COURT OF APPEALS
DECISION
DATED AND RELEASED

July 15, 1997

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1133

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

IN RE THE MARRIAGE OF:

RAYFORD N. DRAKE,

PETITIONER-APPELLANT,

V.

LINDA F. FIKES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

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

PER CURIAM. Rayford N. Drake appeals from a postjudgment order in a divorce action denying his request for modification of maintenance. Drake claims that the trial court erroneously exercised its discretion when it

permanently denied him maintenance. Because the trial court did not erroneously exercise its discretion, we affirm.

I. BACKGROUND

After an eighteen-year marriage, Drake and his ex-wife, Linda F. Fikes, were granted a divorce judgment on July 3, 1991. Both parties stipulated to the terms of the divorce. The stipulation was incorporated into the divorce judgment. Drake appeared *pro se* at the divorce hearing. Fikes had an attorney representing her. At the time of the hearing, Drake was unemployed. Fikes, who had pursued both an undergraduate and a medical school degree during the marriage, was employed as a physician making approximately $75,000 a year. Drake did not seek maintenance.[1] Although the trial court[2] stated that it was "not inclined to deny maintenance in this case, …, with this length of a marriage and the unequal earning capacities and the contributions to the marriage", Drake indicated that he did not want maintenance. Instead, he sought only that his wife pay for his medical insurance premiums and that the issue of maintenance be held open for a period of four years to give him an opportunity to return to school, get up to par and have a stream of income. Drake had already completed two years of undergraduate schooling for an engineering degree. The trial court acceded to Drake's wishes.

[1] Drake now claims that he erroneously believed at the time of the divorce that he could meet his living expense and liabilities. This may have been attributed to his *pro se* status. As Lord Neaves wrote in THE JOLLY TESTATOR WHO MAKES HIS OWN WILL: "No customer brings so much grist to the mill [a]s the wealthy old woman who makes her own will."

[2] The Honorable Leah Lampone presided over the original divorce proceeding.

On June 23, 1995, ten days prior to the expiration of the four year hold-open period, Drake filed a motion for an order to show cause, requesting a modification of the divorce judgment concerning maintenance. The trial court held a hearing to address this issue. Drake testified that in the past four years he has earned seven credits toward his engineering degree. The trial court denied Drake's motion for modification of maintenance.

II. DISCUSSION

A request for maintenance modification is addressed to the discretion of the trial court. *See* ***Haeuser v. Haeuser***, 200 Wis.2d 750, 764, 548 N.W.2d 535, 541 (Ct. App. 1996). We will not reverse a discretionary determination if the trial court considered the pertinent facts, applied the relevant law and reached a reasonable conclusion. *See* ***id.*** at 765, 548 N.W.2d at 542.

The trial court considered the pertinent facts. The original divorce hearing transcript reveals that maintenance was not requested. The issue of maintenance was left open for the limited purpose of assisting Drake–should he need assistance–during the four year post-divorce period to allow him to complete his engineering degree. Maintenance was not left open for any and all purposes. During that four-year period, Drake did not need financial assistance to pursue his education. Drake, in fact, was in a better financial state at the modification hearing than he was at the original divorce hearing. At the original divorce hearing, he had no income. At the modification hearing, he was receiving a monthly income of $2,100.

In addressing the pertinent facts, the trial court applied the correct legal principles. The law governing this case requires the party requesting a modification of the maintenance ruling to bear the burden of proof. *See* ***Haeuser***,

200 Wis.2d at 764, 548 N.W.2d at 542. Further, maintenance modification motions require the moving party to show that there is a substantial change in the circumstances of the parties, s*ee* ***id.***, and, where the original maintenance terms were set by stipulation, the moving party must also show that it would be "unjust or inequitable" to hold the parties to the original judgment. *See* ***Fobes v. Fobes***, 124 Wis.2d 72, 80-81, 368 N.W.2d 643, 647 (1985) (internal quote marks omitted). Although the trial court did not explicitly state these standards in its decision, we can infer from the record that these principles were applied. *See* ***Steinbach v. Gustafson***, 177 Wis.2d 178, 185, 502 N.W.2d 156, 159 (Ct. App. 1993). ("[W]e generally look for reasons to sustain discretionary determinations.") The trial court specifically stated that it "sits as a court in equity in these cases to apply the Family Code which is statutory in nature" and "[w]hen a party comes before the Court seeking to enforce a right in a judgment, that party must have clean hands." From these statements, we conclude that the trial court was addressing the equities of the case in compliance with the proper legal standard.

The trial court's decision also discusses the evidence regarding Drake's efforts to pursue his engineering degree. The trial court concluded that Drake failed to show that he intended to make reasonable efforts to complete his degree. Stated another way, Drake failed to satisfy his burden of showing that modification of the maintenance decision was warranted.

We conclude that the trial court's decision was reasonable. The record supports the trial court's conclusion that the maintenance issue was held

open only for a limited purpose–to allow Drake to obtain his engineering degree.[3] Further, Drake has failed to show a substantial change in the circumstances or that, under the current circumstances, it would be "unjust or inequitable to strictly hold either party to the judgment." The equities do not weigh in Drake's favor. He has made virtually no effort to show that he is truly intent on becoming educated and getting a better job. In addition, he has an income stream now that he did not have at the time of the divorce. Moreover, Fikes has been the sole supporter of their four children.

The trial court's decision is also supported by the limited purpose of maintenance payments.

> The payment of maintenance is not to be viewed as a permanent annuity. Rather, such payment is designed to maintain a party at an appropriate standard of living, under the facts and circumstances of the individual case, until the party exercising reasonable diligence has reached a level of income where maintenance is no longer necessary.

Vander Perren v. Vander Perren, 105 Wis.2d 219, 230, 313 N.W.2d 813, 818 (1982). The trial court in the instant case described Drake's "exercise of

[3] Drake claims that the trial court erred in concluding that the hold-open provision on the maintenance issue was for the limited purpose of allowing Drake to pursue his education. He argues that such an interpretation was "illogical." Having reviewed the record, we disagree. The original divorce hearing transcript demonstrates that Drake was not seeking maintenance, but wanted to hold the issue open while he pursued his engineering degree in case he should need financial assistance while he was in school. The pertinent portion of the transcript provides: "[DRAKE]: My plans are to go back to school, and I would like [maintenance] held open for four years. THE COURT: --to give you an opportunity to return to school and get up to par and have a stream of income, yourself? [DRAKE] That's correct, Your Honor." We conclude that the trial court's interpretation that the hold-open provision was for the limited purpose of allowing Drake to complete his degree was reasonable. This quoted excerpt, together with the fact that Drake did not request maintenance payments at the time of the divorce hearing, despite the fact that he had no income, supports the trial court's decision. The decision is further supported by Drake's failure to bring this motion until almost four years after the divorce judgment.

reasonable diligence" as "a snail's pace." In fact, Drake has failed to exercise reasonable diligence to reach the level of income he desired. His failure to do so should not be rewarded with "an annuity for life" from his ex-wife.

Based on the foregoing, we cannot conclude that the trial court erroneously exercised its discretion when it denied Drake's motion seeking modification of the divorce judgment on the issue of maintenance.[4]

By the Court.—Order affirmed.

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

[4] Drake also argues that the trial court's decision was in error because it did not apply all of the factors listed in § 767.26, STATS. Although we agree that the trial court did not address all of the factors listed in this statute, we disagree that its failure to do so constitutes error. First, the trial court is not obligated to consider all the factors enumerated in § 767.26. *See* ***Trattles v. Trattles***, 126 Wis.2d 219, 228, 376 N.W.2d 379, 384 (Ct. App. 1985). It must consider only those factors which are relevant to the case. *See* ***id.*** In the instant case, the trial court did consider the relevant factors. Second, Drake's motion was presented as a request for a modification of a previously determined divorce judgment. Under these circumstances, the trial court need not proceed directly to the § 767.26 factors. Rather, the threshold principle requires the trial court to address whether the moving party can show that a substantial change in circumstances has occurred which would make it unjust to hold the parties to the original divorce judgment. *See* ***Poindexter v. Poindexter***, 142 Wis.2d 517, 531-32, 419 N.W.2d 223, 229 (1988).