case to permit the circuit court to reconsider any other determinations—such as maintenance, property division and attorney fees—which may have been affected by its decision to divide the stock.

On remand, the court said that, as a result of our decision, Richard was, in effect, receiving 139 shares of stock that were not expressly valued at the time of trial—or considered in the original maintenance determination—because they were divided on a percentage basis; and that this amounted to a substantial change in Richard's financial circumstances entitling Donna to increased maintenance. The court accepted Donna's expert's valuation of the stock, finding that it was worth approximately \$300,000. It was undisputed, however, that the stock paid dividends of only \$334 per month. The court, believing that those dividends represented a lower return than Richard could earn by investing \$300,000 elsewhere—in a 5% certificate of deposit, for example—then took 5% of \$300,000 and imputed that extra income—\$1,300 per month—to Richard, and increased Donna's maintenance by \$700 per month. Initially, the court made the increase effective as of the date of the 1996 divorce judgment. Then, after hearing Richard's objections, the court changed the effective date of the increase to the date of its order on remand, December 4, 1997, noting that, while a retroactive application seemed appropriate under the circumstances, there did not appear to be any authority permitting such a result. As indicated, Richard appeals from the order increasing maintenance, and Donna cross-appeals from the order setting the effective date of the increase.

Richard does not object to the original maintenance award of \$2,800 per month. He challenges only the \$700 increase, arguing that it was based on an

improper imputation of income over and above the stock's actual earnings. He also claims that were he to liquidate his stock at the bank—of which he is president—in order to reinvest it at a higher rate of return, he would in all likelihood lose his job.

It is undisputed that Richard's actual income from the stock is \$334 per month; and that sum was used by the court in determining his earning capacity for purposes of arriving at the initial \$2,800 maintenance award. And there is no evidence in the record that Richard could earn more than \$334 per month on the bank stock, regardless of its value. While the court "figure[d]" that Richard potentially could earn a higher income on his stock were he to sell it for \$300,000 and invest that sum of money elsewhere—at a 5% rate of return—there is no factual basis for such a finding in the record, only the court's statement that:

if Mr. Bedessem took that stock, and you figure even a 5 percent return on that stock, that's an extra \$1,300 a month in income. And nobody is going to have \$300,000 worth of an asset just sitting there doing nothing. It's going to be generating some income.

Richard argues that the stock is not "just sitting there doing nothing," but is securing his employment at the bank where he has worked for over thirty years. He testified that he began acquiring the stock from his father, who was president of the bank at the time, and he maintains that selling it is simply not a viable option—an assertion supported by the testimony of Donna's expert witness, John Michael Anderson, who testified that opportunities for trading closely held stock in a small community bank is "limited." He said that Richard's bank had less than 10% of its stock traded in the two years preceding the divorce trial, and that trading 10% in that period of time would be very unusual for a bank that size.

Because we have found no evidence in the record supporting the circuit court's imputation of additional income to Richard from his ownership of the stock—beyond the dividends of \$334 per month—we reverse the court's decision insofar as it imputes additional income to him beyond that amount; and we remand for the court to reconsider its decision accordingly. In doing so, however, we stress that our decision should not otherwise bar an increase in Donna's maintenance if the applicable criteria exist. We hold only that the court erred in imputing additional income of \$1,300 per month to Richard as a result of his ownership of the stock.

In her cross-appeal, Donna challenges the court's ruling that it lacked authority to retroactively apply the increase in maintenance back to the date of the original divorce judgment. Explaining the reasons for that ruling, the court stated:

The Court is of the opinion that you can't order [the increased maintenance] retroactive. I don't think the obligation arises until the Court actually orders it, and that would be with the date of the Court's last order. I don't think I can go back all the way to the date and time of the [divorce] trial.

....

... I have tried to find some authority for the opposite position, and I can't find one. And I don't think I can do it until – I can't enforce an order that far retroactively....

If you can get the Court of Appeals to tell me I'm wrong, I'll be happy to.²

² This may be one of those rare occasions when we are able to accomplish that very end, while at the same time reversing the court's decision.

In *Overson v. Overson*, *supra*, the trial court, after a remand from this court on a related issue, reconsidered its original maintenance award of \$1,000 per month, reducing it to \$500, and making the reduction retroactive to the date of the original judgment. We affirmed, concluding that while “[g]enerally, trial courts in Wisconsin cannot direct the retroactive increase of support payments[,] ... in cases which have been timely appealed, upon remand the trial court may, in its discretion, retroactively adjust any portions of the original judgment which are covered by the remand.” *Id.* at 759, 412 N.W.2d at 898-99. And we said:

We so hold because to do otherwise would unnecessarily bind a trial court’s hands on remand. If an appellate court points out a trial court’s error and remands the case to enable the error to be corrected, yet forecloses upon the very method by which the error can be corrected, an unreasonable and untenable situation is created. We also consider the fact that the law is presently unclear concerning a trial court’s authority to make modifications in orders for support while the case is on appeal and the fact that the record is with the appellate court. A rule prohibiting a trial court from considering the effect of the original erroneous order on payments made during the period of time that the case is on appeal would work an unnecessary hardship on the party who prevailed on appeal.

Id. at 759, 412 N.W.2d at 899.

Although *Overson* is arguably distinguishable on the facts, we believe its reasoning supports the conclusion that, under the circumstances present in this case, the circuit court may, in its discretion, order an increase in maintenance effective as of the date of the original divorce judgment where: (1) the original matter was timely appealed, and (2) the court was permitted to reconsider its original maintenance determination on the remand.

Richard, disagreeing, argues that it would be “fundamentally unfair” to allow a retroactive increase in this case because it would have the effect of

“punishing” him for winning his appeal. We reject the argument. While Richard may have prevailed on his appeal—in which he successfully challenged the trial court’s “hardship” ruling which permitted consideration of his gifted property in the property division—that “victory” does not shield him from an opposite result on Donna’s cross-appeal from that portion of the court’s decision setting the effective date of the maintenance modification.

We therefore reverse the orders appealed from and remand to the circuit court to reconsider maintenance.

By the Court.—Orders reversed and cause remanded with directions.

Not recommended for publication in the official reports.

