

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.*

Appeal No. 00-0325

Cir. Ct. No. 93FA943154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

**HONORE ANN HARVEY, F/K/A
HONORE ANN OSMANSKI,**

**PETITIONER-RESPONDENT-
CROSS-APPELLANT,**

V.

STEPHEN GAVIN OSMANSKI,

**RESPONDENT-APPELLANT-
CROSS-RESPONDENT.**

APPEAL and CROSS-APPEAL from orders of the circuit court for Milwaukee County: PATRICK T. SHEEDY, Reserve Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Stephen Gavin Osmanski appeals from orders entered pertinent to post-divorce proceedings. Osmanski claims the trial court erroneously exercised its discretion when it: (1) reinstated the orders entered by the trial court that presided over the divorce; (2) failed to calculate child support using the shared-time payer formula in WIS. STAT. § 767.25(1j) and WIS. ADMIN. CODE § DWD 40.04(2); (3) held open the issue of maintenance; and (4) inaccurately recounted stipulations between the parties.

¶2 Honore Ann Harvey cross-appeals from post-divorce orders. She claims the trial court should have awarded her maintenance under WIS. STAT. § 767.26, and the trial court should have awarded her a contribution of \$10,000 toward the payment of her attorney's fees based on Osmanski's "overtrial" tactics.

¶3 On the appeal, because the trial court failed to comply with the first remand of this court which required it to *reevaluate* family support giving proper consideration to what this court termed "the family's needs, [Stephen's] ability to pay, and the tax consequences," we must reverse and remand the matter so that the trial court may engage in such analysis. However, with respect to Osmanski's issues regarding the shared-time payer formula, the maintenance issue, and the stipulations, we affirm.

¶4 On the cross-appeal, we reject Harvey's claim that the trial court should have awarded her maintenance. On the attorney's fees issue, we conclude that the matter should be considered by the trial court and findings need to be made as to whether or not Osmanski "overtried" this case.

¶5 Accordingly, we affirm in part, reverse in part, and remand with directions.

I. BACKGROUND

¶6 The parties were married on November 26, 1977. During the marriage, they had three children: Ann, born on February 6, 1982; Stephen, born on May 3, 1983; and Emma, born on May 10, 1985. On September 22, 1993, Harvey filed for divorce. Judgment for divorce was granted in June 1995, but the final order governing family support was not entered until June 1996. The trial court presiding over the divorce, the Hon. Willis Zick, ordered Osmanski to pay \$921 per month family support in lieu of child support and maintenance.

¶7 Osmanski appealed from the divorce judgment, challenging the family support award. On July 29, 1998, this court summarily reversed the judgment, ruling that the trial court erroneously exercised its discretion in ordering family support because "it failed to explain how it considered the family's needs, Osmanski's ability to pay, and the tax consequences of its family support award." We remanded the matter to the trial court to reevaluate the family support award after considering the pertinent factors.

¶8 Upon remand, Osmanski filed a substitution request against Judge Zick. The Hon. Patrick T. Sheedy was assigned to the case. The trial court conducted hearings pertinent to the remand and other issues on October 26, 1998, November 11, 1998, December 21, 1998, February 11, 1999, March 30-31, 1999, April 1, 1999, May 6, 1999, June 2-3, 1999, June 8, 1999, June 10, 1999, June 22, 1999, and July 27, 1999. Thereafter, the trial court issued four orders concerning the issues relative to the remand: September 13, 1999, November 1, 1999, November 30, 1999, and March 14, 2000. Osmanski appeals from all four orders. Harvey cross-appeals from the order of November 30, 1999.

II. DISCUSSION

APPEAL

A. Remand.

¶9 The remand order of this court instructed the trial court to conduct further hearings necessary in order to properly exercise discretion in setting up family support. Specifically, this court ruled that Judge Zick erroneously exercised discretion when he set family support without an adequate explanation or discussion of the pertinent factors, including the family's needs, Osmanski's ability to pay, and the tax consequences of the award.

¶10 Upon remand, the trial court was under the mistaken impression that its authority was limited to the time following this court's decision on July 29, 1998. As a result, the trial court reinstated Judge Zick's orders governing family support from June 1996 until January 1, 1999. The trial court reasoned that because circumstances had changed during the time this case was on appeal, the court could not go back to the date of Judge Zick's family support order to conduct a reevaluation. This action was erroneous.

¶11 The remand order of this court indicated that Judge Zick erroneously exercised discretion when he ordered family support because he failed to consider the proper factors. We remanded the case so that the erroneous exercise of discretion could be corrected. On remand, the trial court was supposed to go back to the date the family support order was entered, consider the pertinent factors, and offer a reasonable explanation for the family support award. That has not occurred here because Judge Sheedy did not feel he had the authority to do so, and because

he felt “it would be inequitable for the Court to upset the prior financial orders on which the parties have relied and under which they operated through 1998.”

¶12 Instead, Judge Sheedy simply reinstated Judge Zick’s prior orders without an adequate explanation of the pertinent factors. Judge Sheedy certainly could have reached the same conclusion Judge Zick reached, or he might have reached a different conclusion; but our remand required that the trial court give reasons for the family support order. Judge Zick did not give reasons for the family support order or address the pertinent factors. We remanded so the trial court could provide reasons. Judge Sheedy failed to do so on remand.

¶13 We understand Judge Sheedy’s comments regarding the difficulty in returning to June 1996 to consider the past status of the parties. It is now over five years later. The parties’ financial circumstances have changed. Nevertheless, the trial court is bound to follow the remand of this court. A family support order entered without a reasonable explanation and a consideration of the proper factors is an erroneous exercise of discretion.

¶14 The erroneous exercise of discretion that occurred in June of 1996 goes uncorrected unless the remand court explains why it did what it did. Accordingly, upon remand of this case, we specifically direct the trial court to conduct further proceedings necessary to reevaluate Judge Zick’s original family support order entered in June 1996. The trial court shall exercise its discretion by considering the pertinent factors as noted in *Corliss v. Corliss*, 107 Wis. 2d 338, 348, 320 N.W.2d 219 (Ct. App. 1982). After addressing the pertinent factors, the

trial court shall set forth a reasoned explanation as to what amount of family support should have been ordered on June 19, 1996.¹

B. Remaining Issues.

¶15 In reviewing the entire appeal record, we conclude that the remaining determinations challenged by Osmanski can be affirmed.

¶16 Although we have concluded that the trial court erred when it failed to offer reasons based on the appropriate factors for the family support order entered by Judge Zick, we also conclude that from January 1, 1999 forward, the trial court did not erroneously exercise its discretion in ruling on the issues challenged here.

¶17 The trial court viewed this case as falling into two separate time periods. The first was from June 1996, to January 1, 1999.² The second was January 1, 1999, forward. As noted above, the trial court erred by failing to again look at the first time period in order to provide an explanation for the family support order. On remand, the trial court will reexamine that time period, address the pertinent factors, provide a reasoned explanation, and determine whether the \$921 per month order was appropriate.

¹ Although the written judgment was entered in June 1996, both parties agree the support order commenced March 1, 1996. We use the date of June 19, 1996, because that is the date of the written order.

² The first time period was actually March 1, 1996, to November 13, 1999. The parties stipulated to a reduced family support payment between November 13, 1999, and January 1, 1999, because Osmanski lost his job.

¶18 Thus, we now address whether or not the trial court erroneously exercised its discretion when it ruled on child support, maintenance, and stipulated issues related to the second time period. In the post-January 1, 1999 orders, the trial court ruled that there had been a substantial change in circumstances. The trial court found that the parties shared placement of the children equally, and that each party had essentially the same amount of income. As a result, the trial court ordered that no child support or maintenance be paid at that time, and that both issues be held open and reevaluated in two or three years when the parties' financial positions had stabilized.

¶19 The decision whether or not to award maintenance and, if so, how much, in addition to the amount of child support, are all committed to the trial court's discretion. *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). We affirm a trial court's discretionary decision if the court makes a rational, reasoned decision, and applies the correct legal standard to the facts of record. *Id.* If the record supports a determination that there has been a substantial change of circumstances, we will review the trial court's decision regarding the amount of the modification under the erroneous exercise of discretion standard. *Benn v. Benn*, 230 Wis. 2d 301, 307-08, 602 N.W.2d 65 (Ct. App. 1999).

¶20 The record here supports a substantial change in circumstances. At the time of the divorce, Osmanski was earning approximately \$47,000 plus an annual car allowance of \$7,500. In late 1998, Osmanski lost his job. He secured new employment on January 18, 1999, earning approximately \$31,000 annually. This constitutes a substantial change in circumstances. Thus, we review the trial court's orders to see whether or not it erroneously exercised its discretion.

¶21 First, the trial court ordered that no child support or maintenance be paid by or to either party. The trial court reached this conclusion because it found that the parties shared approximately equal placement of the children and, therefore, would share equally the costs and expenses associated with caring for the children. The trial court also found that both parties were earning approximately the same amount of salary. Osmanski earned \$31,000, and Harvey earned \$26,000, plus some rental income. As a result of these findings, the trial court did not apply the shared-time payer formula.

¶22 The determination of child support is committed to the sound discretion of the trial court. *Stephen L.N. v. Kara L.H.*, 178 Wis. 2d 466, 471, 504 N.W.2d 422 (Ct. App. 1993). Accordingly, whether the trial court uses this formula is a discretionary decision. There are certain prerequisites before the trial court applies the shared-time payer formula. The first is that child support is actually awarded. That did not happen here. The trial court found that because of the fifty-fifty placement and the equalized salaries, a child support order was not warranted. The trial court's decision was reasonable and based on facts in the record. Accordingly, we cannot find an erroneous exercise of discretion.

¶23 Second, the trial court held child support and maintenance open for future review. The trial court's reason for doing so was related to the instability of the parties' current jobs. Osmanski indicated that he was unsure how stable his position was, and Harvey was still in a probationary period. A trial court is authorized to hold open a final maintenance decision until a future date if, based on the facts of record, it provides appropriate and legally sound reasons. *Grace v. Grace*, 195 Wis. 2d 153, 158, 536 N.W.2d 109 (Ct. App. 1995).

¶24 Here, the trial court conducted hearings over a period of twelve months. During that time, the trial court was advised that Osmanski lost his job. Osmanski then found a lesser-paying job, although he was unsure as to the stability of the position. Also, during that year, the trial court was advised that Harvey changed jobs, finished her training, and secured a position with the Milwaukee Public Schools. The trial court was concerned, given the history and the newness of the parties' positions, as to the degree of permanency. Accordingly, the trial court held maintenance open in the event there was a substantial change in circumstances. The trial court's decision was reasonable.

¶25 Third, Osmanski complains about paragraph one (containing an order) and paragraph five (containing a stipulation) in the trial court's March 14, 2000 order. He claims that the February 1, 2000 proceeding does not support these two paragraphs and they need to be corrected. We decline to do so. Although the March 14, 2000 order references the February 1, 2000 hearing, it clearly addresses a broader scope. In reviewing the entire record, we conclude that the challenged paragraphs are supported by earlier transcripts. As a result, the trial court's March 14, 2000 order is not inaccurate and need not be changed.

CROSS-APPEAL

¶26 Harvey raises two issues in her cross-appeal: (1) whether the trial court erroneously exercised its discretion when it declined to award her maintenance; and (2) whether the trial court should have awarded her attorney's fees based on Osmanski's "overtrial" tactics. We reject her argument on the first issue and remand for further consideration of the second issue.

A. *Maintenance.*

¶27 Harvey claims the trial court should have awarded her maintenance despite the approximate equalization of the parties' incomes because she had "other claims" on her income before it became available for support purposes.

¶28 The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court, and we will uphold the award absent an erroneous exercise of discretion. An erroneous exercise of discretion occurs when the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either excessive or inadequate. *Bisone v. Bisone*, 165 Wis. 2d 114, 118-19, 477 N.W.2d 59 (Ct. App. 1991).

¶29 WISCONSIN STAT. § 767.26 (1999-2000) lists a number of factors for a trial court to consider when determining the amount and duration of a maintenance award, including the length of the marriage, the age and health of the parties, the property division, the parties' respective educational levels and earning capacities, the contributions of one party to the education or earning power of the other, tax consequences, and the standard of living enjoyed during the marriage. "These factors ... are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective)." *LaRocque v. LaRocque*, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987).

¶30 Although the trial court certainly could have been more explicit in addressing the appropriate factors, we conclude that the trial court did not

erroneously exercise its discretion when it declined to award maintenance. The trial court indicated that because of the equality of income, maintenance was not going to be ordered. The trial court also found that this satisfied the fairness objective because Harvey had continued with temporary employment from June 1996, until she was hired by the Milwaukee Public Schools, earning an income of approximately \$23,000 to \$26,000 from the temporary employment. During that time until January 1, 1999, Harvey also received family support from Osmanski. The trial court based its decision on these factors, and also held maintenance open in the event that circumstances changed. Accordingly, we cannot conclude that the trial court erroneously exercised its discretion.

B. Attorney's Fees.

¶31 Harvey also challenges the trial court's denial of her request for \$10,000 in attorney's fees. In a divorce action, the circuit court may award attorney's fees to one party because the other party has caused additional fees by overtrial. ***Johnson v. Johnson***, 199 Wis. 2d 367, 376-77, 545 N.W.2d 239 (Ct. App. 1996).

¶32 Harvey raised this issue at the trial court level. Although the trial court indicated it would take the issue under advisement, no hearing was conducted and no findings were made. Paragraph 3 of the September 13, 1999 order indicates that each party shall be responsible for its own attorney's fees. Paragraph 6 of the November 30, 1999 order indicates the same thing. However, the last order, dated March 14, 2000, states in paragraph 6: "The Court takes under advisement the request of the Petitioner for a contribution to her attorney fees necessitated by the Respondent's motions." The only response referenced in the record with respect to this issue is the trial court's letter of August 29, 2000,

indicating that it did not intend to provide any response to the attorney's fees request.

¶33 Accordingly, we remand this matter to the trial court with directions to conduct a hearing with respect to Harvey's motion on attorney's fees, make appropriate findings, and determine whether an award to Harvey is required.

III. CONCLUSION

¶34 This is the second time this case is on appeal. The parties have been involved in some type of litigation relating to their divorce since September 1993. There are three children's lives that continue to be affected by the lengthy litigation of this matter. In order to avoid further confusion in this case, we summarize our holdings. We are remanding this appeal and cross-appeal for two specific purposes.

¶35 First, the trial court should conduct necessary proceedings with respect to the family support set by Judge Zick for the time period of March 1, 1996, through the end of 1998. The trial court shall address the pertinent factors governing family support found in *Corliss*, 107 Wis. 2d at 348, and explain why a family support award was required, and also explain what amount of family support was required for this time period.

¶36 Second, the trial court should conduct a hearing on Harvey's attorney's fees motion, and make findings pertinent to this issue. The trial court should examine each of the allegations made by Harvey regarding Osmanski's alleged efforts to "overtry" this case. The trial court shall rule as to whether or not Osmanski should be ordered to pay some of Harvey's attorney's fees.

¶37 The remainder of Judge Sheedy's orders appealed and cross-appealed from are affirmed.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

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

