COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 96-2494

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE MARRIAGE OF:
JULIA M. REVANE,

PETITIONER-RESPONDENT,

v.

MICHAEL J. REVANE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: GARY A. GERLACH, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Michael J. Revane appeals from an order modifying his maintenance obligation to his former wife, Julia M. Revane. He had previously been ordered to pay maintenance of $7,000 per month, as long as he was gainfully employed. With complete retirement pending, he filed a motion

to terminate maintenance. After hearing evidence and receiving written arguments, the trial court amended the judgment of divorce to reduce maintenance to $4,500 per month to terminate upon the death of either party or Ms. Revane's marriage.

Mr. Revane contends that the trial court erroneously exercised its discretion by imputing income to him based on a six-percent rate of return on investments, by adopting Ms. Revane's budget, which he claimed was inflated, by requiring him to invade principal to pay maintenance, and by ignoring the fairness objective. We affirm the trial court's order because we conclude that the court did not erroneously exercise its discretion when modifying maintenance.

A motion to modify maintenance is within the trial court's discretionary authority. ***Poindexter v. Poindexter***, 142 Wis.2d 517, 531, 419 N.W.2d 223, 229 (1988). In exercising its discretion, the trial court is to consider those factors identified in § 767.26, STATS., that are relevant to the parties. ***Id.*** at 531-32, 419 N.W.2d at 229. When a marriage was long-term, a reasoned starting point for the maintenance analysis is to award the dependent spouse half the total combined earnings of both parties. *See* ***Bahr v. Bahr***, 107 Wis.2d 72, 84–85, 318 N.W.2d 391, 398 (1982). This starting percentage is then adjusted to reflect consideration of the § 767.26 factors. ***Id.*** Any modification of maintenance must fulfill the original support objective of allowing the recipient spouse to continue the marital standard of living to the extent possible. ***Gerrits v. Gerrits***, 167 Wis.2d 429, 438, 482 N.W.2d 134, 138 (Ct. App. 1992). The maintenance decision must also result in a fair and equitable financial arrangement between the former spouses. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 32–33, 406 N.W.2d 736, 740 (1987). The paying spouse cannot be allowed to preserve the pre-divorce standard of living while substantially reducing the recipient's living standard. *See* ***id.*** at 35,

406 N.W.2d at 741. Similarly, a spouse who contributed to the marriage as a non-wage-earning homemaker should not be expected to rely solely on the property division for income. *See* ***id.*** at 38, 406 N.W.2d at 742.

As with any discretionary decision, we will not reverse a decision modifying maintenance unless the trial court erroneously exercised its discretion. ***Poindexter***, 142 Wis.2d at 531, 419 N.W.2d at 229. Discretion implies a rational mental process in which facts of record and relevant legal principles are stated by the court and considered to achieve a reasoned and reasonable determination. ***Id.*** If the trial court fails to fully explain its reasons, an appellate court has the option of reviewing the record to determine whether discretion has in fact been exercised and to look for reasons to sustain the decision. *See* ***Vier v. Vier,*** 62 Wis.2d 636, 638–39, 215 N.W.2d 432, 433 (1974). Underlying the discretionary decision, however, may be factual determinations. If a decision is really a factual determination, the test on appeal is whether the finding is clearly erroneous. Section 805.17(2), STATS. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. ***Wallen v. Wallen,*** 139 Wis.2d 217, 224, 407 N.W.2d 293, 296 (Ct. App. 1987).

Mr. Revane contends that the trial court failed to consider the fairness objective when it made "a retired ex-husband pay $54,000 per year, from the principal of his assets, to a healthy, college educated ex-wife, whose own estate exceeds $1,000,000." The absurdity of this claim is apparent when we review the facts concerning the parties' relative financial status.

The Revanes were in their mid-fifties when they divorced in 1988 after twenty-nine years of marriage.[1] Mr. Revane was president of M & I Trust Company, and Ms. Revane was a full-time homemaker whose teaching career ended shortly after their marriage. Thus, while college-educated, she was sixty-one at the time of the modification and had not been in the workforce for over thirty-five years, apparently with Mr. Revane's blessing.

Mr. Revane retired from M & I at the end of 1993, but the company retained him for two years as a consultant at an annual pay of $385,000 per year. Later, M & I agreed to pay him a retirement benefit of $10,277 monthly, for three years after he completely retired at the end of 1995, and then $8,333 monthly, for the remainder of his life. This was additional income not derived from contributions made to retirement accounts while he was employed.

The trial court found that at the end of 1995, Mr. Revane had a net worth in excess of $3,100,000, which was three times his net worth at the time of the property division. The court also found that he had $2,198,186 invested in income-generating assets. In contrast, the trial court found that Ms. Revane's income from wages was *de minimis*. Her financial disclosure statement listed approximately $700 per month non-maintenance income. Her net worth was $1,046,000, which was twenty-seven percent higher than it was at the time of the divorce. The court also found that her income-generating assets totaled $750,000.

Mr. Revane submitted a financial disclosure statement showing approximately $12,000 in monthly income and approximately $18,000 in monthly expenses, excluding maintenance. The trial court found that his standard of living

[1] Before divorcing, they had lived apart for approximately ten years.

was equal to or higher than during the marriage, and noted that the "budget includes over $35,000 a year for entertainment, $8100 a year for gifts and donations and $43,800 a year for 'other expenses.'" These expenses included certain items previously paid for by M & I. During his testimony, Mr. Revane acknowledged that he would have to reduce his expenses, although the monthly budget did not incorporate any reductions. Mr. Revane also testified at his deposition that he would live off of the income, and withdraw whatever he needed from the accounts, which he "hope[d] to grow."

The trial court found that Ms. Revane's monthly expenses were $5,700, which included over $500 per month in gifts and donations. The trial court found that Ms. Revane's standard of living was lower than it was during the marriage, and that some expenses, such as taxes and utilities, would increase.

The trial court concluded that maintenance of $4,500 per month was appropriate. The court concluded that this amount would leave Mr. Revane with monthly disposable income of $11,129. It would also provide Ms. Revane with $5,756, which would be sufficient to meet her needs and her budget. The court found that this amount was justified to meet the support and fairness objectives of a maintenance award.

The trial court's decision did not ignore the fairness objective. Ms. Revane had little income other than maintenance. Although Mr. Revane was retired, he would continue to receive a minimum of $100,000 per year from his former employer. While it is true that Ms. Revane's net worth exceeded one million dollars, Mr. Revane's was three times that amount. Furthermore, although testifying that he expected to reduce expenses, Mr. Revane's projected budget showed no decline in expenses because of his retirement. In fact, he claimed a

substantial increase in expenses because he paid items previously provided by his employer, including expenses for country club memberships. The trial court found that he did not have a decline in his standard of living after the divorce, and, by contrast, that Ms. Revane's standard of living did decline.

Mr. Revane's specific challenges to the trial court's decision are relevant to his claim that he will have to pay the maintenance from principal. First, he challenges the trial court's decision to impute income to him based on a six-percent rate of return on investments.[2] He contends that this rate was not supported by the evidence and that the trial court ignored the evidence that his actual rate of return was 3.6 percent.

The testimony regarding income from investments is limited. There was evidence that Mr. Revane's actual rate of return was 3.6 percent. Mr. Revane, on cross-examination, agreed that he was good at investing money to obtain a good return. Jacqueline Sommers, a certified public accountant, testified that Mr. Revane's investments in government bonds were paying about six percent, which was a "pretty conservative" return.

It is elementary that the rate of return for income from investments is affected by the investment strategy and the type of assets held. Money can be invested for capital gains by investing in assets intended to appreciate, such as real estate or collectibles. Such assets may provide no income until sold, and the trial court did not include any such assets in income-generating assets. Money may also be invested primarily to produce an income stream without any appreciation

[2] The trial court imputed income to both parties at this rate. Thus, the court imputed $131,915 to Mr. Revane and $45,000 to Ms. Revane.

in principal. Investment in certificates of deposit or government bonds are examples of this type of investment. Finally, many investments, such as corporate stocks, are selected to combine capital gains and a regular source of income.

A reasonable inference from Sommers's testimony is that six percent is a conservative rate-of-return for investments intended to produce income but not capital gains. The trial court could also infer from Mr. Revane's actual rate-of-return, the three-fold increase in his net worth, and his "hope to grow" statement that his investment strategy combined asset-appreciation and income-generation. Because the trial court must also consider the support objective of maintenance, it was within its discretion to reject the evidence of the actual rate of return in favor of testimony that six percent was a reasonable rate of return for income-generating investments.

Mr. Revane also contends that the trial court erred by adopting Ms. Revane's "inflated" budget without considering her actual needs. First, he claims that the trial court had an erroneous view of the facts when it found that her budget at the time of divorce was $5,000. He states that her 1988 pre-tax budget was $3,680. Both numbers are supported by the record. Ms. Revane had declared her monthly expenses to be $4,977.26, and Mr. Revane had prepared exhibits showing pre-divorce expenses of the lesser amount. The earlier trial court decisions did not make a specific finding adopting either number.

Second, Mr. Revane objects to the inclusion of payments to Ms. Revane's attorneys because he was not ordered to pay her attorneys' fees. If he had been directed to pay the fees, their inclusion in Ms. Revane's budget would have been inappropriate because they would have been his obligation, not hers.

She is obligated to pay the fees, however, and the expense was properly included when determining her financial need.

Finally, Mr. Revane claims that the budget was inflated by gifts and donations in the amount of $1,600. The trial court found that Ms. Revane's budget included in excess of $500 per month for these items. Mr. Revane disputes payments made to Ms. Revane's relatives that she testified were loans and that he classified as gifts. While this may be a valid issue in a case where the parties have substantially less income, or if the amount of gifts and contributions was a substantial percentage of the monthly budget, the trial court did not erroneously exercise its discretion here by not reducing Ms. Revane's monthly expenses by these amounts. The trial court found that Ms. Revane had reduced her post-divorce standard of living, and she testified that she spent less for items such as food, clothing, and entertainment. This allowed her to make gifts and donations. The trial court's assessment of the situation was well within its discretion.

Mr. Revane also contends that the trial court required him to pay maintenance from principal because, by the court's calculations, he will have $11,000 monthly disposable income, while his expenses are $18,000. This claim borders on being frivolous. The $18,000 contained no reduction in expenses from pre-retirement levels, although Mr. Revane testified that he expected to make reductions. While he complains about paying $54,000 for maintenance, his budget includes almost that amount for "gifts and donations" and "other expenses," as well as $35,000 for "entertainment." It is difficult to understand how a litigant claiming those levels of expenses can argue that his ex-wife's budget, which is only one-third of his, is "inflated."

Nothing in Mr. Revane's arguments supports the conclusion that the trial court erroneously exercised its discretion when it ordered him to pay $4,500 per month maintenance to Ms. Revane. The trial court's decision shows that the court balanced both the support and the fairness objectives of maintenance.

By the Court.—Order affirmed.

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