

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 24, 2000

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-1152**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**WILLIAM B. BURKE,**

**PETITIONER-APPELLANT,**

**V.**

**PATRICIA L. BURKE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment and orders of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. William B. Burke appeals from that portion of a judgment of divorce awarding maintenance and child support, and from the orders denying his motions to reconsider and for modification. William argues that the court improperly determined the amount of his income for the purposes of

maintenance and child support. We conclude that the circuit court properly exercised its discretion when making this determination. We therefore affirm.

¶2 William and Patricia L. Burke were divorced by a judgment dated January 20, 1999. At the time of the divorce, the couple had one minor child. They were awarded joint custody with primary placement with Patricia. William is a self-employed manufacturer's representative whose income fluctuates depending on sales. At trial, he argued that his income would be substantially reduced from previous years because of a reduction in commission rates from his principal account. The court determined the amount of William's income by considering his earning history. The court took half of his income from the current year and half of his income from the previous year and added them together to arrive at the figure to be used (\$70,000). This figure was less than the figure that Patricia had suggested and more than the figure that William had suggested. The court then awarded Patricia a percentage of that figure for maintenance and child support.

¶3 William moved the circuit court to reconsider its order for maintenance and child support. The court would not reconsider. A few months later, William moved the court to modify the award based on the amount of income shown on his income tax return for 1998. Again, the court refused to modify the award.

¶4 On appeal, William contends that the circuit court erroneously exercised its discretion when awarding maintenance and child support because its decision was not a product of a stated, reasoned mental process, the court imputed income to William without a finding that William was shirking, and the court did not fully consider the fairness and support objectives of maintenance. William

also argues that the court erroneously exercised its discretion when it refused to reconsider and modify the award. We disagree.

¶5 The amount and duration of maintenance awards rests within the sound discretion of the circuit court and will not be disturbed absent an erroneous exercise of that discretion. See *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). An erroneous exercise of discretion occurs when “the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either excessive or inadequate.” *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (Ct. App. 1989). Therefore, the court’s decision must be “the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶6 The first issue William raises is that the circuit court erroneously exercised its discretion when it determined the amount of his income. William asserts that the court based its determination on a factual error and therefore must be reversed. William asserts that the circuit court confused his net and gross income, among other things. We conclude, however, that the court’s methodology was proper.

¶7 The court considered that William’s income fluctuated because he was self-employed. The court was not willing to accept William’s self-serving statements that his income had reduced dramatically in the current year. The court, therefore, applied a methodology that considered William’s earning history. The court took half of the income for the current year, in which William claimed

his income had been reduced, and half of the income for the prior year, and added these together to come up with the \$70,000 figure.

¶8 William asserts that the court improperly imputed income to him without a finding that he had been shirking. He also argues that the court did not give appropriate consideration to the support and fairness considerations of maintenance awards. See *LaRocque*, 139 Wis. 2d at 31-33. Specifically, he argues that the award was unfair and did not take into account his reduced earnings.

¶9 William misunderstands what the circuit court did. The court made a factual determination of William's income based on evidence of past years. Rather than just accepting the evidence of the current year's reduced income, the court considered what William's income had been the previous year. The testimony of the representative of William's largest client supports the court's method of making this determination. While the witness testified that William's commission had been reduced, the witness also stated that it was likely that his income would increase as a result of increased sales. Consequently, the evidence before the court showed both that William's income had been reduced in the current year, but that it was likely to increase. As the circuit court noted, as a self-employed person, William had a certain amount of control over the amount of his income. Under these circumstances, the circuit court's method of determining William's income was completely appropriate.

¶10 William also argues that the court erroneously exercised its discretion when it refused to reconsider and modify its award. Since we conclude that the court properly exercised its discretion in making the award, we also conclude that it properly denied the motion to reconsider.

¶11 William's motion to modify came only a few months after the judgment of divorce and was based solely upon his tax return for that year. The court stated that it did not have enough evidence before it to modify the award. Essentially, the court adhered to the same methodology it applied at trial. Since we have already concluded that the methodology used was appropriate under the circumstances, we agree with the court's conclusion that modification of the award was not appropriate at that time. Therefore, we affirm.

*By the Court.*—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

