

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 28, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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**No. 00-2784**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**KENNETH ALAN KLIENSE,**

**PETITIONER-APPELLANT,**

**v.**

**MARIELLA BATES A/K/A MARY BATES KLIENSE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County:  
**MORIA KRUEGER, Judge. *Affirmed.***

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

¶1 VERGERONT, J. Kenneth Kliese appeals a trial court order granting the motion of his former wife, Mariella Bates, to increase the maintenance he was ordered to pay her in the judgment of divorce entered on

February 13, 1997, after a trial in January 1997. He contends the trial court erred in deciding there was a substantial change of circumstances, and erroneously exercised its discretion by failing to consider Bates' income-producing assets and potential social security income, and by including in the increased maintenance award an amount to retroactively compensate Bates. We conclude there was a substantial change in circumstance and that the court did not erroneously exercise its discretion in deciding to increase maintenance and in the amount it ordered. More specifically, we conclude the court had the authority and properly exercised its discretion in ordering Kliese to pay the increased amount effective with the date of the motion, and that the increased amount the court ordered on a current basis did not contain any amount to compensate Bates for any time period prior to the date of the motion.<sup>1</sup>

¶2 Kliese also appeals the trial court's order that he pay \$5,214 as a contribution to Bates' attorney fees, contending that the court did not make any finding regarding need and ability to pay and there was no overtrial. We conclude the court's decision to award this contribution, after determining that Kliese's unreasonable conduct necessitated this expenditure for attorney fees, was a proper exercise of the court's discretion.

¶3 Accordingly, we affirm the court's order granting Bates' motion for an increase in maintenance and its order requiring a contribution of attorney fees.

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<sup>1</sup> In her brief Bates contends we do not have jurisdiction over the order granting an increase in maintenance, a position that she also asserted by motion. We disposed of that motion in an order, concluding we did have jurisdiction.

## BACKGROUND

¶4 At the time of their divorce the parties had been married thirty-five years and had two emancipated children. Kliese was 57½ years old and employed as a psychiatrist; Bates was 58½ years old and a homemaker. They stipulated to an equal division of the marital estate, with the exception of certain disputed personal property items, and the division of those items and the amount of maintenance for Bates was tried to the court.

¶5 At trial, Kliese testified that he resided in northwestern Wisconsin and worked at Northern Pines Community Programs seven days every two weeks. He also traveled to Fort Atkinson, in southeastern Wisconsin, to continue a private practice at a clinic there; he had been traveling there a day and a half every week, and then reduced that to twice a month. He planned to discontinue the work in Fort Atkinson because a change in his status with that clinic would reduce his net earnings for tax purposes. He did not plan on increasing the hours he worked at Northern Pines because there was no opportunity to do so, and maintaining a private practice on his own in the area would be extremely difficult. He estimated his adjusted annual income working only at Northern Pines would be \$154,356. He arrived at this result by considering only his earnings from Northern Pines, but building in two extra weeks of vacation so he would have five weeks of vacation a year, and then deducting his business expenses.

¶6 The trial court accepted \$154,356 as Kliese's adjusted gross income, finding that it "[was] based on his working four-fifths time and [is] sufficient to provide both for himself and for a fair level of spousal support. An order requiring him to work further and produce a higher level of income cannot be justified given all the facts and circumstances of this case." The court found Bates' income to be

\$17,600, which represented estimated interest earnings on a portion of her separate estate at 8% per annum. The court explained that this was a fair figure because it did not include interest earnings on the marital estate. Given the length of the marriage, the court found that an equal sharing of the parties' income was appropriate. The court noted the disparity in income, finding at that point in time Bates was not in a position physically or emotionally to go into the workforce, although she might be in the future. The court ordered Kliese to pay \$4,833.34 per month in maintenance, which, it explained, resulted in a sufficiently close equalization of disposable income. The judgment provided that "the payor shall notify the Dane County Clerk of Courts, within ten (10) days, of ... any substantial change in the amount of his ... income such that his ... ability to pay ... maintenance is affected."

¶7 On May 4, 1999, Bates moved to increase maintenance on the grounds that Kliese's income was at least 30% higher than at the time of the divorce and he had remarried and had certain economies as a result of shared expenses since his remarriage. Bates also requested that Kliese pay the costs and attorney fees incurred in bringing the motion.

¶8 The testimony at the hearing on the motion showed Kliese worked at the Fort Atkinson clinic until late April or early May of 1997, and that in 1997 he earned approximately \$11,000<sup>2</sup> from that clinic. His 1997 tax return showed that his total income from his work as a psychiatrist that year was \$193,583, net of expenses. Kliese gave these reasons for having higher income in 1997 than the

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<sup>2</sup> Although the transcript of the hearing states that Bates' attorney asked Kliese whether he "earned approximately \$111,000 from Fort Atkinson via a W-2," and Kliese said "yes," the W-2 shows \$11,868.45. We therefore assume either Bates' attorney misspoke or there is a typographical error in the transcript.

\$154,356 he projected at the divorce hearing: in September 1997 he took on more hours at Northern Pines because another psychiatrist left; his business expenses dropped considerably after he stopped working in Fort Atkinson; and even though he was working only four days a week, whenever he took a vacation he would work extra days to keep his income up. In 1998 his total reported income from his work as a psychiatrist, net of expenses, was \$189,827. In 1999 he began working for another clinic one day a month. In December 1999, Northern Pines, which had covered five counties, disbanded, and Kliese began working on a contract basis with new agencies and clinics that grew up in those counties to replace the five-county program.

¶9 At the time of the motion hearing on April 3, 2000, Kliese testified he had not yet filed his income tax return for 1999, but he estimated that his income net of business expenses for 1999 was approximately \$200,000. He projected his income for the year 2000 to be \$183,000, net of business expenses. This projection was based on working forty-seven weeks for an average of just over four days a week. He testified that he was trying to work more to replenish his retirement account. He was remarried and his wife earned \$31,000 in 1999, and he projected she would earn the same in 2000. Kliese acknowledged he had not informed the Dane County Clerk of Courts or Bates that his income since the divorce was higher than he had projected.

¶10 Bates testified she was not working and was physically unable to do so because of osteoarthritis, the symptoms of which began in 1998, and because of the other health problems she had at the time of the divorce. She also testified that the cost of her health insurance and her uninsured health care had increased.

¶11 The parties agreed Bates could start drawing social security the following month, when she turned sixty-two, on Kliese's account, but the monthly amount would be less than if she waited until sixty-five; given her life expectancy, she would receive substantially less over her lifetime if she began to receive it at sixty-two rather than waiting until sixty-five.

¶12 In its written decision on the motion, the court stated that its intent at the time of divorce to equalize the parties' income was obvious. It found there had been a substantial change in circumstances because Kliese's income in each of the years since the divorce had been substantially higher than the \$154,356 that the court found to be his income at the time of the divorce. The court stated Kliese had engaged in a "manipulation of figures and repeated underestimate of income combined with inflated expenses," and had benefited from his "lack of candor for three and a half years." The court observed that even if Kliese's testimony at the divorce trial on his projected income was the result of a mistake, preparation of his 1997 tax return should have revealed the errors to him and he should have reported his actual higher income as required by the divorce judgment. The court found Bates' health had continued to deteriorate, disqualifying her for paid labor; her health insurance and healthcare expenses had increased by almost \$18,000 per year; she had moved into a more modest home and reduced her discretionary spending; and she had spent \$45,000 of her inherited assets since the divorce, thus decreasing the income from those assets the court had found at the time of divorce.

¶13 The court ordered that Kliese pay \$7,417 on the fifteenth of each month, effective on May 4, 1999, the date of filing the motion. We will discuss later in the opinion how this amount was computed. The court found an arrearage of \$31,003.92 and ordered Kliese to pay \$500 per month on that amount. The court also concluded it was appropriate to order "an award of a large percentage of

[Bates’] attorney fees” because of “the considerable amount of work that [Bates’] lawyer has had to go to in revealing, explaining, and arguing to correct the misinformation petitioner presented to mislead us all....” However, the court stated it needed information from Bates’ attorney on the amount of his fees and the work done, and it scheduled a later hearing for that purpose.

¶14 Kliese filed a motion for reconsideration, which the court denied. After hearing evidence on Bates’ attorney fees, the court ordered that Kliese pay her counsel \$5,214, 75% of the attorney fees requested. The court found that at least this amount was due to Kliese’s underestimating his income and then not informing either Bates or the court that he was earning substantially more, when it was clear from the court’s decision at the time of divorce that its intent was to equalize their income. The court explained this was not a “need-based determination” but “a question of should Ms. Bates have to bear over \$6,000 in attorney’s fees tying to get [Kliese] to do what he was required to do from the first place—to share equally for so long as that was feasible and possible....”

## DISCUSSION

### *Maintenance*

¶15 A trial court may modify maintenance only upon a substantial change of circumstances in the parties’ finances, and the burden is on the moving party to establish this. ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996). A substantial change in circumstances should be such that it is inequitable to strictly hold either party to the original maintenance award. ***Murray v. Murray***, 231 Wis. 2d 71, 77, 604 N.W.2d 912 (Ct. App. 1999). Whether there has been a substantial change of circumstances presents a mixed question of fact and law. ***Id.*** The findings of the circumstances at the time of the

divorce and at the time of the motion, and whether a change has occurred, are findings of fact, and we accept those factual findings unless they are clearly erroneous. *Id.* Whether a change is substantial is a question of law, which we review de novo. *Id.* However, because the trial court's legal determination is so intertwined with its factual determinations, we give weight to the trial court's decision on whether the change is substantial. *Id.*

¶16 Even when there is a substantial change in circumstances, whether to modify maintenance and how much to award are within the discretion of the trial court. *Id.* at 77-78; *Johnson v. Johnson*, 225 Wis. 2d 513, 519, 593 N.W.2d 827 (Ct. App. 1999). A trial court properly exercises its discretion when the court considers the facts of record, applies the correct law, and reasons its way to a rational result. *Murray*, 231 Wis. 2d at 78. Generally, we look for reasons to sustain a trial court's discretionary determinations. *Id.*

¶17 We consider first Kliese's contention that the trial court erred in deciding there was a substantial change in circumstances.<sup>3</sup> He contends there has been no change in Bates' health because both now and at the time of the divorce she was unable to hold employment due to a physical disability, and because the value of her assets has increased. Any financial need Bates has now that she did not have at the time of the divorce, Kliese contends, is due to her own mismanagement of funds and not to a change in her health. Kliese argues that the increase in income above the \$154,356 he projected is due to unanticipated events and Bates should not benefit from his working more, particularly in light of what

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<sup>3</sup> Kliese argues this decision was an erroneous exercise of the trial court's discretion. However, as we have stated above, the question whether there is a substantial change in circumstances is a mixed question of fact and law. We therefore rephrase his argument.

he terms the court’s “original finding that [Kliese’s] adjusted gross income of \$154,356 is sufficient to provide ‘for a fair level of spousal support.’”

¶18 Contrary to the implication of Kliese’s argument, the court did not rely on Bates’ worsened health, increased health costs, and need to draw on her inherited assets as a substantial change in circumstances. Rather, the court made the findings that her health was worse, her healthcare costs had increased, and she had to draw on her inherited assets to meet her expenses in the context of addressing Kliese’s argument that Bates did not need an increase in maintenance.<sup>4</sup> Therefore, in deciding whether there is a substantial change in circumstances, we confine our analysis to the substantial change the court identified—the increase in Kliese’s income over the amount he projected. We conclude that the factual findings underpinning this conclusion are not clearly erroneous, and we conclude the change in Kliese’s income from that which he projected to that which he actually earned was a substantial change.

¶19 There is no dispute that the initial maintenance award was based on a determination that Kliese’s adjusted gross income was \$154,356. There is also no dispute over the amount Kliese actually earned in 1997, 1998, and 1999. We agree with the trial court that the difference between these actual earnings and the amount he projected is a substantial difference. Following our analysis in *Murray*, we look to the purpose of the initial award as a means of gauging whether this higher actual income is a substantial change in circumstances for purposes of maintenance modification. *See id.* at 79-80. There is no dispute here that the court’s goal in setting the amount of maintenance was to equalize the income of

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<sup>4</sup> These factual findings are not clearly erroneous because there is support in the record for them.

the parties and that it used the income figure of \$154,356 rather than the higher amount Kliese had been earning (business income net of expenses in 1996 was \$193,646) because he testified that he intended to cease working at the Fort Atkinson clinic. The reasons Kliese gave for the higher amount of actual earnings—another psychiatrist leaving, the desire to maximize earnings, a reduction in business expenses—were not contemplated or anticipated by the court when it made its initial determination: there was no evidence that Kliese would do anything other than stop working in Fort Atkinson and continue working at his current level at Northern Pines. We conclude, as did the trial court that it would be inequitable to hold both parties to the initial maintenance award.

¶20 We do not agree with Kliese that *Murray* supports his argument to the contrary. There the maintenance recipient moved to extend the term of a limited-term maintenance award to which the parties had stipulated on the ground that the recipient continued to need financial assistance. We reversed the trial court's decision that her financial need, together with the increased earnings of the payor over the ten-year term of limited maintenance, constituted a substantial change in circumstances. We concluded that the purpose of the limited term agreement was to limit the responsibility of the payor spouse to a certain time and to avoid future litigation; the financial circumstances of the recipient spouse were due to her imprudent financial decisions; and the recipient spouse had acted contrary to the goals of the original award. *Id.* at 81-82. In contrast to *Murray*, the purpose of the maintenance award in this case was to equalize the parties' income; therefore, in contrast to *Murray*, Kliese's higher actual earnings are material to that purpose. Also, in contrast to *Murray*, Bates is not seeking to impose an obligation on Kliese that is greater than the court originally ordered

because of circumstances within her control; rather, she is seeking to impose on him the obligation the court originally intended.

¶21 To the extent Kliese is suggesting that the court intended he could earn any amount he chose over \$154,356 and it would not affect his maintenance obligation, we reject that argument. The trial court's finding that it was reasonable for Kliese to quit his employment in Fort Atkinson and work only four-fifth's time at Northern Pines was not a determination that if Kliese chose to work more, his earnings would have no bearing on maintenance.

¶22 We next consider Kliese's arguments that the court erroneously exercised its discretion in increasing maintenance. Kliese first contends the trial court did not consider Bates' income-producing assets, specifically her retirement investments, her separate property, and her ability to receive social security at the age of sixty-two. He relies on *Plonka v. Plonka*, 177 Wis. 2d 196, 204, 501 N.W.2d 871 (Ct. App. 1993), in which we reversed a trial court decision to reduce maintenance because the trial court did not take into account that the payor, who was nearing retirement, had increased pension payments and an early retirement subsidy allowance. We stated: "... when a post-divorce motion for reduction in maintenance is presented, the nature and amount of current income-producing assets should be freshly examined together with any new post-divorce sources of income. When undertaking such an examination, the trial court must consider the reasons that form the basis of the allocation of assets in the original division of the estate." *Id.* at 205.

¶23 The trial court in this case did not fail to consider any income or asset of Bates. Rather, it did consider, at Kliese's urging, whether Bates' assets and the potential social security income were reasons not to increase maintenance

to equalize the parties' incomes, and it decided they were not. The court gave reasoned explanations for this decision and the record supports those explanations.

¶24 With respect to Bates' assets, the court stated that “[f]or purposes of this determination, the perimeters of the original divorce decision should guide the considerations.” This is consistent with our statement in *Plonka* that in considering the income-producing assets on a motion for modification, the basis for the original allocation of assets should also be considered. At the time the trial court here made its original maintenance award, it did so in the context of an equal division of the marital property and a separate estate belonging to Bates. In arriving at the original maintenance award, the court observed it did not include the assets of either party in determining income, except that it did attribute to Bates' income a figure representing interest on her separate property. Since the divorce, the assets of both parties have increased. In this case, the court decided “it would seem undeniably unfair to allow Dr. Kliese to continue accumulate holdings to cushion his retirement while requiring his ex-wife spend down her assets.” In the circumstances of this case, we see no erroneous exercise of discretion in the court's decision to continue to treat the assets of both parties as it had done at the time of the divorce.

¶25 With respect to the potential for receiving social security at the age of sixty-two, the court found Bates was very aware that her maintenance payments would greatly diminish when Kliese retired. The court found it would be “foolhardy” to require her to start drawing social security now “when it will lessen her later payments just at the time when she will need them even more....” This is a reasonable conclusion based upon the record and is not an erroneous exercise of discretion.

¶26 Kliese next contends the court did not have the authority to include in its calculation for maintenance an amount to compensate Bates for the maintenance she did not receive because of Kliese's understatement of his projected income.<sup>5</sup> In his initial brief he appears to challenge both the court's authority to order payment of an arrearage in the amount of \$31,003.92 and the court's authority to impose \$7,417 as the ongoing monthly obligation. However, in his reply brief Kliese indicates that an arrearage resulting from payments effective on the date of the motion might be authorized and appropriate.

¶27 As the trial court expressly recognized, WIS. STAT. § 767.32(1m) (1999-2000),<sup>6</sup> provides that a court may not "revise the amount of ... maintenance payments due ... prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations." Therefore, the trial court had the authority, when it issued its decision on June 8, 2000, to make any increase in maintenance effective with the date of notice of the motion. As Bates points out in her brief, and Kliese does not dispute in his reply brief, the \$31,003.92 the court described as an "arrearage" is the difference between the amount of maintenance Kliese paid under the original judgment, and the \$7,417 the court determined he should pay, based on his higher income, for the months of May 1999 through May 2000. Therefore, the court had the authority to order Kliese to pay that arrearage, and the question becomes whether the court properly exercised its discretion in doing so.

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<sup>5</sup> When a trial court exercises its discretion based on an error of law, that is beyond the limits of the court's discretion and the decision may not stand. *Gerrits v. Gerrits*, 167 Wis. 2d 429, 441 n.6, 482 N.W.2d 134 (Ct. App. 1992).

<sup>6</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶28 Although the court did not expressly state how it arrived at the figure of \$7,417 per month, the brief and exhibits Bates submitted to the trial court show that this is the monthly amount necessary to equalize income, assuming Bates' annual income is \$14,000 and Kliese's is \$200,000. The record supports using the \$200,000 figure for Kliese's income because he testified that was his income for the year 1999. Although, in April 2000 he estimated that his income for the year 2000 would be only \$183,000, the court could reasonably decide to use the income from 1999 to compute his obligation. First, with respect to the arrearage, eight of the twelve months were in 1999. Second, and more significantly, the court explained that because of the unreliability of Kliese's projection of income at the time of the divorce trial, it declined to accept his projection for 2000. In the absence of any evidence conclusively establishing Kliese's income would be lower in 2000 than it was in 1999, it was not clearly erroneous for the court to find that his income in 2000 would be the same as it was in 1999.

¶29 While the court was not required to make the increase effective on the date of the motion, we conclude that its decision to do so was a proper exercise of discretion. Kliese had the higher income during that time period, Bates had not benefited from an equalization of income during that time period as the court intended, and Kliese had the means to pay the arrearage at \$500 a month as the court ordered. We therefore conclude that the court's order that Kliese pay an arrearage of \$31,003.92 at the rate of \$500 per month was a proper exercise of its discretion.

¶30 We now turn to Kliese's argument that the trial court did not have the authority to order him to pay \$7,417 per month in current maintenance because that amount contained an "element of recompense" in addition to the amount necessary to equalize income. We are satisfied it does not. We agree with Kliese

that the court would be acting beyond its authority were it to order him to pay more current maintenance than that needed to equalize the parties' present income because the court wished to compensate Bates for maintenance she did not receive, before the date of the motion, due to Kliese's understatement of his projected income. However, as we understand the calculation of the \$7,417, it contains no such addition to the amount needed to equalize the parties' income, if Bates has an income of \$14,000 and Kliese an income of \$200,000, net of business expenses. For the reason explained by the court and discussed in the preceding paragraph, the record supports the trial court's finding of \$200,000 as a current income for Kliese.

¶31 We acknowledge the court did state that the goal of "this spousal support is no longer just to equalize the available income to the parties, but it also now includes an element of recompense for the funds the petitioner's deception cost his wife." However, read in context, we understand that to be a reference to its decision in the preceding sentences to increase maintenance effective with the date of notice of the motion.<sup>7</sup>

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<sup>7</sup> The full paragraph is:

Given what appears to be egregious behavior by petitioner in misleading us all as to his actual income, many of the proposals advanced by Mr. Auerbach seem fair. [Footnote omitted.] It is appropriate that Dr. Kliese contribute as close to what had been intended to be equalized net income for as much of 1999 as possible. The motion (order to show cause) was filed on May 4, 1999. Section 757.32(1m) Wis. Stats. permits a modification to date back to the date of filing the motion, and the judgment requires payments on the 15<sup>th</sup> of the month. Therefore, this order is effective as of May 4<sup>th</sup>, 1999 and includes the May payment. Because respondent has so solidly established that she failed to receive over \$100,000 that was intended by the January 1997 decision, the goal of this spousal support is no longer just to equalize the available income to the parties, but is [sic] also now

(continued)

¶32 We also acknowledge that in her brief to the trial court, Bates was urging the court to set maintenance at \$7,417 for a period of seven years, recognizing that, if Kliese's income was \$183,000 in 2000 and subsequent years, he should pay \$960 each month more than the amount needed to equalize incomes; this additional amount, Bates argued, would approximate over seven years the amount Kliese should have paid Bates based on his actual income from the date of the divorce to the date of the motion and earnings on that. Bates argued that this "extra" amount was justified by the goal of restoring Bates to the position she would have been in had Kliese not understated his projected income. However, the court did not adopt this approach. Because it found Kliese's income, net of business expenses for 2000, was \$200,000, the \$7,417 it ordered is the amount needed to equalize the parties' income and nothing more. Moreover, the court did not impose this obligation for seven years or any particular period of time, but rather "until further order of the court." Thus, nothing in the court's order prevents Kliese from moving the court for a reduction in maintenance should circumstances warrant.

¶33 In summary, we conclude the trial court properly exercised its discretion in deciding to increase maintenance to an amount that would equalize the parties' income as it had intended to do when it made its original award and properly exercised its discretion in making this increase effective on the date of the motion. We also conclude that the record supports the amount of \$7,417 as the

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includes an element of recompense for the funds the petitioner's deception cost his ex-wife.

amount necessary to equalize the parties' current incomes, and this amount does not contain an unauthorized element of recompense.<sup>8</sup>

### *Attorney Fees*

¶34 In a family law matter, a trial court may order one party to contribute to the attorney fees of the other, when the first party takes an unreasonable approach to a case which results in attorney fees that would otherwise not have been necessary. *Ondrasek v Ondrasek*, 126 Wis. 2d 469, 483, 377 N.W.2d 190 (Ct. App. 1985). Whether to order a contribution for this reason, and, if so, the amount, is committed to the trial court's discretion. *Id.* When a court awards a contribution of attorney fees for this reason, it need not take into account the financial need of the parties, *id.*, as it must when it orders contribution under WIS. STAT. § 767.262.<sup>9</sup>

¶35 Kliese contends the court erroneously exercised its discretion in ordering a contribution of fees because it was not based on Bates' need for a contribution and Kliese's defense of the motion was "within reason." It was a

<sup>8</sup> Both parties agree the court was mistaken when it referred to \$100,000 as the amount the original decision intended Bates to receive. In her brief to the trial court, Bates asserted Kliese "had the unintended use of over \$100,000...." By this figure, Bates meant the total amount by which Kliese's actual income for 1997, 1998, and 1999 exceeded \$154,356 times three years and not the portion that Kliese should have paid Bates for an equalization of their actual income. However, this mistake does not affect the validity of the \$7,417 award because that amount does not include an amount to compensate Bates for any period before the date of the motion.

<sup>9</sup> WISCONSIN STAT. § 767.262(1)(a) provides:

Award of attorney fees. (1) The court, after considering the financial resources of both parties, may do the following:

(a) Order either party to pay a reasonable amount for the cost to the other party of maintaining or responding to an action affecting the family and for attorney fees to either party.

reasonable defense, he contends, because of the court's finding at the time of the divorce trial that \$154,356 was sufficient to provide both for Kliese and a fair level of spousal support, and because there is no rule of law that a person who receives maintenance at the time of the divorce is entitled to one-half of the other person's income for the rest of their lives.

¶36 We agree with Kliese that the premise for the court's award of attorney fees was that Kliese intentionally misrepresented his projected income at the divorce trial, or at the least failed to report as required by the judgment when his income was higher than projected, and this conduct was unreasonable and required Bates to spend money to prove his actual income and to obtain the maintenance the court intended her to have. To the extent this premise is based on factual findings, we conclude they are not clearly erroneous. It is the trial court's role, not the role of this court, to make credibility determinations. *Rivera v. Eisenberg*, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). The trial court could reasonably believe that Kliese knew, when he projected an income figure in January 1997 that included no income from the Fort Atkinson clinic, that he would be working at that clinic at least a few more months; it could reasonably decide that when he reduced his projected income at the Northern Pines clinic by the amount of business expenses he had incurred when working an entire year in Fort Atkinson, he was intentionally overstating his business expenses, and thus, understating his income. The court could also reasonably decide Kliese knew at the time of the divorce trial that he intended to work additional hours toward

retirement, and he did not first make that decision at a later time.<sup>10</sup> Alternatively, the court could decide that, although Kliese did not know at the time of the divorce that he would end up working more hours in 1997 and subsequent years, when he did, so, he should have reported the increased earnings. The court could reject his explanation that he believed he did not have to report anything above the \$154,356 as an unreasonable reading both of the court's decision from the bench and the terms of the judgment of divorce.

¶37 Kliese does not contend that, if his conduct was as the court found it to be, his conduct is not a proper basis for ordering a contribution of fees under the *Ondrasek* rule; nor does he challenge the reasonableness of the fees or the allocation of 75%. Therefore, since the record provides a factual basis for the court's premise in ordering a contribution, we conclude the court properly exercised its discretion in doing so.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

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<sup>10</sup> Kliese testified at the motion hearing that he decided to work more to build for retirement because, given Bates' inherited property, he was not going to have nearly as much as she did for retirement; but he acknowledged that, at the time he testified at the divorce trial, he knew all there was to know about what his financial circumstance would be when the divorce was granted.

