

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 21, 1998

Marilyn L. Graves  
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 § 808.10 and RULE 809.62, STATS.

No. 97-2887

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT III

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IN RE THE MARRIAGE OF:

PATRICIA HEBERT,

PETITIONER-APPELLANT,

V.

THOMAS J. HEBERT,

RESPONDENT-RESPONDENT.

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APPEAL from an order of the circuit court for Eau Claire County:  
PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

CANE, P.J. Patricia Hebert appeals from the trial court's order modifying the maintenance obligation of her former husband, Thomas Hebert, contending the court misused its discretion. Because the trial court's decision to

modify maintenance does not reflect an unreasonable exercise of discretion, the order is affirmed.

The Heberts were married in 1966. During the marriage, Thomas completed dental school and opened a dental practice in Eau Claire where he still has his practice. Patricia also worked during the marriage as a full-time flight attendant until she retired in 1985. The Heberts divorced in 1991 with no minor children at the time of the divorce. The relevant part of the original divorce judgment provided for Thomas to pay Patricia maintenance in the sum of \$1,500 per month. The maintenance was to continue indefinitely with annual increases based on inflation. In addition, the court required Thomas to secure the maintenance award with a \$250,000 limited term life insurance policy.

In February 1996, Thomas filed a motion requesting the court to modify or terminate his maintenance obligation as well as the obligation to maintain the life insurance policy. After two days of testimony and argument, the trial court ordered that maintenance would terminate on July 1, 2002. In the interim, the monthly maintenance was to be gradually reduced by \$250 beginning with the July 1997 payment and by \$25.12 for each of the following fifty-nine payments. The court also reduced the required life insurance to \$150,000 and by \$20,000 per year thereafter until July 2002, when it could be terminated.

Patricia challenges the trial court's order modifying the maintenance obligation, contending that the court did not base its factual findings on facts appearing in the record and that the decision was an unreasonable exercise of discretion. On the other hand, Thomas refutes her contentions, arguing that there is more than sufficient evidence to support the court's findings as well as its exercise of discretion to modify the indefinite maintenance award.

## STANDARD OF REVIEW

We open our discussion with an important observation. We are not reviewing the family court's initial award of maintenance as provided in the judgment. Rather, we are reviewing the family court's postjudgment order granting in part Thomas's motion to modify maintenance. This markedly changes our appellate perspective. Although a request for maintenance modification, just as with an initial award of maintenance, is addressed to the family court's discretion, *see Gerrits v. Gerrits*, 167 Wis.2d 429, 440, 482 N.W.2d 134, 139 (Ct. App. 1992), the court may change a maintenance award only upon a positive showing of a change in circumstances. *Id.* at 437, 482 N.W.2d at 138. This change must be substantial and relate to a change in the financial circumstances of the parties. *Id.* Most importantly, unlike an initial award of maintenance, this burden logically rests with the party seeking the change. *See Miner v. Miner*, 10 Wis.2d 438, 446, 103 N.W.2d 4, 9 (1960).

An exercise of discretion must be based on the facts appearing in the record and the appropriate and applicable law, as well as being the product of a rational mental process. *See Dowd v. Dowd*, 167 Wis.2d 409, 416, 481 N.W.2d 504, 507 (Ct. App. 1992). The determination of the amount and duration of maintenance is a matter of trial court discretion, and we will not disturb the court's determination unless it misuses its discretion. *Fowler v. Fowler*, 158 Wis.2d 508, 519, 463 N.W.2d 370, 374 (Ct. App. 1990). Trial judges are allowed wide latitude to make decisions in the exercise of their discretion. Thus, we will not reverse a discretionary decision if the record discloses that discretion was in fact exercised and we can perceive a reasonable basis for the decision. *See Prahl v. Brosamle*, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). We will generally

look for reasons to sustain a trial court's discretionary decision. *Gerrits*, 167 Wis.2d at 441, 482 N.W.2d at 139.

### CHANGE OF CIRCUMSTANCES

Here, the trial court found that while, at the time of the divorce, the equities of the case required maintenance for an indefinite period, there had been a significant change of circumstances making it no longer equitable. While reviewing the factors set forth in § 767.26, STATS.,<sup>1</sup> the court also specifically

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<sup>1</sup> Section 767.26, STATS., provides:

**Maintenance payments.** Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.
- (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future,

(continued)

considered as an appropriate factor Patricia choosing to reduce her work substantially thus choosing a lower standard of living than that enjoyed during the marriage.

The court observed that at the time of the divorce, Patricia represented her intention was to obtain a business degree with which, in her opinion, she could earn \$25,000 to \$30,000 a year. It noted that instead of going to school, she left her job and other interim jobs to become a tour guide earning less than \$2,000 per year. It described Patricia's decision as deciding to become "semi-retired," leaving the job market and doing little, if anything, to become self-sufficient or at least more self-sufficient. Her "work" involved taking trips for which she received minimal pay or no pay at all, but allowed a very leisurely life-style. Although Patricia takes exception to the court's reference to her as being a "pool goddess," this was merely the court's observation of her life-style and her own description on her answering machine.

The trial court observed that there is nothing wrong with choosing this life-style if there are means to support it. It stated that it would be unreasonable, however, to expect an ex-spouse to provide indefinite support for this life-style. The court stated:

In short, after the divorce, [Thomas] continued to work, plan ahead for retirement and has paid maintenance which

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where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(9) The contribution by one party to the education, training or increased earning power of the other.

(10) Such other factors as the court may in each individual case determine to be relevant.

has been ordered. [Patricia], on the other hand, voluntarily left the world of gainful employment, did not seek a degree to improve her ability to earn a living or other kind of gainful employment but has lived off her previous relationship through maintenance and the pension funds which the parties acquired while they were married.

This has been her choice. Maintenance has a very important function. It is to help maintain the parties and give them the opportunity to become self-sufficient or more self-sufficient and to maintain them in the standard of living that was enjoyed during the marriage.

This case, however, is an abuse of that goal. It may very well be that even with a respectable reasonable diligence that [Patricia] would not be able to obtain a standard of living reasonably comparable to that enjoyed during the marriage, and under those circumstances, maintenance should certainly be continued, but by not working, [Patricia] has chosen not to have a standard of living reasonably comparable to that enjoyed during the marriage. This has been her choice.

The trial court continued its rationale by recognizing the fairness objective of maintenance, but emphasized that maintenance is not a permanent annuity and a dependent spouse cannot avoid employment and simply rely upon the supporting party to provide a standard of living that existed during the marriage. The court stated:

That is exactly what is going on here. As a finding of fact, I find that [Patricia] has avoided gainful employment. She has been--she could have been retrained or reemployed at a range previously indicated to the court in 1991, at \$25,000 to \$30,000 per year ....

... it would be grossly inequitable to continue to require [Thomas] to provide for the ex[-]spouse indefinitely who has showed no willingness or attempt to support herself.

The substantial change of circumstances I find as a fact in this case is that [Patricia] has avoided work and has chosen to live off pension proceeds and maintenance with very little income from this bus tour guide business.

We agree with the trial court that there was a substantial change of circumstances to modify the indefinite maintenance. As stated in *Fowler*, when one is capable of accepting reasonably available, gainful employment, he or she cannot avoid such employment and simply rely upon the former spouse to provide a standard of living comparable to that enjoyed during the marriage. This same analysis applies where the ex-spouse has chosen to substantially reduce his or her income even though he or she may remain employed. See *id.* at 521-22, 463 N.W.2d at 375.

The evidence is undisputed that Patricia chose not to return to school or pursue more gainful employment. The fact that an ex-spouse makes a career choice that results in reduced income does not automatically require that maintenance be reduced. However, it is a significant factor the trial court may consider in determining maintenance. *Id.* at 522, 463 N.W.2d at 375. Here, a very important fact is that the trial court found Patricia was not making any attempt to become self-sufficient or at least more self-sufficient and was treating the indefinite maintenance as a permanent annuity. As stated in *Vander Perren v. Vander Perren*, 105 Wis.2d 219, 229, 313 N.W.2d 813, 818 (1982), an ex-spouse's lack of initiative or effort to become self-supporting is a relevant factor, although not determinative, for a court to consider in awarding or terminating maintenance. The supreme court continued to point out in *Vander Perren* that:

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.

*Id.* at 230, 313 N.W.2d at 818. Thus, it was appropriate under the trial court factual findings to conclude there was a substantial change of circumstances justifying a revisit to the maintenance issue.

### **MODIFIED MAINTENANCE**

Next, we address whether the trial court reasonably exercised its discretion in its order modifying maintenance. The court found:

I find that within a five-year period [Patricia] should be able to be entirely self-sufficient at the present standard of living she has selected. This may not be the same standard of living that was enjoyed while during the marriage. However, through her conduct, she has selected, by not working, to live at a lesser standard of living.

... [Patricia's] prior work history before early semi-retirement indicates that she is an intelligent person, readily capable of making the changes necessary, given time, to support and to make those changes.

The trial court, however, recognized that maintenance should not be terminated immediately and concluded that it should be reduced gradually so that there would be incentive and time to become self-sufficient. It also observed under the gradual reduction, Thomas will have provided maintenance for a term of approximately twelve years, which is half the length of their marriage.

Although we may have decided the maintenance issue differently, the question we must address is whether the modified maintenance award was the result of an unreasonable exercise of discretion. Here, we cannot conclude the trial court's modification is unreasonable in light of the finding that Patricia is capable of obtaining gainful employment to sustain a reasonable standard of living. The record of the two-day hearing provides an ample factual basis for the trial court's conclusions.



*By the Court.*—Order affirmed.

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