COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 04-1635

Cir. Ct. No. 96FA000255

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

JOSEPH N. FRANCIS,

PETITIONER-APPELLANT,

V.

MAUREEN M. FRANCIS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 BROWN, J. This appeal arose from a former husband's motion to modify or terminate his maintenance obligation to his former wife, in light of his retirement plans. He first argues that the trial court engaged in improper "double-

counting" when it included pension benefits awarded to him in the property division as funds available for maintenance. We disagree. The trial court in the original divorce proceeding did not assign value to either party's interest in the pension to be offset by other property in the property division. The former husband also claims the trial court erroneously exercised its discretion when it failed to consider "certain salient facts." We conclude, however, that the reduced maintenance award the trial court arrived at was reasonable, based on the record and the court's decision. We therefore affirm.

¶2 Joseph N. Francis and Maureen M. Francis were married on August 24, 1963, and divorced thirty-three years later on June 6, 1997. Joseph has worked for over forty years as a customer service specialist for SBC. Maureen has been a switchboard operator at Sheboygan Memorial Medical Center since 1988. The trial court in the original divorce action divided the property equally between the parties, incorporating in its decision a partial oral agreement between the parties, and awarded Maureen maintenance in the amount of $1166.66 per month.

¶3 The parties' agreement, summarized in Exhibit A attached to the trial court's judgment of divorce, assigned monetary values to most of the assets. When balanced with a $7768 equalization payment from Joseph to Maureen, each party's share constituted fifty percent of those assets. The agreement also listed "Ameritech Pension QDRO" as an asset for each party. The agreement did not specifically assign a value to either party's share, but the QDRO (Qualified Domestic Relations Order) directed the plan administrator to value the plan and to assign Maureen fifty percent of that value, calculated as of the date of divorce.

¶4 Maureen eventually withdrew $70,565, about half of her share of Joseph's pension. She rolled over $44,968.05 into a Modern Woodman annuity. The rest she used for other purposes, including home repairs from flood damage.

¶5 The parties have twice moved for modification of Maureen's maintenance award. First Maureen moved to modify her maintenance because Joseph's income had substantially increased. The trial court granted her motion, ordering Joseph to pay the greater of his current maintenance obligation or twenty-nine percent of his periodic gross income, and on April 19, 2000, we affirmed.

¶6 On September 8, 2003, just over three years later, Joseph moved the court to terminate or, alternatively, to reduce his maintenance obligation. Joseph contended that retirement was medically necessary due to plantar fasciitis, a foot ailment that results when the tendon or fibrous material from the heel bone tears. Joseph represented that his work as an installer repairman involves mostly outside work and requires him to climb ladders and telephone poles, a task that has become painful for him. He also stated that he wanted to retire because he has reached retirement age.

¶7 The trial court agreed that Joseph's retirement constituted a substantial change of financial circumstances. Whereas he grossed $53,725 in calendar year 2003, his total monthly income upon retirement would only total $2949 per month, the equivalent of $35,388 per year. Of that amount, $1639 represented income from Joseph's pension and $1310 would come from social security. Although the court rejected his assertion that his medical condition made retirement necessary based on its conclusion that the condition was treatable, it nonetheless concluded that Joseph's age and forty-three years of service with his

employer made retirement an appropriate option. Accordingly, it reduced the monthly maintenance amount to $575.[1] Joseph appeals.

¶8 The trial court's decision to modify a maintenance award is a discretionary one. ***Kenyon v. Kenyon***, 2004 WI 147, ¶25. In making its decision, it should consider fairness to both of the parties, given all the circumstances. ***Id.***, ¶30. Accordingly, we review that decision using the erroneous exercise of discretion standard. ***Id.***, ¶10. Although we need not forage through the record in search of support for the trial court's decision, we may nonetheless conclude discretion was properly exercised when, based on the record, we can conclude that the award is reasonable. *See* ***Littmann v. Littmann***, 57 Wis. 2d 238, 250, 203 N.W.2d 901 (1973); ***Vier v. Vier***, 62 Wis. 2d 636, 639-40, 642, 215 N.W.2d 432 (1974).

¶9 We first consider Joseph's argument that the trial court improperly considered his entire pension in determining his postretirement ability to meet his maintenance obligations. Joseph observes that the trial court included the value of Joseph's pension, as of the date of divorce, in the property division in the original divorce action. Joseph notes that our supreme court in ***Kronforst v. Kronforst***, 21 Wis. 2d 54, 63-64, 123 N.W.2d 528 (1963), held that the trial court could not award a profit-sharing trust asset to a party as part of the property division and also include that asset as a source of income for purposes of determining maintenance. Here Joseph contends that because he received fifty percent of the

[1] The order is unclear whether the amount is $570 or $575. Although on page 4 of the order, the court arrived at $570 as the amount required to equalize the parties' monthly disposable incomes, on page 5, it directed Joseph to pay Maureen an amount of $575 beginning on May 14, 2004.

pension plan, valued as of the divorce date, in his share of the property division, the trial court violated ***Kronforst***'s rule against "double-counting" when it failed to limit the amounts available for maintenance purposes to only those funds added to the plan following the divorce.

¶10 Joseph acknowledges our decision in ***Wettstaedt v. Wettstaedt***, 2001 WI App 94, 242 Wis. 2d 709, 625 N.W.2d 900, in which we concluded that the lower court had not double counted a pension benefit divided by a QDRO. *See* ***id.***, ¶¶1, 9. He claims, however, that this case is different from ***Wettstaedt***. He states that in that case, the court did not include the value of the husband's pension in the property division, instead merely dividing the plan benefits equally between the parties. Joseph asserts that here, on the other hand, the trial court *did* include the value of Joseph's pension in its judgment of divorce when it divided the marital estate. In making this proposition, he relies on (1) the fact that the QDRO directs the plan administrator to value the pension as of the divorce date and allocate half of this amount to Maureen and (2) Maureen's actual withdrawal of half of her interest—the $70,565—which would have necessitated such a valuation.

¶11 In ***Wettstaedt***, we stated our holding as follows: "[w]hen an employee-spouse's pension is divided by QDRO, and no value is assigned to either spouse's interest to be offset by other property awarded in the property division, a family court is not prohibited by the 'double-counting' rule from considering pension distributions in determining maintenance." ***Id.***, ¶20. We must determine whether the facts of this case come within the ***Wettstaedt*** holding. We review this question of law independently. *See* ***State v. Brandt***, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999) (application of the appropriate legal standard to a set of facts presents a question of law that we review de novo).

¶12 We conclude that this case falls squarely within ***Wettstaedt***. Even if Joseph is correct that his pension plan was valued in the property division because the plan administrator—pursuant to the QDRO incorporated into the judgment of divorce as part of the parties' agreement—eventually arrived at a monetary value representing Maureen's share, he misunderstands ***Wettstaedt***. He appears to read that case to except pension benefits from the double-counting rule only when the divorce decree does not call for valuation of a pension plan. The key determinant in ***Wettstaedt***, however, was not that "no value is assigned to either spouse's interest" but rather that "no value is assigned to either spouse's interest *to be offset by other property* awarded in the property division." ***Wettstaedt***, 242 Wis. 2d 709, ¶20 (emphasis added). Joseph does not contend that he gave up part of his pension benefits as a quid pro quo for receiving other property; nor does he contend that Maureen accepted part of his pension in lieu of other property.

¶13 Indeed, this case is factually indistinguishable from ***Wettstaedt*** in all relevant respects. In ***Wettstaedt***, "[i]n place of values under both the 'Husband' and 'Wife' columns of the property division balance sheet was inserted '1/2 QDRO.'" ***Id.***, ¶10. Similarly, Exhibit A memorializing the Francises' agreement referenced only the QDRO and left blanks in the spaces assigned for dollar amounts. Moreover, both here and in ***Wettstaedt***, the parties each received fifty percent of the other assets after the husband made a balancing payment to the wife. *See* ***id.*** In neither case did the division of the pension plan seem to have influenced the division of the other property.

¶14 In addition to Joseph's "double-counting" argument, he also complains that the trial court's decision erroneously failed to take several salient factors into account. He asserts that it should have considered the following. First, Maureen has increased the equity in her home and will have the mortgage

paid off within three years; thus, she could refinance, sell the home and get cheaper housing, or obtain a home equity loan in order to decrease her need for maintenance. Second, Maureen works only thirty-five to thirty-nine hours per week for a single employer. According to Joseph, her failure to find a second job, a job with higher wages, or increased hours at her current employment reflects a lack of reasonable diligence on her part to reduce her financial need.

¶15 Third, Joseph claims that Maureen's share of his pension is a source of potential income. He states that she can withdraw from the Modern Woodman annuity at any time without penalty, and as soon as Joseph retires, the remaining funds left in the pension plan will become available to her as an annuity. According to Joseph, the court erred when it simultaneously considered his share of the pension as income available for maintenance purposes and failed to recognize Maureen's share as income imputable to her when calculating her need for maintenance.[2]

¶16 As to Joseph's first point, ***Wettstaedt*** repeated the rule that one spouse should not be forced to invade his or her share of the property division in

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[2] Joseph also appears to fault the trial court for not considering how the maintenance award related to the purpose of maintaining Maureen at the marital standard of living. To the extent that his complaint is based on the three points just enumerated, our consideration of those issues fully addresses that concern. If, however, Joseph's grievance is based on the fact that the court did not specifically refer to whether a $575 maintenance amount was necessary to maintain Maureen at the marital standard of living (even without regard to the three enumerated factors), he ignores the history of this case. The last time Joseph appealed an order modifying his maintenance obligation, we *rejected* his contention that an award amounting to the greater of $1166.66 or twenty-nine percent of his gross periodic income required him to support Maureen beyond her marital standard of living. *See* ***Francis v. Francis***, No. 99-2683-FT, unpublished slip. op. ¶10 (Wis. Ct. App. Apr. 19, 2000). The record contains a copy of that opinion. Surely, a reasonable trial court could have concluded that a *reduction to less than half* of the amount we upheld in that prior proceeding would not exceed the marital standard of living. Thus, we can conclude that the trial court's award was reasonably supported by the record.

order to live while the other spouse is not so forced. ***Wettstaedt***, 242 Wis. 2d 709, ¶¶12, 17-18. Maureen received her house as part of the property division. She has no obligation to sell it for cheaper housing in order to relieve Joseph of a maintenance obligation he prefers to avoid. The trial court did not err in failing to consider this "option."

¶17 Similarly, a reasonable court might conclude that fairness did not require one spouse to encumber his or her interest in the marital property received by forcing him or her to incur extra debt on that property. Moreover, Maureen testified that refinancing to lower her monthly mortgage payment would not be economically wise. A court could find this testimony credible without exceeding the bounds of reasonableness.

¶18 We also consider Joseph's concern that the mortgage will be paid off in three years. The trial court's order stated that termination of maintenance *at this time* would be unfair. At this time, Maureen still has a mortgage. A reasonable maintenance award need not ignore present debts.

¶19 We turn next to Joseph's second point regarding Maureen's employment options. We know of no rule that requires a maintenance recipient to seek the most lucrative employment in order to relieve a former spouse from a maintenance obligation. The history of this case is also instructive. All proceedings related to these parties' divorce were before the same judge. When the court increased Maureen's maintenance in 1999 to its present level, it specifically took into account that she had increased her working hours to thirty-six to thirty-nine hours per week and made roughly $1337 per month in the most recent calendar year. Although in this most recent proceeding, the court did not specifically refer to the number of hours Maureen works, it did state that she is

sixty-two years old and that her monthly income is $1685 per month. This amount represents an increase since the last modification of almost $350 per month. Maureen testified that she now works roughly thirty-five hours per week and takes overtime hours when they are available. To conclude that Maureen is appropriately employed for a woman of retirement age and has made some progress toward increasing her income stream would not be unreasonable.

¶20 Finally, we address Joseph's objection to the trial court's failure to impute to Maureen amounts from her share of his pension plan while counting his share against him for maintenance purposes. The trial court's decision informs our analysis of its reasonableness.

> At both the time of the divorce and a subsequent review hearing, the court expressed its intention to essentially equalize the parties' net disposable monthly income. A primary factor in the court's determination has been the parties' nearly 33-year marriage.[] Against this backdrop, the court believes that in light of the change in total financial circumstances between the parties, reduction of the maintenance award is appropriate based on an equalization of the parties' income….
>
> The court continues to be directed by the beacon that serves as the inherent guiding principle of this case, *viz.*, equalization of the parties' disposable monthly income rooted in fairness/support.
>
> The court also finds that such modified maintenance award is fair and reasonable under the circumstances.

Certainly, the trial court's desire to equalize the former spouses' incomes in light of over three decades of marriage could properly be a paramount consideration in applying the fairness standard. Both the court's decision and undisputed facts in the record reveal that counting Joseph's pension income and not Maureen's appropriately followed that goal.

¶21 We emphasize the following factors. First, the court concluded that Maureen could not afford to retire until she reached sixty-five, and the record reflects a reasoned basis for that finding. Maureen testified that: (1) she plans not to use the unspent funds in her share of Joseph's pension until that time, so she can supplement her social security and (2) that if she were to retire now, her entire social security benefit would go to healthcare because she is not yet eligible for Medicaid. Taken together, the parties' letter briefs to the trial court represented that if Maureen were to retire immediately, her social security benefit would be $583 per month but would increase to $803 per month if she waited for some three years to three and one-half years.

¶22 Second, in the original divorce proceeding, each party received half of the marital estate, and the maintenance awarded left each party with roughly equal amounts of disposable monthly income. Thus, preretirement resources were essentially equal. Third, each party received half of Joseph's pension plan as of the divorce date. Maureen alone kept her own 401K plan in the property division. Joseph, on the other hand, would receive any benefits in his plan that accrued following the divorce. This arrangement, in light of the trial court's apparent goal of equalization, would appear to aim at equalizing postretirement income as well.

¶23 Taking all these factors together, it appears to us that what the trial court had in mind was to allow Maureen to build up her nest egg for retirement over the next few years so that she would not deplete her postretirement assets and end up significantly worse off than Joseph upon reaching retirement. In the meantime, Joseph would continue to pay maintenance in order to make that goal possible. Although the court awarded maintenance for an indefinite period instead of cutting it off upon Maureen's retirement, in light of the court's stated goal of equalization, it would appear that the trial court simply wished to ensure that

maintenance would not terminate until the court was sure the parties' postretirement situations were indeed roughly comparable. We cannot say that this approach is unfair.

¶24 Certainly the trial court *could have* taken Maureen's share of Joseph's pension into account and either terminated maintenance or given her a much reduced award from the present one. However, given the court's stated goal of equalizing the parties' situations, either scenario potentially leaves Joseph on the hook for maintenance for a significantly *longer* period of time. If Maureen were forced to deplete her retirement resources now, down the road, all else being equal, her financial need would increase rather than decrease. Again, we do not think that the trial court intended to make Joseph a permanent source of income for Maureen, and the fact that it has declined for now to take into account funds available to her from Joseph's pension appears to be an attempt to minimize her dependence on his support in the long run.

¶25 We affirm the trial court's decision. ***Wettstaedt*** clearly controls this case, so the lower court did not err when it included Joseph's pension income as funds available to meet his maintenance obligation to Maureen. Moreover, the court clearly considered fairness to both parties in determining the appropriate amount of maintenance. A sound basis for the award it arrived at is manifest. Essentially, in order to satisfy the court's major fairness concern of equalizing the parties' resources, Joseph would either have to pay now or pay later. We hold that the former was a reasonable choice.

By the Court.—Order affirmed.

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