COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3456

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

IN RE THE MARRIAGE OF:

OTTO MOGGED III,

PETITIONER-APPELLANT,

V.

MARGARET A. MOGGED,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Shawano County: JAMES P. JANSEN, Judge. *Affirmed*.

Before Cane, C.J., Peterson and Lundsten, JJ.

¶1 PER CURIAM. Otto Mogged III appeals an order vacating a previous maintenance determination pursuant to WIS. STAT. § 806.07(1)(h) and setting maintenance at $2,000 per month. Otto argues that the trial court erroneously exercised its discretion when it failed to apply the "extraordinary

circumstances" test and failed to examine relevant factors. He further argues that the trial court erroneously ordered a retroactive increase. We reject his arguments and affirm the order.

¶2 The parties divorced in 1992. In 1997, Otto brought a motion to reduce maintenance. At a motion hearing at which Margaret did not appear, the trial court reduced maintenance from $2,800 to $800 per month. Margaret filed a motion to reopen the matter.[1] The trial court granted the motion and set maintenance at $2,000. Otto appealed. On appeal, this court reversed and remanded the matter because the record did not reveal the court's reasoning process underlying its decision. This appeal follows a hearing on remand. *See* ***Mogged v. Mogged***, 2000 WI App 39, 233 Wis. 2d 90, 607 N.W.2d 662.

¶3 A motion to reopen a judgment or order is governed by WIS. STAT. § 806.07(1)(h), which provides that the court may relieve a party from an order for any "reason justifying relief from the operation of judgment." "Subsection (h) is written in broad terms … under subsection (h) the ground for granting relief is 'justice.'" ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 544-45, 363 N.W.2d 419 (1985). "[F]inality is important and … subsection (h) should be used sparingly." ***Id.*** at 550. "[T]he 'extraordinary circumstances' test is an appropriate way to approach claims for relief under sec. 806.07(1)(h)." ***Id.*** at 549.

> In exercising its discretion, the circuit court should consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments, including the following: whether the judgment was the result of the conscientious, deliberate and well-informed

[1] Although the record is unclear, there is no dispute that Margaret filed a motion to vacate or reopen the matter.

> choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id. at 552-53.

¶4 Once the court determines that grounds exist to reopen a judgment under WIS. STAT. § 806.07(1)(h), the decision to grant relief is discretionary. ***Johnson v. Johnson***, 157 Wis. 2d 490, 497, 460 N.W.2d 166 (Ct. App. 1990). Discretionary decisions are sustained if the record reveals that the trial 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 (1982). We may not exercise discretion for the trial court. *See* ***Wisconsin Ass'n of Food Dealers v. City of Madison***, 97 Wis. 2d 426, 434, 293 N.W.2d 540 (1980). We may, however, examine the record to determine whether a rational basis exists. *See* ***Schauer v. DeNeveu Homeowners Ass'n***, 194 Wis. 2d 62, 71, 533 N.W.2d 470 (1995).

¶5 In the case before us, on remand, the trial court concluded that it was unfair that no full hearing was held and, as a result, "manifest injustice" required that the order reducing maintenance to $800 per month be reopened. The court explained that the order reducing Otto's maintenance obligation resulted from a non-appearance and the matter was never litigated on its merits. In addition, the record discloses that Margaret did not make a deliberate decision to forgo a hearing but, rather, that counsel did not appear at the time scheduled. *See* ***Mogged***, 2000 WI App 39 at ¶¶6-7.

¶6 We are satisfied that the trial court reasonably exercised its discretion when it determined that grounds existed under WIS. STAT. § 806.07(1)(h) and reopened the order modifying maintenance. Although the court did not use the term "extraordinary circumstances," we agree with Margaret that its term "manifest injustice" adequately conveyed the court's rationale. While the court's explanation was brief, it nonetheless illuminated the court's reasoning process. It considered that the default order was not the result of Margaret's conscientious, deliberate choice. Rather, her counsel elected not to appear on Margaret's behalf. Additionally, the trial court reasoned that judicial consideration of the merits was limited because Margaret was not afforded a fair opportunity to present her proofs. The record reveals that the court considered proper factors under ***M.L.B.*** and reached a reasonable conclusion. This is the essence of a discretionary determination.

¶7 Next, Otto argues that the trial court erred when it retroactively modified maintenance. He contends that because Margaret did not file her motion to vacate until February 1998, it was error to revise maintenance as of November 1, 1997. Otto relies on WIS. STAT. § 767.32(1m), which provides that the court may not revise the amount of maintenance prior to the date that notice of the motion is given.

¶8 We reject Otto's contention. Margaret cogently explains: "Prior to the effective date of November 1, 1997, [Otto] was paying maintenance in the amount of $2,800 per month. … [O]nce the prior order was reopened, [Otto's] motion for a reduction of maintenance was once again pending."

¶9 The record supports Margaret's explanation. The trial court reasoned that it did not retroactively increase maintenance. Instead, upon vacating

the October 1997 order, the court considered the merits of Otto's motion, which was filed October 7, 1997. The court determined that the evidence permitted a downward adjustment of maintenance from $2,800 per month to $2,000 per month, commencing November 1997. Because the record demonstrates that the maintenance order decreases maintenance effective after Otto's motion was filed, there was no retroactive increase.

By the Court.—Order affirmed.

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