

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 2, 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. 96-1305

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

In re the Marriage of:

STEVEN J. BOHR,

Petitioner-Appellant,

v.

CONNIE R. BOHR,

Respondent-Respondent.

APPEAL from an order of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Steven J. Bohr appeals from an order reopening the judgment divorcing him from Connie R. (Conchita) Bohr. Because the circuit court properly exercised its discretion in reopening the judgment of divorce pursuant to

§ 806.07(1)(h), STATS., we affirm the order reopening the judgment and amending the property division and maintenance provisions of the judgment of divorce.

The parties were divorced in 1992 after seventeen years of marriage. Steven was represented by counsel; Conchita was not. The parties' marital settlement agreement was approved by the court commissioner. In their agreement, Steven agreed to pay Conchita \$850 per month as maintenance "until he retires from his present place of employment, or upon his death ... [or] upon the marriage or death of [Conchita]." Steven received all interest in his military pension.¹ He was employed in the private sector at ZF Industries at the time of the divorce. At the time of the divorce, Steven earned \$61,050 per year comprised of \$46,821 in employment income and \$15,372 from his military pension. Conchita was employed as a factory worker earning approximately \$9412 per year.

In December 1994, Conchita sought legal advice when Steven ceased making his monthly maintenance payments. She filed a motion to reopen and modify the judgment of divorce under § 806.07(1)(h), STATS., on the grounds that Steven's military pension had not been properly divided. Conchita also sought modification of maintenance.

In considering whether to reopen the judgment of divorce under § 806.07(1)(h), STATS., the trial court applied the criteria set forth in *State ex rel. M.L.B. v. D.G.H.*, 122 Wis.2d 536, 363 N.W.2d 419 (1985). In a July 1995 decision, the trial court found that the original judgment of divorce did not result from a conscientious, deliberate and well-informed decision by Conchita because Steven's military pension was not valued at the time of the final hearing on the divorce, Conchita was unrepresented,

¹ Steven retired from the military in 1989 and began drawing his military pension at that time.

there was no judicial consideration of the merits of the property division because the divorce judgment was granted by default pursuant to the parties' agreement, Steven's pension had to be valued as part of the divorce regardless of the parties' agreement that Steven should retain the pension, and there were no intervening circumstances making it inequitable to reopen the property division.

After a January 1996 evidentiary hearing on property division and maintenance, the trial court found no reason to deviate from the presumed fifty-fifty division of the pension (which the parties stipulated had a pretax value of \$330,633 at the time of the divorce). The court awarded Conchita one-half of Steven's "disposable retired pay," which it defined as the gross naval pension less a service-connected disability payment. The court also reopened maintenance which, under the original divorce judgment, terminated if Steven retired from ZF Industries.² The court found that when Steven's maintenance obligation terminated by virtue of his release from ZF Industries, he had paid only forty-two months of maintenance to Conchita after a lengthy marriage. In light of the parties' disparate income potential and the fact that Conchita had just begun receiving a share of Steven's pension, the court found that it was fair to hold open Steven's maintenance obligation rather than permit it to terminate entirely as provided by the original judgment of divorce. Steven appeals.

Whether to reopen a divorce judgment under § 806.07, STATS., is discretionary with the trial court. *Spankowski (Zuercher) v. Spankowski*, 172 Wis.2d 285, 290-91, 493 N.W.2d 737, 740 (Ct. App. 1992). A discretionary decision will be upheld by this court if it demonstrates a reasoning process based on facts or reasonable

² In September 1995, ZF Industries terminated Steven's employment and he received six months of salary as severance pay. The court also awarded Conchita monthly maintenance payments from Steven's severance pay. Steven does not contest this aspect of the trial court's award.

inferences from the record to which proper legal standards were applied. *See id.* at 290, 493 N.W.2d at 740. If the record shows that the circuit court exercised its discretion and that there was a reasonable basis for its decision, we will not reverse an order granting a motion for relief under § 806.07. *See M.L.B.*, 122 Wis.2d at 542, 363 N.W.2d at 422.

Section 806.07(1)(h), STATS., permits relief for “[a]ny other reasons justifying relief from the operation of the judgment.” The “extraordinary circumstances” test applies and the court must determine whether, in view of all the facts, “extraordinary circumstances” exist which justify relief in the interest of justice. *See State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis.2d 618, 625-26, 511 N.W.2d 868, 871 (1994).

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 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.

M.L.B., 122 Wis.2d at 552-53, 363 N.W.2d at 427.

In reaching its decision to grant Conchita relief from the divorce judgment, the trial court applied the proper legal principles excerpted above from *M.L.B.* We further conclude that the trial court’s findings under these factors are supported by this record.

Steven concedes that the present value of his military pension was not valued for purposes of property division at the time of the divorce. He argues that valuation was unnecessary because the pension was already in pay status and the parties

agreed to offset the entire pension against maintenance and Steven's agreement to be solely financially responsible for the parties' minor child.

We disagree with Steven's argument. In *Steinke v. Steinke*, 126 Wis.2d 372, 383, 376 N.W.2d 839, 845 (1985), the court expressly held that "[t]he trial court must evaluate and include the pension interest in the property division whether or not the parties present evidence on its value." We also disagree with Steven that *Steinke* requires an expert opinion of the pension's value. *Steinke* requires only "a proper valuation." See *id.* The methodology for that valuation is within the trial court's discretion. See *id.* at 384, 376 N.W.2d at 845. A trial court has broad discretion in valuing pension rights and dividing them between the parties. See *id.* at 385, 376 N.W.2d at 845. That the pension was not valued at divorce, in combination with the other facts found by the trial court, was grounds to reopen the judgment.

Steven argues that if we sustain the trial court's decision to reopen the judgment of divorce, we should reverse the award to Conchita of one-half of the nondisability portion of his military pension because a portion of the pension accrued before the parties were married.

Under § 767.255, STATS., equal division of the parties' property is presumed upon divorce. The premarital component of a pension plan is in the nature of property brought to the marriage which may be relevant to how the asset should be divided. See *Rodak v. Rodak*, 150 Wis.2d 624, 630, 442 N.W.2d 489, 492 (Ct. App. 1989). Although Steven's appellant's brief calculates the percentage of the pension attributable to his premarital military service, he did not present the trial court with a proposed value of that portion of the pension. In the absence of such evidence, the trial court's finding that neither party brought substantial property to the marriage was not

clearly erroneous. *See* § 805.17(2), STATS. The trial court had no basis upon which to carve out the premarital portion of Steven's pension.³

In dividing the pension in half, the trial court considered the factors governing property division set forth in § 767.255, STATS. The court found that the marriage was lengthy, neither party brought appreciable property to the marriage and each party made a traditional contribution to the marriage. The court reviewed the parties' health and contribution to the other party's education. The court considered the parties' respective earning capacities and incomes. The court also considered that Steven had remarried and started a new family and had primary placement of the parties' minor child. Because Conchita had received maintenance and been relieved of child support in the original divorce judgment, the court did not award Conchita one-half of Steven's pension retroactive to the date of the original judgment. We cannot say that the court misused its discretion in awarding Conchita one-half of Steven's military pension.

Steven argues that the trial court erroneously modified maintenance because there was no substantial change of circumstances before his obligation to pay maintenance ended under the original judgment when he was terminated by ZF Industries. Steven was terminated in September 1995. We conclude that the trial court's July 1995 decision to reopen the property division to account for a substantial marital asset permitted the trial court to reconsider the maintenance award. Revisiting maintenance was warranted because there was a substantial error in failing to include the pension in the property division. *See Steinke*, 126 Wis.2d at 389, 376 N.W.2d at 847. Property division and maintenance are interrelated. *See* § 767.26(3), STATS.; *see also*

³ The trial court's exercise of discretion with regard to the pension is evident in its reduction of the amount to be divided by that portion attributable to Steven's service-connected disability payments.

Arneson v. Arneson, 120 Wis.2d 236, 255, 355 N.W.2d 16, 25 (Ct. App. 1984). The trial court properly considered that interrelationship.

By the Court.—Order affirmed.

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

