COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3101

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

IN RE THE MARRIAGE OF:
MARILYN C. GOETSCH,

PETITIONER-RESPONDENT,

V.

HOWARD N. GOETSCH,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

Before Eich, Vergeront and Frankel,[1] JJ.

PER CURIAM. Howard Goetsch appeals from an order denying his motion to modify maintenance. He argues that maintenance to his ex-wife,

[1] Circuit Judge Mark A. Frankel is sitting by special assignment pursuant to the Judicial Exchange Program.

Marilyn Goetsch, should be reduced because she decided to defer payment of social security benefits until she was eligible for a higher payment, and her cohabitation should result in a presumption of changed circumstances. We reject his arguments and affirm the order.

Howard based his motion for a reduction of his maintenance payments in part on Marilyn's decision to defer receipt of social security benefits. The parties agree that she was eligible for benefits of $587 starting in May 1997, and that if she waited until July 1998 she would receive $655 per month.

Howard argues that, by making this decision, Marilyn violated her duty to exercise due diligence to support herself and, therefore, his maintenance payments should be reduced by $587 per month. The trial court concluded that Marilyn made a reasonable decision which will result in higher benefits for her later when Howard may be retired and have a reduced ability to pay maintenance. We will not disturb the trial court's maintenance determination unless the court erroneously exercised its discretion. ***LaRocque v. LaRocque***, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). We affirm a discretionary decision if the court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). We conclude that the trial court considered the applicable law and relevant facts to

reach a reasonable conclusion, and therefore did not erroneously exercise its discretion.[2]

Howard also argues that Marilyn's cohabitation should lead to a rebuttable presumption that her financial condition has improved. However, the supreme court has previously rejected the argument that cohabitation is, by itself, grounds to terminate maintenance. The court concluded that where the ex-spouse is being supported by the cohabitor, or the cohabiting couple shares expenses, it may be appropriate to decrease or terminate maintenance. *See* ***Van Gorder v. Van Gorder***, 110 Wis.2d 188, 197-98, 327 N.W.2d 674, 679 (1983). The court did not establish a rebuttable presumption, and we are bound by the supreme court's opinion. *See* ***State v. Olson***, 99 Wis.2d 572, 583, 299 N.W.2d 632, 638 (Ct. App. 1980).

Marilyn requests that we find the above argument frivolous. Although we have the authority to find an *appeal* frivolous under RULE 809.25(3), STATS., that rule does not allow us to find individual arguments within a brief frivolous. The request for fees on appeal must therefore be denied.

By the Court.—Order affirmed.

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

[2] Howard argues in his reply brief that eligibility for social security benefits requires maintenance reduction "as a matter of law," and he analogizes it to the treatment of accounts receivable in property division. However, because this argument is raised for the first time in his reply brief, we do not consider it further. *See* ***In re Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (1981).