

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 15, 2001

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-2121**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**PATRICIA A. SEUBERT,**

**PETITIONER-RESPONDENT,**

**V.**

**GERALD J. SEUBERT,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for La Crosse County:  
JOHN A. DAMON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gerald Seubert appeals from an order denying his motion to reduce or eliminate his maintenance payments to his ex-wife, Patricia Seubert. He claims the trial court erroneously exercised its discretion by

considering income generated from a retirement account which he was awarded as part of the property settlement to be available for purposes of maintenance, and by failing to give the proper weight to other relevant factors. Having reviewed the record, however, we are satisfied that the trial court acted within its discretion and affirm.

## **BACKGROUND**

¶2 The parties were divorced in 1991 after a thirty-three year marriage. As part of the property division, the trial court awarded Gerald a three-quarter interest in his retirement account. The trial court also ordered Gerald to pay Patricia \$700 per month in maintenance for an indefinite period. At that time, Gerald was earning \$3,634 per month as the finance director for La Crosse County and Patricia was earning \$1,810 per month as a school nurse. After Gerald retired in 2000, his gross income was reduced to \$3,624 per month, including \$2,429 from his retirement pension, while Patricia's monthly gross income had increased to \$2,761. Gerald moved to reduce or eliminate his maintenance payments based upon the change in circumstances.

¶3 The trial court denied the motion, relying in part upon an exhibit which showed that, because most of Gerald's income was not taxable while most of Patricia's income was, Gerald's net monthly income after paying maintenance was \$2,840 while Patricia's net monthly income including maintenance was \$2,571. The trial court also noted that Gerald had voluntarily limited the amount of his income by choosing a joint and survivor annuity option from his retirement account that paid \$610 less per month than an annuity on his own life would have, and that his submitted budget was higher than necessary to sustain his standard of

living because he had chosen to subsidize his wife's business venture at a loss for four straight years.

### STANDARD OF REVIEW

¶4 The decision whether to modify maintenance lies within the trial court's discretion. *Seidlitz v. Seidlitz*, 217 Wis. 2d 82, 86, 578 N.W.2d 638 (Ct. App. 1998). We will sustain a discretionary determination so long as the trial court considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). We will, however, independently determine whether the trial court operated under a mistaken view of the law. *Id.* at 590 n.2.

### ANALYSIS

¶5 When modifying maintenance, the trial court should consider the same factors applicable to the initial determination. *Dowd v. Dowd*, 167 Wis. 2d 409, 416, 481 N.W.2d 504 (Ct. App. 1992). In addition to the parties' respective incomes and expenses, these factors include the length of the marriage, the age and health of the parties, the property division, the parties' respective educational levels, the earning capacity of the party seeking maintenance, 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. WIS. STAT. § 767.26 (1999-2000).<sup>1</sup> "[T]he purpose of any maintenance adjustment is to fulfill the objective of the original judgment, which is to maintain the dependent spouse at the standard of

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

living enjoyed during the marriage.” *Gerrits v. Gerrits*, 167 Wis. 2d 429, 438, 482 N.W.2d 134 (Ct. App. 1992).

¶6 Here, the trial court found that the parties had a long-term marriage, that they were close to the same age, that Patricia was twenty-seven percent permanently disabled from a back injury, that the marital property had been divided substantially equally, that the parties’ educational levels were not particularly relevant given Gerald’s retirement and Patricia’s approaching retirement, that the parties’ living expenses were similar aside from Gerald’s subsidization of his wife’s business, that Patricia’s gross income had increased since the divorce while Gerald’s gross income had declined, but Gerald had chosen to reduce his earning capacity by \$610 per month by his choice of an annuity option, and that the bulk of Patricia’s income was taxable while the bulk of Gerald’s was not. Gerald does not directly dispute any of these factual findings. Rather, he claims that the trial court misapplied the applicable law to the relevant facts. We disagree.

¶7 First, it is well established that a long-term marriage may warrant the equalization of incomes. *Seidlitz*, 217 Wis. 2d at 88. The trial court’s emphasis on this factor was not misplaced. Moreover, it was appropriate for the trial court to consider the income available to the parties after taxes. *See id.* (comparing the parties’ “disposable” income).

¶8 Second, contrary to Gerald’s contention, there is no absolute rule against considering income-producing property for purposes of maintenance. *Cook v. Cook*, 208 Wis. 2d 166, 179-80, 560 N.W.2d 246 (1997). Rather, the trial court is supposed to take account of any inequity that might arise from double counting certain assets as both property and income. Here, both parties were

awarded interests in retirement accounts as part of the property settlement. Since neither party was drawing on their retirement accounts at the time of the divorce, the trial court was not called upon at that time to decide whether to double count those assets for its initial maintenance determination. We are satisfied that the trial court could subsequently consider the income produced by those accounts for purposes of adjusting maintenance, so long as both parties' accounts were treated in the same manner. *See Pelot v. Pelot*, 116 Wis. 2d 339, 344-45, 342 N.W.2d 64 (Ct. App. 1983).

¶9 Finally, Gerald argues that an indefinite term of maintenance does not mean a permanent annuity. However, while it is true that an indefinite term of maintenance may be terminated when and if the dependent spouse becomes self-supporting at a level comparable to that enjoyed during the marriage, there is nothing which prohibits the continuation of maintenance for as long as the dependent spouse requires assistance to maintain the same standard of living. Here, the trial court imputed a substantial amount of income to Patricia at the time of divorce based on its determination of her earning capacity. Therefore, the additional income which Patricia earned by working full time rather than part time following the divorce was already included in the trial court's calculation of the amount of money it would take for her to maintain a standard of living reasonably comparable to that enjoyed during the marriage. There was no indication that she could maintain that level of income without maintenance; rather, the record showed that she was working at her full earning capacity at the time of the modification hearing. We conclude that the trial court did not misuse its discretion when it concluded that indefinite maintenance was still appropriate.

*By the Court.*—Order affirmed.

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

