COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2445

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

IN RE THE MARRIAGE OF: REBECCA J. ATWOOD,

PETITIONER-RESPONDENT,

V.

ROBERT E. ATWOOD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Robert Atwood appeals from a trial court order denying Robert's motion to terminate his obligation to pay maintenance to Rebecca Atwood in the amount of $1,007.50 monthly on the ground that there had been a substantial change in circumstances since the parties' divorce in 1983.

Robert's motion was initially heard by a court commissioner who suspended his obligation to pay maintenance. Rebecca requested a de novo hearing before the trial court. The trial court determined that although there had been numerous changes in the parties' financial circumstances, the totality of the circumstances did not support a termination or suspension of Robert's maintenance obligation. It therefore denied Robert's motion and ordered that maintenance of $1,070.50 per month be reinstated retroactive to the date of suspension by the family court commissioner.

Robert argues on appeal that the trial court erred in: (1) making findings without conducting a hearing; (2) requiring maintenance to continue at the original level, despite a change in the parties' relative positions; and (3) requiring Robert to invade his retirement accounts to pay maintenance. Because we conclude that the trial court did not err, we affirm.

STANDARD OF REVIEW

The amount and time limitation for the payment of maintenance is a matter of trial court discretion. ***Dean v. Dean***, 87 Wis.2d 854, 877, 879-80, 275 N.W.2d 902, 912, 913-14 (1979). This standard also applies to modification proceedings. *See, e.g.,* ***Thies v. MacDonald***, 51 Wis.2d 296, 303-04, 187 N.W.2d 186, 190 (1971). A discretionary decision will be reviewed to determine whether it is the "product of a rational mental process whereby the facts of record and the 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, 20-21 (1981). If it is, we will sustain the decision. ***Id.***

FINDING OF FACTS

Robert argues that the trial court erred in failing to conduct a fact-finding hearing before making its de novo determination. We reject this argument.

Both parties submitted proposed statements of stipulated facts. Although these statements differ superficially, we have examined them closely and conclude that they coincide in all substantial details. Specifically, the parties agreed that in 1994 and 1995, Robert received over $100,000 (gross) in severance payments from his former employer, Amoco; that Robert received a separate settlement of his Amoco Retirement Account, as well as a Standard Oil Retirement Account in the aggregate amount of over $30,000; and that he received another, also separate, payment of $398,419 as a lump-sum retirement distribution. In addition, the parties agreed that at the time of the hearing Robert was in possession of a new house which cost over $171,000. The parties also agreed that Rebecca was earning approximately $30,000 per year, that she worked a fifty-one hour week to do so, and that she was ill and under medication. Attached to the stipulated facts submitted by Rebecca was a financial disclosure form (which form was acknowledged in Robert's proposed agreed statement) which showed that Rebecca owned no real estate, had no substantial assets, had retirement assets of under $1,000, owed money to creditors, and was making payments on a 1992 car. In addition, Robert's statement acknowledged that a "de novo hearing was held ... on Monday, October 28, 1996."

Under these circumstances, Robert cannot complain that the trial court failed to hear facts: he submitted a proposed statement of stipulated facts containing a great many particulars of his financial condition; he acknowledged the de novo hearing; and the proposed statements certainly contain sufficient

information from which a trial court could make specific findings of fact on which to base a reasoned determination of outcome. *See* ***Hartung***, 102 Wis.2d at 66, 306 N.W.2d at 20-21. Having invited the error (if error it is), the appellant is estopped from coming to us now and complaining that the error occurred. ***Soo Line R. Co. v. Office of the Comm'r of Transp.***, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992).

MAINTENANCE AWARD

Robert argues that the trial court erred in failing to consider his reduction in earnings when it denied Robert's motion to modify maintenance. We reject this argument. Although the ability of the obligor to pay maintenance is one of the factors to be considered, ***Poindexter v. Poindexter***, 142 Wis.2d 517, 530, 419 N.W.2d 223, 228 (1988), a trial court errs if it fails to consider the support objective of maintenance. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 33, 406 N.W.2d 736, 740 (1987). The support objective is not satisfied when the payee spouse is not living at a standard of living reasonably comparable to that enjoyed during the marriage, but the obligor spouse is. ***Id***. at 35, 406 N.W.2d at 740-41.

The court found that Robert had substantial assets (over $600,000 in investments), that he had recently bought a $171,000 house, and that he lived beyond his means as shown by a budget he submitted. In contrast, the court found that Rebecca was working fifty-one hours per week, was in poor health, had few assets, was making payments on a 1992 car, and had been unable to accumulate substantial assets or retirement funds. The court concluded that despite Robert's reduced earnings, under the "totality of the circumstances," Robert's maintenance obligation should continue at the amount ordered in 1983.

In view of Robert's acknowledgment that during the marriage he and Rebecca lived comfortably,[1] in view of the trial court's determination that Robert continued to live at a standard reasonably comparable to that enjoyed during the marriage, and in view of the trial court's determination that Rebecca was not enjoying a comparable standard of living,[2] the court's decision takes proper account of the support objective of maintenance. ***LaRocque,*** 139 Wis.2d at 35, 406 N.W.2d at 740-41. The court made a "reasoned and reasonable determination" by applying the law to the facts, in a "rational mental process." We therefore sustain the court's determination. ***Hartung***, 102 Wis.2d at 66, 306 N.W.2d at 20-21.

RETIREMENT FUNDS

Robert argues that the court erred in requiring him to invade his retirement funds[3] in order to pay maintenance. We reject this argument as well.

The court determined that Robert could modify his lifestyle, and that Robert had chosen to invade his retirement funds for his personal use in the past. The facts presented to the trial court support this determination. Robert's retirement funds are not the only source of possible maintenance payments and to

[1] As Robert acknowledges in his brief, in 1983 (the time of the divorce) he and Rebecca earned joint income of over $50,000.

[2] As stated in the agreed facts Rebecca makes approximately $30,000 gross, but works fifty-one hours a week to achieve this income, and is ill and under medication. The court also took note of additional facts on her financial disclosure statement, namely, that Rebecca owns no real estate, has less than $1,000 in retirement funds, has no substantial assets, and is making payments on a 1992 automobile.

[3] We also note that Robert's assets include 1994 and 1995 severance payments in the amount of over $100,000 (gross). These assets are not retirement funds.

the extent the retirement funds must be invaded, these funds are, and have been, used for pre-retirement personal objectives.

Robert argues that the court erred because cases permitting consideration of retirement-type funds in maintenance are distinguishable from his situation. Specifically, Robert attempts to distinguish ***Dowd v. Dowd***, 167 Wis.2d 409, 481 N.W.2d 504 (Ct. App. 1991), and ***Pelot v. Pelot***, 116 Wis.2d 339, 342 N.W.2d 64 (Ct. App. 1983).[4]

Dowd and ***Pelot*** do not support Robert's position. In ***Dowd***, the court held that interest on a pension fund could be considered in calculating income for the purposes of determining obligor's ability to make maintenance payments. ***Dowd***, 167 Wis.2d at 412, 481 N.W.2d at 506. Similarly in ***Pelot***, the court held that interest accumulating in obligor's money market account could be taken into account in determining obligor's ability to make maintenance payments. ***Pelot***, 116 Wis.2d at 346-47, 342 N.W.2d at 68.

Robert attempts to distinguish his case on the grounds that, unlike the obligor in ***Dowd***, he would have to pay a penalty to withdraw his funds. However, to the extent Robert would have to invade retirement funds to make his payments, he has already shown his willingness to make such early withdrawal, as well as willingness to pay such a penalty, by using these funds for his own pre-retirement use. This undercuts his argument that early withdrawal somehow invades segregated retirement funds. Further, payment of a penalty is simply a

[4] Robert has cited no cases in favor of his argument. Instead he attempts to distinguish cases which, on their face, permit the trial court to do as it did in considering Robert's assets to reinstate maintenance. Of the numerous cases Robert attempts to distinguish, we analyze ***Dowd*** and ***Pelot*** as the most applicable.

factor for the court to consider in determining maintenance. See ***Pelot***, 116 Wis.2d at 347, 342 N.W.2d at 68.

Robert also attempts to distinguish these cases on the grounds that, unlike the obligors in ***Dowd*** and ***Pelot***, he has not yet retired. Nothing in ***Dowd*** or ***Pelot*** implies that the fact of the obligor's retirement, standing alone, is significant. Rather, the significance of retirement was that it caused a change of circumstances which, in turn, triggered the potential for a reduction in maintenance. In addition, despite the retirements in ***Pelot*** and ***Dowd***, the court held against both retired obligated spouses: the interest on Pelot's money market account could be considered in setting Pelot's maintenance obligation, and the interest on Dowd's pension fund could be used to set Dowd's maintenance obligation. ***Pelot***, 116 Wis.2d at 346-47, 342 N.W.2d at 68; ***Dowd***, 167 Wis.2d at 412, 481 N.W.2d at 506. We therefore reject this attempted distinction.

The court properly exercised its discretion in denying Robert's motion, and we affirm.

By the Court.—Order affirmed.

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