

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2011

A. John Voelker
Acting 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. 2010AP1665-FT

Cir. Ct. No. 2000FA1081

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DENNIS MUSURLIAN,

PETITIONER-APPELLANT,

V.

RUTH MUSURLIAN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
GERAL P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Dennis Musurlian has appealed from an order entered in the trial court on April 12, 2010, denying his motion to modify

maintenance and finding him in contempt for failure to pay maintenance as ordered in the judgment divorcing him from the respondent, Ruth Musurlian. Dennis contends that the trial court erroneously exercised its discretion when it refused to reduce maintenance based on his age, failing health, and reduced income. Based on these same factors, Dennis contends that his failure to pay maintenance was not willful, and that the trial court erroneously found him in contempt. Pursuant to this court's order of July 22, 2010, and a presubmission conference, the parties have submitted memo briefs. Upon review of those memoranda and the record, we affirm the order of the trial court.

¶2 A trial court may modify a maintenance award only upon a showing of a substantial change in the financial circumstances of the parties. *Murray v. Murray*, 231 Wis. 2d 71, 77, 604 N.W.2d 912 (Ct. App. 1999). However, even when there has been a substantial change in circumstances, the ultimate decision to grant or deny a motion for modification lies within the trial court's discretion. *Id.* This court will uphold the trial court's exercise of discretion when the record reveals that the court employed a process of reasoning in which the facts and applicable law were considered in arriving at a conclusion based on logic and proper legal standards. *Id.* We generally look for reasons to sustain the trial court's discretionary decision. *Id.* Even if a trial court fails to articulate the reasons for its decision, this court will independently review the record to determine whether there is a reasonable basis upon which it may uphold the trial court's discretionary decision. *Rottscheit v. Dumler*, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525.

¶3 For purposes of evaluating whether there has been a substantial change in the parties' financial circumstances, the appropriate comparison is between the parties' current financial status and the facts existing when

maintenance was last set, whether that was in the original divorce judgment or in a previous modification order. *Kenyon v. Kenyon*, 2004 WI 147, ¶2, 277 Wis. 2d 47, 690 N.W.2d 251. At the modification hearing, the trial court should adhere to the findings of fact made in the previous proceeding and may not retry the issues decided in that proceeding. *Id.* However, if a party establishes a substantial change in financial circumstances, then the trial court must consider the dual objectives of support and fairness in determining whether modification is warranted. *Id.*, ¶3. The objectives are: (1) support of the recipient spouse in accordance with the needs and earning capacities of both the recipient spouse and the payer; and (2) a fair and equitable financial arrangement between the parties. *Id.*, ¶29. The factors listed in WIS. STAT. § 767.56 (2009-10)¹ must be considered in light of these objectives. *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶29, 269 Wis. 2d 598, 676 N.W.2d 452. Fairness must be considered with respect to the situations of both parties. *Id.*, ¶31.

¶4 Some background is necessary to understand the issues pertaining to Dennis' motion for modification. Dennis and Ruth were divorced after a marriage of more than forty years. In the March 2003 judgment of divorce, the trial court awarded all right, title and interest in the parties' automotive repair business, American Auto and Truck Repair (American Auto), to Dennis. The trial court found that American Auto had a value of \$250,000, and that Dennis derived a gross annual income of \$240,000 from its operation.² Accepting Dennis' estimate that his operating expenses were \$8000 per month, the trial court found that he had

¹ WISCONSIN STAT. § 767.56 (2009-10) was formerly numbered WIS. STAT. § 767.26 (2003-04). All references to the Wisconsin Statutes are to the 2009-10 version.

² These values were undisputed.

a net income of \$144,000 per year, or \$12,000 per month. After imputing income to Ruth of \$14,500 annually based on an earning capacity of \$7.00 per hour, the trial court ordered Dennis to pay maintenance of \$1000 per week. The trial court further ordered Dennis to notify Ruth of any offers for the purchase of American Auto, and stated that he could not sell or liquidate American Auto without satisfying the delinquent tax obligations assigned to him by the judgment of divorce, which the trial court determined had arisen from Dennis' operation of and inaccurate reporting of income from American Auto.³

¶5 In April 2006 Dennis moved to modify maintenance based on changed circumstances arising from his impending imprisonment for tax evasion. In support of his motion, Dennis contended that he was not able to generate income for the foreseeable future or to continue the operation of American Auto.

¶6 The transcript of the evidentiary hearing on Dennis' 2006 motion is not part of the record on appeal. However, the record includes the transcript of the oral decision issued by Racine County Circuit Court Judge John S. Jude on January 23, 2007, denying Dennis' motion to modify maintenance. In his oral decision, Judge Jude found that the revenue generated by American Auto had been the parties' sole source of income since 1987, that Dennis had been arrested for tax evasion in March 2005, that he commenced serving a twenty-seven month sentence in May 2006, and that with good time he anticipated being released in April 2008. As testified by Dennis, the trial court further found that Dennis had sold American Auto for \$4500 shortly before his incarceration. It found that,

³ The trial court found that tax liabilities exceeded \$200,000.

contrary to the terms of the divorce judgment, Dennis had not given Ruth notice prior to the sale.

¶7 Although the trial court found that Dennis' incarceration constituted a change of circumstances, it concluded that modification of maintenance was unwarranted. It stated that because Dennis was incarcerated, shirking cases were inapplicable to his motion, citing *Rottscheit*, 262 Wis. 2d 292, ¶38. However, while it did not find shirking, it considered Dennis' earning capacity, finding that Dennis' earning capacity had not diminished and that Dennis could continue to work in the auto repair business after his release subject to upgrading his education. It found that there was no reliable or credible evidence as to why the business was sold for \$4500 when it was worth \$250,000 at the time of the divorce. It found incredible Dennis' testimony that his knowledge and equipment were obsolete and that he could not keep up with the purchase of modern equipment. It rejected Dennis' contention that the business had little value and was no longer viable. The trial court also found that by selling American Auto for a fraction of its worth, failing to notify Ruth of the sale, and failing to apply sales proceeds to the delinquent taxes, Dennis had eliminated the source of income for the parties and frustrated the goals established in the divorce judgment for both property division and maintenance, reflecting his intention to avoid the support obligation established in the divorce judgment. Based upon these factors and reasons, Judge Jude denied Dennis' motion for modification of maintenance.

¶8 The motion for modification of maintenance that is the subject of this appeal was filed by Dennis in October 2008, following his release from prison. In his motion, Dennis sought a reduction in maintenance based on his reaching of retirement age, health problems, and reduced income.

¶9 Testimony was taken on Dennis' motion over the course of two days. At the first hearing, Dennis testified that he was now sixty-nine years old, that he had suffered a heart attack while in prison, and that he suffered from high blood pressure, diabetes, high cholesterol, back problems, and poor circulation in his legs. Dennis testified that he was no longer physically capable of operating an auto repair business, and that he lacked the current knowledge and expertise required to do so.

¶10 Dennis' treating physician also testified on his behalf. He testified that Dennis had stents in his coronary arteries as a result of the heart attack. Based on Dennis' health problems, the physician recommended that Dennis avoid heavy lifting and stressful work. Although he conceded that Dennis was healthy enough to supervise the operation of an automotive repair shop, he opined that Dennis was unable to work full-time as a mechanic and that reopening an auto repair business would increase Dennis' risk of another heart attack.

¶11 Dennis also testified about his difficulties in finding employment upon release from prison. He testified that he was currently employed to test drive cars for \$10 an hour for thirty to forty hours per week. He testified that he earns only \$1720 a month and that he receives only \$430 of his \$1130 monthly social security check, with the remainder of the social security payment going to Ruth. Alleging that he could not pay maintenance of \$1000 a week, Dennis requested

that his maintenance obligation be reduced to \$560 per month, taking into account his income of \$2150 per month, and Ruth's income from social security.⁴

¶12 In her trial court argument, Ruth conceded that Dennis' physical ailments constituted a change of circumstances since the time of the divorce. However, she disagreed that he could not reasonably be expected to match his prior earnings. In addition, she contended that Dennis had unclean hands and that his income loss resulted not from his health problems, but from his decision to sell the parties' sole source of income for a fraction of its worth, in violation of the divorce judgment requiring him to notify Ruth before selling it. She also contended that Dennis never adequately explained why he did not hire someone else to manage the business for him.

¶13 Based upon the parties' agreement that a change of circumstances had occurred, the trial court⁵ found a substantial change of circumstances since the time of the divorce. It also correctly noted that when a substantial change of circumstances has been shown, fairness to both parties must be considered in determining whether modification is warranted. Ultimately, it concluded that modification of maintenance was unwarranted.

¶14 On appeal, Dennis contends that the trial court erroneously exercised its discretion when it failed to consider his age, health problems, and

⁴ Ruth testified that she was sixty-six on the date she testified, and that her income consisted of \$559.40 in social security income for herself, and half of Dennis's social security payment as maintenance. Ruth also testified that her mother resided with her and gave Ruth \$550 of her social security payment each month.

⁵ The Honorable Gerald P. Ptacek presided at the hearings on Dennis' second motion for modification of maintenance.

uncontroverted reduction in income, and instead denied modification based on a determination that he had unclean hands. Dennis contends that he was entitled to modification because even if his prior “bad acts” of failing to pay taxes or selling the business had not occurred, he would not be able to earn sufficient income to pay maintenance of \$1000 per week now. He contends that his current inability to pay maintenance is the result of his health problems and age, and is not the result of wrongful conduct, rendering the unclean hands doctrine inapplicable. Dennis further contends that the trial court did not find shirking or impute income to him based upon a finding that he unreasonably reduced his income, and thus could not reasonably deny his motion for modification on that ground. In addition, he contends that it is unfair to require him to pay maintenance of \$1000 per week when he earns only \$2150 per month.

¶15 Upon close examination, Dennis’ arguments fail. In denying Dennis’ motion, the trial court expressly considered the factors set forth in WIS. STAT. § 767.56. In discussing the age, physical and emotional health of the parties, it noted that both of them had reached retirement age and that Dennis had presented testimony regarding his health problems and surgery while in prison. It considered the property division that had been ordered at the time of the divorce, finding that Dennis divested himself of \$245,000 of value in American Auto when he sold it for \$4500, without regard to Ruth’s rights, the effect on his ability to pay maintenance, and the requirements of the divorce judgment, including the requirement that he notify Ruth before selling. While agreeing that Dennis had a right to retire, it concluded that his conduct in selling American Auto and committing acts that led to his incarceration deprived Ruth of the source of income he could have used to pay maintenance. It also noted that, except for social security, Dennis had not made maintenance payments since March 2006.

¶16 These factors support the trial court’s conclusion that Dennis did not have clean hands and was not entitled to relief based on principles of equity. However, contrary to Dennis’s contention, this was not the entirety of the trial court’s reasoning in denying relief. The trial court also implicitly considered Dennis’ earning capacity, explicitly rejecting his argument that he could not keep up with current automotive technology and establish a car repair business because of a lack of knowledge or money. The trial court noted that this argument was similar to the argument Dennis made in 2006. It found that small independent repair shops still existed, and that Dennis could have kept his skills “up to par” if he had chosen to do so. While acknowledging Dennis’ heart surgery, it also noted that he had heart problems even before his first motion for modification.⁶

¶17 Read in its entirety, we construe the trial court’s analysis as rejecting Dennis’ argument that he is unable to pay maintenance as ordered in the divorce judgment because of his age and health problems. The trial court concluded that the business sold by Dennis had great value. It rejected his argument that he could not build a business up again because of lack of knowledge or money, and implicitly rejected his claim that his health problems prevented him from doing so. The trial court’s discussion indicates that it implicitly found that Dennis’ claim that he could not pay maintenance as ordered in the divorce judgment because of his cardiac and other health problems was unreasonable, and that he had the earning capacity to rebuild his business or otherwise earn sufficient income to pay maintenance as ordered.

⁶ In denying the motion for modification filed by Dennis in 2006, Judge Jude stated that Dennis had testified concerning heart problems, but did not address that matter further because it was not the basis for Dennis’ motion.

¶18 As acknowledged by Dennis in his appellant's brief, a trial court may consider earning capacity rather than actual earnings when an obligor intentionally avoids the duty to support or where the obligor unreasonably diminishes or terminates his income in light of a support obligation. See *Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). Although the issue of reasonableness presents a question of law, because a legal conclusion as to reasonableness is so intertwined with the factual findings supporting the conclusion, this court gives weight and appropriate deference to the trial court's conclusion regarding reasonableness. *Id.* at 492-93.

¶19 While the trial court did not explicitly state that it was basing its denial of Dennis' motion on his earning capacity, as discussed above we may independently review the record to determine whether there is a reasonable basis to uphold an exercise of discretion by the trial court. See *Rottscheit*, 262 Wis. 2d 292, ¶11. The record establishes that the trial court implicitly determined that Dennis had unreasonably diminished his income and that he retained an earning capacity sufficient to make the maintenance payments ordered in the divorce judgment. Because the record supports these determinations and the trial court's determination that modification was not equitable or fair, we uphold the trial court's order denying Dennis' motion for modification of maintenance.⁷

¶20 In his final argument, Dennis challenges the trial court's finding that he is in contempt for failure to pay maintenance. A person may be held in

⁷ In reaching this conclusion, we have considered the testimony of Dennis' physician regarding limitations on his ability to work in the auto repair business. However, a trier of fact is not bound by the opinion of an expert. *State v. Kienitz*, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999). In addition, even Dennis' physician acknowledged that Dennis was healthy enough to supervise an auto repair shop.

contempt for failure to pay support if that failure is willful and contemptuous and not the result of inability to pay. *Benn v. Benn*, 230 Wis. 2d 301, 309-10, 602 N.W.2d 65 (Ct. App. 1999). The trial court must find that the person is able to pay and that the refusal to pay is willful and with intent to avoid payment. *Id.*

¶21 Dennis contends that because the uncontroverted evidence at the modification hearing indicated that his gross monthly income is only \$2150 per month, the trial court could not find that he is able to pay maintenance of \$1000 per week. He further objects that the trial court made no finding that his failure to pay was willful.

¶22 Dennis' contention that the trial court could not find that he was able to pay maintenance fails for the same reasons his challenge to the order denying modification fails. The trial court implicitly found that he has the capacity to pay and has unreasonably failed to do so. As already discussed, this finding is supported by the record and will not be disturbed by this court.

¶23 The trial court also implicitly and reasonably concluded that Dennis' refusal to pay was willful and resulted from his intent to avoid payment. Dennis chose to sell American Auto for \$4500. As noted by Ruth in her brief on appeal, the difference between the sale price and the value of the business as determined at the time of the divorce exceeded the amount of maintenance arrears that had accrued at the time of the contempt hearing. As determined by Judge Jude in denying Dennis' first motion for modification, Dennis did not establish that it was necessary for him to sell the business at such a depressed price. The record also indicates that, except for the partial social security payment received by Ruth from Dennis' social security award, the last maintenance payment made by Dennis was in March 2006. Under these circumstances, the trial court could reasonably

conclude that Dennis' refusal to pay was willful and resulted from his intent to avoid payment. The trial court therefore properly found him in contempt.

By the Court.—Order affirmed.

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

