

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Appeal No. 2009AP1160

Cir. Ct. No. 2004FA3184

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

LINDA C. WRIGHT,

PETITIONER-APPELLANT,

V.

CHARLES F. WRIGHT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Reversed and cause remanded for further proceedings.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Linda C. Wright appeals a non-final order of the circuit court, which limited the scope of proceedings on remand following our

opinion in an earlier appeal.¹ See *Wright v. Wright*, 2008 WI App 21, 307 Wis. 2d 156, 747 N.W.2d 690. We agree with Ms. Wright that the restrictions imposed by the order are inconsistent with our prior mandate. We therefore reverse the order and remand the cause for further proceedings.

BACKGROUND

¶2 The Wrights were divorced in March 2006, after more than twenty-one years of marriage. An equal property division was ordered, with the parties each receiving approximately \$12 million in property. Maintenance was resolved separately in July 2006. The circuit court awarded Ms. Wright fifty percent of Mr. Wright’s income from four sources, to continue indefinitely, but excluded distributions that Mr. Wright received from business interests Fall River Capital, Quaestus, and Barclay. See *id.*, ¶¶3–5, 307 Wis. 2d at 164–165, 747 N.W.2d at 694. On appeal, Ms. Wright argued “that the [circuit] court erred when it determined what income of [Mr. Wright] should be used for setting maintenance[.]” *Id.*, ¶7, 307 Wis. 2d at 166, 747 N.W.2d at 695.

¶3 We reversed the maintenance order. We noted that, in setting maintenance, the circuit court “is obligated to consider all income sources, ordinary and extraordinary, when making its determination.” *Id.*, ¶37, 307 Wis. 2d at 178, 747 N.W.2d at 701. We explained why the articulated reasons for excluding income from Fall River Capital, Quaestus, and Barclay were erroneous. See *id.*, ¶¶38–42, 307 Wis. 2d at 179–181, 747 N.W.2d at 701–702. We then wrote:

¹ We granted Ms. Wright’s petition for leave to appeal by order dated June 15, 2009. See WIS. STAT. RULE 809.50.

Based on the foregoing, we conclude that the trial court erred in excluding from the maintenance calculation the future income generated from the Fall River Capital, Quaestus, Barclay and other business interests awarded to [Mr. Wright]. Accordingly, we reverse that portion of the order and remand to the trial court to conduct whatever proceedings necessary to address our decision on this issue. We remand, in part, in response to [Mr. Wright]'s contention that [Ms. Wright] never raised this issue to the trial court with respect to entities other than the three specifically mentioned. It is clear from the record that [Ms. Wright] did raise the issue in the trial court, but that the trial court only specifically addressed Fall River Capital, Quaestus and Barclay. On remand, the trial court should consider income from *all sources* in determining the maintenance calculation.

Id., ¶43, 307 Wis. 2d at 181, 747 N.W.2d at 702.

¶4 When the case was returned, the circuit court asked the parties to brief arguments regarding the scope of proceedings following the remand. Based on the briefs, the circuit court issued an order stating, in relevant part: “At the remand hearing, the scope of the Court’s maintenance hearing is that the Court shall consider the income from the specific business entities addressed in the Court of Appeals’ Decision, namely: Fall River Capital, Barclay and Quaestus.” Ms. Wright, believing this order inappropriately limits the remand proceedings, appeals.

DISCUSSION

¶5 “On remand the [circuit] court has jurisdiction to take such action as law and justice may require under the circumstances as long as it is not inconsistent with the mandate and judgment of the appellate court.” *Fullerton Lumber Co. v. Torborg*, 274 Wis. 478, 483, 80 N.W.2d 461, 464 (1957), superceded on other grounds by WIS. STAT. § 103.465. In cases where the appellate court reverses and remands the case for further proceedings, the circuit

court can carry into effect the mandate of the appellate court only so far as its discretion extends. *See id.*, 274 Wis. at 483–484, 80 N.W.2d at 465. The circuit court “is left free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision.” *Id.*, 274 Wis. at 484; 80 N.W.2d at 465. The sole question before us now on appeal is whether the circuit court, on remand, took action “not inconsistent with” our prior mandate.

¶6 A maintenance determination is committed to the circuit court’s discretion. *See LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 436, 663 N.W.2d 789, 793. Discretion requires the examination of relevant facts and application of a proper legal standard which, upon the use of a demonstrated rational process, yields a conclusion that a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987).

¶7 Previously, the circuit court concluded Ms. Wright was entitled to a maintenance award funded by four particular sources while specifically excluding income from three other sources.² We concluded that the circuit court’s articulated reasons for excluding Fall River Capital, Quaestus, and Barclay constituted an erroneous exercise of discretion. We thus reversed the portion of the order excluding those interests.

¶8 Additionally, the circuit court had not addressed the existence of, or the basis for excluding, any other sources of income. Thus, Ms. Wright asserted in

² The sources were the Fall River Group Salary and Bonuses; the Fall River Group Subchapter S Distributions; GRAT Distributions; and Fall River Group Retained Earnings Distributions. *Wright v. Wright*, 2008 WI App 21, ¶38, 307 Wis. 2d 156, 178, 747 N.W.2d 690, 701.

the first appeal “that she requested the [circuit] court to base its maintenance award on income from all sources: ‘any income from all sources is fair game for maintenance.’” *Wright*, 2008 WI App 21, ¶36, 307 Wis. 2d at 178, 747 N.W.2d at 700.

¶9 Consequently, “[w]e remand[ed], in part, in response to [Mr. Wright]’s contention that [Ms. Wright] never raised this issue to the circuit court with respect to entities other than the three specifically mentioned.” *Id.*, ¶43, 307 Wis. 2d at 181, 747 N.W.2d at 702. We noted Ms. Wright clearly had raised the issue of counting or considering other income sources, but the circuit court had only given reasons for excluding Fall River Capital, Quaestus, and Barclay. *Ibid.* Our mandate was issued consistent with the rule that “all sources of income, ordinary and extraordinary, are to be considered when establishing ... maintenance.” *See Dowd v. Dowd*, 167 Wis. 2d 409, 415, 481 N.W.2d 504, 506 (Ct. App. 1992).

¶10 In determining the scope of the maintenance hearing on remand, the circuit court determined this court to be saying that the circuit court:

made a mistake from excluding the income from these specific business entities. And that will be the scope of our decision here. Because the Court of Appeals talked about what the error was and talked about how it should basically be handled. It should be put back into the case. It did not in any way indicate that there should be recalculation of the entire award.

Mr. Wright asserts that the circuit court appropriately exercised its discretion in determining the above to be the scope of the maintenance hearing. We disagree.

¶11 First, remand was necessary to provide the circuit court with an opportunity to exercise its discretion and set an appropriate maintenance award.

However, it appears that the court’s “demonstrated rational process” was simply to add the three excluded entities into the maintenance calculation because this court said it was error to exclude them. In reality, we had only explained why the previously articulated reasons for excluding Fall River Capital, Quaestus, and Barclay from the calculation were erroneous. Had we intended to circumscribe or circumvent the circuit court’s discretion, and force inclusion of those three assets in a maintenance determination, we could have so crafted our mandate.

¶12 Second, it is true that nothing in our prior decision specifically indicates that the entire maintenance decision should be reopened, especially since Mr. Wright did not appeal the circuit court’s fundamental findings that (1) Ms. Wright was entitled (2) to fifty percent of Mr. Wright’s income (3) for an indefinite period (4) in order to maintain the lifestyle she had enjoyed during the marriage. However, it is clear from the prior mandate that we at least expect the circuit court to revisit and review all sources of Mr. Wright’s income. Then, consistent with standards set forth in WIS. STAT. § 767.56 and case law,³ the circuit court should exercise and document its discretion in determining: (1) which sources and their values are appropriately considered for funding a maintenance award that accomplishes the objectives of support and fairness, *see LaRocque v. LaRocque*, 139 Wis. 2d 23, 32–33, 406 N.W.2d 736, 739–740 (1987), and (2) what the maintenance award will be.⁴

³ See, e.g., *LaRocque v. LaRocque*, 139 Wis. 2d 23, 32–33, 406 N.W.2d 736, 739–740 (1987) (dual objectives of maintenance); *Bahr v. Bahr*, 107 Wis. 2d 72, 84–85, 318 N.W.2d 391, 398 (1982); *King v. King*, 224 Wis. 2d 235, 247–249, 590 N.W.2d 480, 484–485 (1999).

⁴ We do not express an opinion, however, on whether or which sources should form the basis of a maintenance award; only that there must be appropriate exercise of discretion in making a maintenance determination.

¶13 The circuit court has interpreted our prior mandate as stating that the circuit court need only include and review the three specific sources of Mr. Wright's income previously and erroneously excluded from the original maintenance determination. This interpretation is inconsistent with our prior mandate and reflects no exercise of discretion relative to setting maintenance. The circuit court's order so limiting proceedings on remand is, therefore, reversed, and the cause remanded for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

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

