

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1845

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

NEIL F. JENNINGS,

PETITIONER-APPELLANT,

v.

MARLYS J. JENNINGS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Neil Jennings appeals from an order on his postjudgment motion to reduce the maintenance paid to his ex-wife, Marlys Jennings. The trial court reduced Neil's obligation from \$2000 per month to \$590

per month. Neil contends, however, that the facts supporting his motion compel an order terminating maintenance. We disagree and affirm.

¶2 The parties divorced in 1996 after thirty-seven years of marriage. Based on Neil's substantial income from an appliance service company he owned and operated, compared with Marlys's reliance on monthly social security disability checks, the trial court ordered Neil to pay maintenance of \$2000 per month.

¶3 By 1998, Neil's business was failing and he could no longer afford the maintenance payments. Consequently, he moved for a reduction or termination of maintenance. At the hearing on his motion he testified that his business had failed and that he was attempting to sell his business assets. He also testified that he had contacted several prospective employers, with no luck. He was pessimistic about his employment prospects due to the fact that he was sixty-one years old and had an arthritis condition. In a deposition, his treating physician testified that Neil's arthritis substantially limited his physical ability. Marlys submitted evidence indicating that Neil had recently performed physical labor inconsistent with his alleged limitations.

¶4 The trial court found that Neil's business setbacks constituted a change of circumstances. The court also found, however, that Neil could earn \$25,000 per year based on his training and experience, that he exaggerated his arthritis condition and that he had not made a sustained effort to find other employment. Consequently, the court ordered maintenance to continue at a reduced level of \$590 per month, using a calculation based on Neil's \$25,000 earning potential and Marlys' income of \$540 per month in social security

disability payments. The purpose of that calculation was to equalize the parties' potential disposable income.

¶5 Issues of maintenance are addressed to the trial court's discretion. *See Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). We affirm if the trial court reaches a rational, reasoned decision based on the proper legal standards and facts of record. *See id.* If the exercise of discretion relies on findings of fact, we affirm those findings if they are not clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98). Under the clearly erroneous standard, findings of fact are affirmed unless the great weight and clear preponderance of the evidence supports a contrary finding. *See Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

¶6 The trial court properly considered Neil's earning capacity to determine his maintenance obligation. As a general rule, the trial court may award maintenance based on potential rather than actual earnings if the payer has made an unreasonable choice of employment. *See Sellers*, 201 Wis. 2d at 587. Here, it was not Neil's choice of employment the court found unreasonable, but his inadequate effort to find work to replace his failing business. However, the same principle logically and necessarily applies; the payer cannot avoid a maintenance obligation by unreasonable conduct.

¶7 The trial court's findings of fact on the maintenance issue were not clearly erroneous. Neil produced evidence of unsuccessful job applications sent to some twenty potential employers in the month before the hearing, some unsolicited and some in response to advertised openings. He did not, however, offer evidence that this was a reasonable canvassing of the jobs potentially available to him in the area. As a party seeking to change the maintenance award,

Neil carried the burden of proof on the issue. *See Haeuser v. Haeuser*, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996). He did not meet that burden merely by listing a number of job applications out of the context necessary to measure their reasonableness.

¶8 Evidence supported the trial court's findings that Neil could earn \$25,000 per year. He was a highly experienced appliance repair person and small business owner. He described himself in his resumé as "very people oriented with excellent communication skills," as a "hardworking responsible individual," and as "well organized with strong personal motivation." For a regular forty-hour per week employment, \$25,000 per year computes out to roughly \$12.00 per hour, less than Neil paid one of his repairmen. Under these circumstances, the trial court's determination of a \$25,000 earning capacity was not against the great weight and clear preponderance of the evidence.

¶9 Evidence also supports the determination that Neil's arthritis did not affect his ability to find employment and keep it. Neil introduced evidence of substantial limitations. Marlys introduced evidence that Neil performed physical tasks inconsistent with those alleged limitations. The trial court chose to believe the evidence Marlys presented and resolved the dispute in her favor on that basis. Such determinations on the weight and credibility of disputed evidence are not subject to review. *See Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993).

¶10 Neil contends, additionally, that the trial court did not adequately explain the \$590 per month award. The record indicates that the award was a formulated attempt to equalize the parties' potential, disposable income, based on the amount Marlys actually received, and the amount Neil could potentially earn.

Neil does not explain why the result of using that formula was unfair or excessive, given the numbers used in the calculation. From the standpoint of potential gross income, the award leaves Neil with close to sixty percent of the combined total. In a long marriage, the trial court may start with the proposition that the dependent partner may be entitled to fifty percent of the parties' combined income. *See Bahr v. Bahr*, 107 Wis. 2d 72, 84-85, 318 N.W.2d 391 (1982).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

