

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 15, 1995

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(1), STATS.

NOTICE

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

No. 94-2647

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

In re the Marriage of:

JOANNE BARTLETT,

Petitioner-Respondent,

v.

BERT BARTLETT,

Respondent-Appellant.

APPEAL from an order of the circuit court for Waukesha County:
WILLIS J. ZICK, Judge. *Affirmed.*

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

PER CURIAM. Bert Bartlett appeals from an order which reduced maintenance to his former wife, Joanne Bartlett, by \$100 per month. Bert claims that maintenance should be terminated because of the substantial reduction in his income and the financial assistance Joanne receives from a live-in companion. We conclude that the trial court properly exercised its discretion and affirm the order.

The Bartletts were divorced in 1988 after thirty years of marriage. At that time, Bert earned \$62,736 per year. Bert was required to pay maintenance in the amount of \$1450 per month.

In January 1994, Bert moved to terminate maintenance. The motion was considered as one to reduce or suspend maintenance. The trial court found that Bert's income was in excess of that reported on his 1993 tax return. It adjusted Bert's income to arrive at a final income of \$42,000 per year. Finding that Joanne was capable of earning \$5000 and that she receives approximately \$3000 per year from a sometime live-in companion, the trial court reduced maintenance to \$1350 per month.

Maintenance is subject to modification only upon a positive showing of a substantial change in the financial circumstances of the parties. *Gerrits v. Gerrits*, 167 Wis.2d 429, 437, 482 N.W.2d 134, 138 (Ct. App. 1992). Bert concurs in the trial court's conclusion that a substantial change has occurred but contends that the reduction in his income is much greater than that found by the trial court. While the modification of maintenance involves the exercise of the trial court's discretion, *Poindexter v. Poindexter*, 142 Wis.2d 517, 531, 419 N.W.2d 223, 229 (1988), the determination of income is a finding of fact which we will not set aside unless clearly erroneous, *DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 588, 445 N.W.2d 676, 681 (Ct. App. 1989). Thus, contrary to Bert's argument, we do not look at whether the trial court provided an explanation of the reasons underlying its determination of Bert's income. Rather, we examine whether there is evidence to support the trial court's finding.

For purposes of appellate review, the evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. *Bank of Sun Prairie v. Opstein*, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *Id.* In addition, the trial court is the ultimate arbiter of the witnesses' credibility when it acts as the fact finder and there is conflicting testimony. *Id.* We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. *Id.*

Bert argues that the trial court's finding is erroneous because he has virtually no income from the restaurant that he and his wife have owned and operated since 1989. Bert's accountant, who was hired in the second half of 1993, testified about tax returns and financial statements he had prepared for Bert's corporation, the entity through which the restaurant is operated. The accountant indicated that the corporation loses money and has little financial stability. He also determined that the cash flow to Bert and his wife in 1993 was \$24,381, which included a salary of \$5975 to Bert's wife.

Bert himself testified that he and his wife work in excess of seventy hours per week in the restaurant for no salary. They live in an apartment attached to the restaurant and take their meals at the restaurant. He had to take a \$100,000 loan from his mother-in-law in 1993 in order to make a balloon payment. Bert indicated that various cars which are titled in his name really belong to his brother. He tries to sell the cars from the restaurant on his brother's behalf. Bert also explained that he is only a figurehead for a travel agency whose corporate papers and loans bear his name. Bert testified that he receives no income from that agency.

While this evidence tends to support Bert's claim of poverty, the trial court chose to rely on the loan applications Bert had submitted to a bank in 1991 and 1993. On each application Bert stated his income to be \$60,000 per year. This \$60,000 figure was the trial court's starting point for determining Bert's income. The trial court then deducted five percent, or \$3000, in recognition of Bert's puffery on the loan application. An additional \$15,000 was deducted for the services Bert's wife provides at the restaurant.

Bert argues that there is no reasonable basis for the trial court to reject the accountant's testimony and rely on the loan applications to the exclusion of tax returns and financial statements prepared by the accountant. However, the issue is one of credibility. Joanne testified that during their marriage, Bert's practice was to collect cash from their business and keep it in envelopes in the basement of their home. Also, during the marriage she was told by Bert that he did not report all of the cash on his income tax returns. A basis exists for the trial court to believe that Bert has more income than that which he reports. Bert represented to the bank that he earns \$60,000 per year but expects the trial court to accept his claim of poverty. By Bert's own admission, it is established that his income is subject to manipulation. Thus,

Bert's calculation of his income is not, as he claims, irrefutably credible. The trial court properly relied on the loan application to set Bert's income.

Bert argues that the \$15,000 attributed to his wife's contribution to the restaurant business is not supported by any evidence. No testimony was offered that someone performing the duties performed by Bert's wife would be paid \$15,000 a year. However, Bert's wife received \$6500 in salary from the business in 1993. The trial court was generous in increasing the amount of income attributable to his wife's efforts. The error, if any, is in Bert's favor and does not transmute the trial court's determination of income to guesswork.

Bert claims that the trial court inserted the wrong numbers into the computer program it used to determine the appropriate amount of maintenance. The trial court started with a 1993 taxable income for Bert of \$21,359 based on exhibit 4, the accountant's cash flow analysis. Although we cannot determine how the trial court arrived at the starting figure, the potential error is without consequence. Later in its calculation, the trial court added in the difference between \$42,000 total income and the 1993 taxable income figure to determine Bert's disposable income. Thus, the \$42,000 income was ultimately used by the trial court in determining the amount of maintenance. To the extent the figures utilized in the computer analysis were in error, it constitutes a manifest error which should have been brought to the trial court's attention before appeal. Failure to bring a motion before the circuit court to correct such manifest error constitutes a waiver of the right to have such an issue considered on appeal. *Schinner v. Schinner*, 143 Wis.2d 81, 93, 420 N.W.2d 381, 386 (Ct. App. 1988).

Bert's final argument is that the trial court failed to consider the assistance Joanne receives from a sometime live-in companion. The cohabitation of the recipient spouse does not disqualify the spouse from receiving maintenance but it is a relevant factor bearing upon maintenance. See *Van Gorder v. Van Gorder*, 110 Wis.2d 188, 197-98, 327 N.W.2d 674, 678-79 (1983). The trial court did impute rental income to Joanne for the periods of time when a companion stays with her and helps her pay bills and buy food. The evidence was that the companion stayed with her sporadically and it was unknown whether such visits would continue in the future. The trial court fulfilled its obligation to consider this factor.

It turns out that Joanne's sometime live-in companion is Bert's brother. We see Bert's argument to be nothing more than moral outrage on the suggestion that Joanne has become involved with his brother. Such an argument has no place in this court.

By the Court.—Order affirmed.

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