

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 20, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

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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.

**Appeal No. 2004AP3102**

**Cir. Ct. No. 1999FA96**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**CHARLOTTE S. BEYER,**

**PETITIONER-APPELLANT,**

**V.**

**LARRY F. BEYER,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Wood County:  
GREGORY J. POTTER, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Charlotte Beyer appeals from a post-divorce order reducing the amount and duration of her maintenance from her ex-husband Larry

Beyer. While we are satisfied that the record supports a reduction in the amount of maintenance, we conclude the circuit court failed to articulate a reasonable basis for terminating the reduced award after approximately three and one-half years. Accordingly, we reverse and remand for further consideration.

¶2 When Larry and Charlotte divorced in 1999 after more than thirty years of marriage, they equally divided \$672,000 in net assets. Among the assets awarded to Charlotte were the marital residence, a substantial amount of stocks and cash, some IRAs and a portion of Larry's 401K, while Larry kept the bulk of his 401K plan and a separate retirement account in addition to other real estate and some insurance policies. Larry also agreed to pay Charlotte \$1,000 per month in maintenance until death or remarriage. Four years later, Larry moved to reduce or terminate his maintenance payments because major reconstructive back surgery had forced him to take early retirement.

¶3 The circuit court held a hearing on the motion at which it was undisputed that Larry's income had been reduced from about \$51,000 per year in wages to \$19,200 per year in pension benefits. The circuit court concluded that Larry's early retirement constituted a substantial change in circumstances, and decided to reduce the maintenance payments for three and one-half years, after which they would terminate altogether. Charlotte does not dispute that there had been a substantial change in circumstances, but does contest several of the circuit court's factual findings and its exercise of discretion.

¶4 First, Charlotte claims that the circuit court improperly found that she had an income capacity of \$10,920, when she had never made more than half of that in her life. However, Charlotte is mischaracterizing the circuit court's finding as to her earning capacity. While it is true that Charlotte had never earned

more than about \$4,000 per year during the marriage, she had stopped working altogether by the time of the post-divorce hearing due to claimed back and neck problems. Therefore, the circuit court was required to decide whether her earning capacity had been reduced since the original maintenance order was entered. The circuit court found that Charlotte had failed to provide sufficient evidence to show that she was no longer physically able to work and “should be able to get a job at minimum wage in some form or fashion.” It did not state that she should be able to obtain full-time employment or find she could earn \$10,920 per year. In the context of the evidence presented at the hearing, it is clear that the circuit court was simply refusing to reduce her earning capacity from what it had been at the time of the divorce.

¶5 Second, Charlotte claims the circuit court improperly failed to impute \$1,366 in Social Security income to Larry. It was undisputed that Larry could begin receiving \$1,366 per month once he turned sixty-two several months after the post-divorce hearing, but had decided to delay his receipt of benefits until he was sixty-six, in order to receive \$1,795 per month. The circuit court found that Larry’s decision was “logical and reasonable.” It follows, though it was not explicitly stated, that the circuit court concluded Larry was not shirking his maintenance obligation by choosing to wait for a higher benefit. We are satisfied the circuit court’s determination was supported by the record. The court therefore did not err in refusing to impute \$1,366 in Social Security benefits to Larry’s current earning capacity.

¶6 Charlotte also claims the circuit court should have found a portion of Larry’s pension income available for maintenance purposes. The court acknowledged that there may have been some increase in Larry’s retirement account that was attributable to his post-divorce contributions and therefore

theoretically available for maintenance purposes. *See Olski v. Olski*, 197 Wis. 2d 237, 540 N.W.2d 412 (1995). However, it found that Charlotte had failed to show what portion of his monthly benefit was attributable to post-divorce contributions to the retirement plan. Again, the record supports the circuit court's determination. Charlotte's own expert testified that, based on exhibits presented at the time of divorce, Larry had already earned an estimated \$1,783 or \$2,264 in monthly pension benefits during the marriage, depending upon whether employee contributions were withdrawn. After Larry retired early and took a lump sum withdrawal of his contributions, his actual monthly benefit was \$1,593. The expert noted that it was somewhat difficult to make the necessary comparisons due to variation in several assumptions underlying the calculations, and the expert did not state any specific amount of monthly pension benefits which he believed was attributable to post-divorce contributions. We therefore see no error in the circuit court's finding that the entire pension benefit would be treated as part of the property settlement. The finding resulted from a failure of proof on Charlotte's part, not a failure of the circuit court to apply the proper legal standard.

¶7 Charlotte next argues that the circuit court erred in stating at one point that Larry did not have "any property." While the circuit court's statement was technically inaccurate since it was undisputed that Larry still had possession of at least some of the real estate he had been awarded in the divorce, the circuit court went on to note in the same sentence that Larry was living with his parents. In context, then, it is apparent that what the circuit court meant was that Larry had not purchased his own residence following the divorce. In any event, since the property Larry was awarded in the divorce was not available for purposes of maintenance, Charlotte has not explained how the circuit court's misstatement affected its maintenance analysis.

¶8 In short, we are satisfied that the circuit court made appropriate factual findings and considered proper statutory factors, as well as both the support and fairness objectives, when it concluded that the parties' current financial situation warranted a significant reduction in the amount of maintenance. *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶¶29-32, 269 Wis. 2d 598, 676 N.W.2d 452. It emphasized that both parties were now living off their property settlements (Larry, by drawing upon the retirement account he had been awarded, and Charlotte, by liquidating stocks and other assets), and that neither one had sufficient income to meet budgetary needs.

¶9 The circuit court did not, however, terminate maintenance at this time. Rather, the court ordered that maintenance be terminated after three and one-half years. The court's decision to order reduced maintenance payments for three-and-one-half years was based upon what it termed "one additional fairness factor." It again noted that as a result of Larry's decision to delay receipt of his Social Security benefits until he reached his full retirement age of sixty-six, "there is a difference in those two incomes of \$459." It went on:

And what I am going to do is find that he would be receiving that difference to which Mrs. Beyer would be entitled to. Therefore, what I'm going to do is take that amount of \$459, that being the difference of his pension if he were to start taking it at age 62 versus 66, I am dividing that in half, and therefore I am going to award Miss Beyer maintenance in the amount of \$225 per month, which will run for a period until she's eligible to start drawing on her 401k, which is at the age of 59 and a half. At that time maintenance will cease.

¶10 We are unable to follow the circuit court's logic. First, the circuit court had already determined that it was reasonable for Larry to forgo a monthly Social Security benefit of \$1,366 for the next four years. Since Larry was not receiving any Social Security benefit, the only way he could pay the ordered

maintenance was through use of his portion of the property division, i.e., his pension benefits. The order for limited term maintenance thus seems to contradict the circuit court's implicit finding that Larry was not shirking.

¶11 If, contrary to its statement that Larry's decision was reasonable, the court nonetheless concluded that Larry was shirking, why did the court not award half of the \$1,366 figure that Larry was forgoing? Or, if it was the circuit court's position that Charlotte would be entitled to half of Larry's social security benefit once he began receiving it, why did the court not hold maintenance open for the present and award her half of the entire \$1,795 monthly benefit once Larry began to draw it? We are unable to understand under what theory Charlotte would be entitled to only half of the increased amount that Larry would secure by waiting to draw benefits. Finally, we do not understand the rationale for terminating the reduced maintenance award just before Larry would actually begin to receive his Social Security benefits. There was nothing in the record to show that Charlotte would be able to meet her budget with the addition of benefits from her \$16,000 interest in a 401K plan, and unlike Social Security benefits, whatever amount she did receive from the 401K would also be attributable to her half of the property division. Moreover, it would seem that the original lifetime maintenance award contemplated that both parties would eventually be living on Social Security and other post-retirement forms of income.

¶12 In sum, although the record clearly supports a substantial reduction in maintenance at this time, the circuit court failed to articulate a reasonable basis for terminating the reduced maintenance award after three and one-half years when it had previously determined that Charlotte was entitled to lifetime maintenance. Accordingly, we reverse the revised maintenance order and remand with directions that the circuit court reconsider the matter, giving more specific

consideration to the questions noted above, to what the future financial situation of both parties is likely to be, and to whether a future termination date for maintenance should be ordered at this time.

*By the Court.*—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

