

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 1999

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. 98-1080

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

PAUL STEVEN SCRENOCK,

PETITIONER-APPELLANT,

V.

MALYN SCRENOCK,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Adams County:
DANIEL S. GEORGE, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Paul Steven Screnock appeals a circuit court order which denied his motion to eliminate his maintenance payments and/or to require his former wife to pay him child support, and which further required him to contribute toward his former wife's costs and attorney fees. Upon reviewing the

record, we conclude that the trial court properly exercised its discretion in each of these regards. Accordingly, we affirm.

BACKGROUND

Paul and Malyn married in 1975 and had three minor children when they divorced in 1995. At the time of the divorce, the circuit court determined that Paul's earning capacity as an attorney was approximately \$70,000 per year, while Malyn's earning capacity as a high school graduate with some bookkeeping and legal secretarial skills was approximately \$12,480 per year. Based upon those figures and an equal placement arrangement for the children, the circuit court ordered Paul to pay Malyn \$1,200 per month in maintenance and \$464 per month in child support, in accordance with the percentage guidelines.

A few months after the divorce judgment was entered, the parties mediated a change in placement whereby the oldest two children would spend approximately two-thirds of their time with their father and the youngest child would continue to spend equal time with each parent. Paul then moved to modify his financial obligations to Malyn. The trial court issued an order on August 2, 1996, which eliminated Paul's child support but maintained the same level of maintenance and refused to order Malyn to seek additional work.

Meanwhile, Malyn sold the real estate which she had been awarded in the divorce for \$26,000 to \$27,000 more than it had been valued in the property division, and she made arrangements to purchase the travel agency where she had been working at the time of the divorce. Based upon these events, Paul again moved for revision of the divorce judgment on May 29, 1997, claiming that he was entitled to child support and/or a reduction in maintenance based upon Malyn's increased income and failure to become self-supporting. Malyn, in turn,

moved for an increase in maintenance and an award of attorney fees. The trial court determined that Malyn's earning capacity had increased to \$16,000 a year, but concluded that the one-time gain realized from the sale of an asset which Malyn had been awarded in the divorce did not constitute a substantial change in the parties' overall financial circumstances. The court further noted that it was impossible to accurately determine the amount of Paul's income due to his failure to provide requested information about his cash receipts, but that his overall ability to meet his budgetary needs had been increased by his remarriage. Recognizing that ordering Malyn to pay child support would require, and be offset by, an adjustment to the amount of her maintenance, the court declined to modify the parties' support obligations, but ordered Paul to contribute \$4,000 to Malyn's attorney fees to compensate Malyn for the additional proceedings necessitated by his failure to fully disclose his income.

STANDARD OF REVIEW

The determination of whether there has been a substantial change of circumstances sufficient to warrant the modification of maintenance or child support presents a mixed question of fact and law. *Rosplock v. Rosplock*, 217 Wis.2d 22, 32-33, 577 N.W.2d 32, 37 (Ct. App. 1998). The circuit court's findings of fact regarding what, if any, changes have occurred in the parties' circumstances will not be disturbed unless clearly erroneous, while the question of whether those changes are substantial is a question of law which we review *de novo*. *Id.* at 33, 577 N.W.2d at 37. Because the circuit court's legal determination is intertwined with its factual findings, however, we still give weight to its decision. *Id.* In addition, assuming that a modification of maintenance or child support is warranted, the trial court has discretion to determine the amount of the award. *Sellers v. Sellers*, 201 Wis.2d 578, 585, 549

N.W.2d 481, 484 (Ct. App. 1996); *Abitz v. Abitz*, 155 Wis.2d 161, 174, 455 N.W.2d 609, 614 (1990).

An award of attorney fees also lies within the trial court's discretion, and we will uphold it so long as the record demonstrates a rational decision based on the application of the correct legal standards to the facts of record. *Bisone v. Bisone*, 165 Wis.2d 114, 123-24, 477 N.W.2d 59, 62 (Ct. App. 1991).

ANALYSIS

Modification of Support Orders.

The family court may modify a child support or maintenance award upon a showing that there has been a substantial change in circumstances since the last order. Section 767.32(1), STATS. "[T]he substantial or material change in the circumstances should be such that it would be unjust or inequitable to strictly hold either party to the judgment." *Fobes v. Fobes*, 124 Wis.2d 72, 81, 368 N.W.2d 643, 647 (1985) (internal quotation omitted). Because Paul relies upon essentially the same factual circumstances for both his child support and maintenance claims, we will consider the issues together.

Paul maintains that he was entitled to receive child support and/or a reduction in maintenance because: (1) he had primary physical placement of two of the three children; (2) Malyn had realized increased income from the sale of real estate during 1997; and (3) Malyn had not obtained full-time employment. We agree with the circuit court that none of these assertions warranted modification.

First of all, Paul glosses over the fact that he had already obtained one modification of his support obligation based upon the change in the children's

placement schedule following the divorce. The circuit court's order of August 2, 1996, eliminated Paul's child support payments to Malyn. If Paul wished to challenge the circuit court's refusal to award him child support based upon his interpretation of the application of the guidelines to the revised placement schedule, he should have appealed that order. Because there had been no change in the placement schedule since the prior order was entered, any deviation from the guidelines in that respect was the same as it had been before and did not represent a substantial change in circumstances.

Secondly, we agree with the circuit court's conclusion that neither *Maly v. Maly*, 186 Wis.2d 125, 519 N.W.2d 717 (Ct. App. 1996) nor *Cook v. Cook*, 208 Wis.2d 166, 560 N.W.2d 246 (1997), compelled it to count the excess value of Malyn's real estate proceeds as income available for the child support and maintenance. Both cases make clear that realized gain from the sale of property division assets must be categorized on a case-by-case basis. Here, both Paul and Malyn were awarded undeveloped land in the divorce. It would be logical to infer that Paul would also realize a substantial amount of income from appreciation if he were to decide to sell his eighty acres. It was therefore reasonable for the trial court to refuse to consider the appreciated value of Malyn's property for support purposes.

Nor are we persuaded that Malyn's gain from the sale of real estate constituted a substantial or material change in the parties' circumstances, even if it could be considered income for the purposes of a support analysis. As the circuit court noted, the extra income did not effect a significant change in Malyn's standard of living, because it was primarily used to pay litigation debts.

Next, we are satisfied that the circuit court's determination of Malyn's earning capacity was not clearly erroneous, and that the modest increase over her previous earning capacity was not substantial enough to warrant a modification in child support or maintenance. The trial court needed to determine whether the totality of the circumstances indicated a substantial change in the *relative* financial positions of the parties. This required consideration, not only of any increase in Malyn's income, but also of any changes in Paul's financial situation. Paul's failure to document his own income to the trial court's satisfaction represented a failure to carry his burden of proof. Furthermore, the trial court properly took into account Paul's increased ability to meet his financial obligations following his remarriage. Even if "[t]he increased expenses of separate households may prevent the parties from continuing at their pre-divorce standard of living, [a] court must not reduce the recipient spouse to subsistence level while the payor spouse preserves the pre-divorce standard of living." ***LaRocque v. LaRocque***, 139 Wis.2d 23, 35, 406 N.W.2d 736, 741 (1987).

Attorney Fees.

As Paul notes, attorney fees may be awarded in a divorce case upon a showing of ability to pay, need, and reasonableness. ***Bisone***, 165 Wis.2d at 124, 477 N.W.2d at 62. However, the family court also has the power to award attorney fees as a sanction for overtrial based on the history of litigation between the parties. ***Nelsen v. Candee***, 205 Wis.2d 632, 645-46, 556 N.W.2d 784, 789-90 (Ct. App. 1996). The trial court's implicit finding that Paul's repeated refusals to cooperate with discovery unreasonably inflated Malyn's attorney fees was not clearly erroneous. In addition, we note that the motion which Paul filed on May 29, 1997 represented the third time that he had attempted to litigate the issue of shirking, and the second time that he had attempted to have the support

obligations modified on the basis of the change in the children's placement. Paul's relitigation of settled issues also supports the trial court's determination that it would be unfair to require Malyn to pay the full cost of responding to the motion. We conclude that the trial court's award of attorney fees represents a proper exercise of its discretion.

By the Court.—Order affirmed.

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

