

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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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. 99-2683-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

JOSEPH N. FRANCIS,

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

v.

MAUREEN M. FRANCIS,

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

APPEAL and CROSS-APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph N. Francis appeals and Maureen M. Francis cross-appeals from an order modifying maintenance from a fixed amount to a percentage of Joseph's income. Joseph contests the percentage award and

Maureen contests the court's refusal to make the maintenance modification retroactive. Pursuant to a presubmission conference and this court's order of November 11, 1999, the parties submitted memorandum briefs. Upon review of those memoranda and the record, we affirm.

¶2 The parties were divorced in 1997 after thirty-three years of marriage. At the time of the divorce, the circuit court found that Joseph was earning approximately \$4000 per month and Maureen was earning approximately \$1283 per month. With annual maintenance of approximately \$14,000 (or \$1166 per month), Joseph would have monthly disposable income of \$1977 and Maureen would have monthly disposable income of \$1986. The court found this appropriate in light of the parties' ages and lengthy marriage.

¶3 Upon receipt of Joseph's tax returns for 1997 and 1998, Maureen moved the court to increase maintenance because Joseph's actual average monthly income exceeded the \$4000 relied upon by the circuit court in setting maintenance. Joseph earned an average of \$4262 per month in 1997 and \$5565 per month in 1998, which Maureen claimed was a substantial change in circumstances warranting an increase in maintenance. Maureen's modification motion also asked the court to fashion a mechanism for automatically adjusting maintenance annually and to modify maintenance retroactively in recognition of Joseph's significant delay in providing his 1997 tax information and to address his 1998 income increase.

¶4 In its decision from the bench after a hearing on Maureen's modification motion, the court harkened back to its original maintenance order. In fashioning its original maintenance order, the court noted that it had considered the parties' thirty-three-year marriage and their contributions to the marriage. The

court's starting point for maintenance was an equal division of the parties' income. In light of the evidence presented at the modification hearing, the court found that Joseph voluntarily accepted overtime prior to and after the divorce and that overtime pay constituted a significant portion of Joseph's income through the years.¹

¶5 The court then reviewed the parties' current financial circumstances and found that the increase in Joseph's gross monthly income from \$4000 at the time of the divorce to \$5565 in 1998 was a substantial change in financial circumstances. Maureen's gross monthly income had increased only negligibly during the same period. The court noted that the purpose of maintenance is to maintain the recipient at the standard of living enjoyed during the marriage or as close to that level as the parties' financial circumstances permit.

¶6 The court found that Joseph's overtime hours rendered his income unpredictable and warranted a percentage maintenance award under *Hefty v. Hefty*, 172 Wis. 2d 124, 132, 493 N.W.2d 33 (1992). The court specifically noted that it "was probably remiss at not recognizing this fact at the time of the initial award." The court considered Joseph's ability to pay and Maureen's needs, and modified maintenance to twenty-nine percent of Joseph's gross monthly earnings with a minimum monthly payment equal to the original maintenance award of \$1166 per month.

¶7 On appeal, Joseph argues that his increased income is solely due to his voluntary acceptance of overtime hours and that he is being penalized for his

¹ Joseph and his supervisor testified that overtime is at times discretionary and at times mandated by the employer. Joseph and Maureen testified that he worked overtime during much of their marriage.

industriousness and for improving the financial circumstances of his second marriage. He disagrees that his overtime income satisfies the unusual circumstances test of *Hefty* for the imposition of a percentage maintenance award.

¶8 A percentage maintenance award is within the court's discretion, *see id.* at 130, and is warranted when very unusual circumstances necessitate a deviation from a fixed award, *see id.* at 132. An example of an unusual circumstance is the payor's ability to manipulate income which precludes the circuit court from predicting the payor's income for maintenance purposes. *See id.* We will not limit *Hefty*, as Joseph proposes, to the circumstance where the payor is an executive. Rather, we conclude that *Hefty* applies where a payor has the ability to manipulate income.

¶9 Maintenance may be modified where there has been a substantial change in the parties' financial circumstances. *See Johnson v. Johnson*, 217 Wis. 2d 124, 127, 576 N.W.2d 585 (Ct. App. 1998). The decision is a discretionary one, *see id.*, which must have a reasonable basis in the record, *see Littmann v. Littmann*, 57 Wis. 2d 238, 250, 203 N.W.2d 901 (1973). We discern no misuse of discretion by the circuit court in modifying maintenance to account for Joseph's overtime income. The record supports the court's finding that overtime is an integral part of his income. Joseph's historic acceptance of overtime hours supports the court's conclusion that a percentage maintenance award is appropriate and satisfies the court's original intention to equalize income between the parties. The modification order appropriately accounts for a component of Joseph's income which was extant at the time of the divorce.

¶10 Joseph argues that the modification order requires him to support Maureen at a level exceeding the marital standard of living. We disagree. The

parties' standard of living at the time of divorce consisted of their combined gross income. *See Johnson v. Johnson*, 225 Wis. 2d 513, 518-19, 593 N.W.2d 827 (Ct. App.), *review denied*, 225 Wis. 2d 491, 594 N.W.2d 385 (Wis. Apr. 27, 1999) (No. 98-2141). The modified maintenance award does not exceed Maureen's marital standard of living which was the parties' combined gross income of \$63,396.²

¶11 On cross-appeal, Maureen challenges the court's refusal to modify maintenance retroactively. Maureen included a request for retroactivity in her maintenance modification motion. However, she did not make that argument at the hearing on the motion or in her posthearing letter brief to the circuit court. When she submitted her proposed order modifying maintenance, Maureen asked the court to modify maintenance retroactively. Joseph objected, and the court declined.

¶12 We do not address Maureen's arguments regarding retroactivity because she did not prominently argue this request in the circuit court. A party must raise and argue an issue with some prominence to allow the court to address the issue and rule. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). We correct lower court errors; we do not rule on matters which were never developed in that court. *See Vollmer v. Luety*, 156 Wis. 2d 1, 10-11, 456 N.W.2d 797 (1990). Because Maureen did not give the court a chance to hear argument and rule on the retroactivity question, we conclude that she has waived this issue on appeal.

² If we have not addressed with specificity some particular aspect of Joseph's arguments, we have deemed it lacking sufficient merit or importance to warrant individual attention. *See State v. Waste Management of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

¶13 If we were to reach the merits of Maureen's argument, we would note that the record supports the court's refusal to modify maintenance retroactively. Even though the court did not state its reasons for refusing Maureen's request,³ we may independently review the record to determine whether it provides a basis for the court's decision. *See Town of Seymour v. City of Eau Claire*, 112 Wis. 2d 313, 322, 332 N.W.2d 821 (Ct. App. 1983).

¶14 The original maintenance order set Joseph's maintenance at a fixed amount. Therefore, Joseph had no reason to believe that earning additional income through overtime would automatically affect his maintenance obligation. That the court modified the maintenance order to capture the overtime component of Joseph's income is not grounds to modify maintenance retroactively in the absence of evidence and argument in favor of retroactive modification.

By the Court.—Order affirmed.

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

³ Maureen chastises the circuit court for not addressing the retroactivity issue. However, as we have held above, Maureen never raised the issue with prominence to permit the court to make a ruling after considering the arguments of the parties. We note that Joseph made several objections to Maureen's request for retroactive modification of maintenance. This is the type of dispute which should have been addressed at the hearing or in posthearing letter briefs, not in a letter submitting a proposed order.

