

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 01-3466
STATE OF WISCONSIN

Cir. Ct. No. 00-FA-114

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

ELAINE M. PARODO,

PETITIONER-RESPONDENT,

V.

JERRY J. PARODO,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County:
LEWIS MURACH, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Jerry Parodo appeals a judgment divorcing him from Elaine Parodo. The issue is whether the court erred by setting maintenance as a percentage of Jerry's income for an indefinite term. We affirm.

¶2 Jerry's first argument is that the court erred by setting maintenance as a percentage of his income. The parties agree that maintenance is a discretionary determination. They also agree that a percentage award of maintenance is appropriate when there are unusual circumstances, such as the payor's unpredictable income or ability to manipulate his income. *See Hefty v. Hefty*, 172 Wis. 2d 124, 132, 493 N.W.2d 33 (1992). Jerry correctly argues that the trial court decision did not expressly state why a percentage figure, rather than a specific dollar amount, is appropriate in this case. However, when the trial court fails to set forth its reasoning, we independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶3 Jerry argues that the evidence was insufficient to support a finding that his income was subject to fluctuations. We disagree. His income over preceding years varied, due in part to sales of stock from his employer's employee stock ownership plan (ESOP). He testified that his employer puts stock in his account, which he can sell quarterly. In addition, Jerry's total wage income for those years was higher than would occur from working at his hourly wage for forty hours per week. The parties appear to agree that this was caused by overtime. Jerry testified that he did not anticipate receiving any ESOP distributions in 2001, and that he would not be seeking any more overtime because he would receive so little of the money after taxes and child support. However, he also testified that he had worked overtime as recently as a month before the hearing, and that overtime continued to be available. The trial court could reasonably conclude from this testimony that both ESOP stock sales and overtime earnings remained a possibility in the future.

¶4 There are other indications that Jerry's income may continue to fluctuate. We note that, when discussing child support, Jerry's counsel sought to establish a percentage figure for child support due to Jerry's variable income. He fails to offer a convincing explanation for why that variability of income would not also be true when considering maintenance. In addition, Jerry's opposition to a percentage standard on appeal raises some doubt about his own expectations for income. It is not clear why he would care whether the trial court set maintenance at a definite amount or used a percentage figure that would consistently produce that same maintenance amount when applied to Jerry's allegedly unchanging future income. A percentage maintenance award would have an adverse effect on Jerry only if his income exceeds what the trial court anticipated. We note that Jerry does not argue that the court's chosen percentage figure, when applied to his base wage without overtime or stock sales, produces an excessive award of maintenance. This suggests that his concern on appeal is primarily with preventing the maintenance payments from becoming larger if his income increases above his base wages.

¶5 Jerry also argues that the court erred by setting maintenance for an indefinite term. He argues that maintenance should last only until the recipient is able to reach a level of income where maintenance is no longer needed, and that awarding Elaine maintenance on an indefinite basis reduces her incentive to achieve that level of income. We are satisfied that the court properly exercised its discretion. Given Elaine's age of 49, her limited education, her then-current position as a manual laborer and as a parent with primary placement of children aged fourteen and fifteen, the court could reasonably conclude that Elaine is not certain to reach a level of income at which maintenance will no longer be

appropriate. Jerry has not identified anything in the record that supports his argument that Elaine will forego any opportunities to earn more income.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

