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DISTRICT II

December 5, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2018AP73

In re the marriage of: Roberta A. Ulloa v. Andrew Ulloa
(L.C. #2014FA656)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Andrew Ulloa appeals the maintenance portion of an order stemming from the trial court's re-examination on remand of property division and maintenance in his and Roberta Ulloa's divorce action. *See Ulloa v. Ulloa*, No. 2016AP687, unpublished op. and order at 2 (WI App Nov. 30, 2016). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In his first appeal, we agreed with Andrew that the trial court's decision to treat Roberta's pension as income instead of an asset subject to property division violated our supreme court's holding in *Steinke v. Steinke*, 126 Wis. 2d 372, 376 N.W.2d 839 (1985), *modified per curiam*, 127 Wis. 2d 444, 379 N.W.2d 853 (1986). *Ulloa*, No. 2016AP687, unpublished op. and order at 1-2. We therefore reversed the judgment and remanded, directing the court to consider Roberta's pension in the property division and then to reconsider the maintenance award. *Id.* at 2.

On remand, the trial court valued the marital portion of each party's pension, which were substantially equal. Finding no reason to deviate from the presumption of equal property division, *see* WIS. STAT. § 767.61(3), the court awarded each party his/her own pension and left intact the remainder of its original property award. Andrew does not appeal this issue.

In setting maintenance, other than eliminating Roberta's pension payments from her income calculation, the court relied on its original fact-finding and analysis, imputing to Roberta an annual income of \$13,195—representing thirty-five hours a week at minimum wage. So as to equally split the parties' combined annual income, the court increased Andrew's previous \$2000 monthly maintenance obligation by \$925 a month. It also increased the duration from seven years to an indefinite term, reasoning that Roberta, nine years Andrew's senior, would have a greater need for support, as she no longer would collect any of Andrew's pension. Finally, the court made the higher maintenance payments retroactive to the date of the first payment, ordering Andrew to pay the "arrearage" at a rate of \$1600 per month beginning November 15, 2017, until eliminated. Andrew appeals.

Andrew contends the evidence does not support the imputed salary of \$13,195 to Roberta, the \$2925 maintenance payment, or the \$1600 arrearage order.

Maintenance determinations are entrusted to the trial court's discretion and will not be disturbed on review absent an erroneous exercise of discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. The trial court rulings here were based upon several factual determinations. We review findings of fact under a clearly erroneous standard. WIS. STAT. § 805.17(2). “[E]ven though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the finding.” *Sellers v. Sellers*, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996). “To command reversal, the evidence supporting a contrary finding must constitute the great weight and clear preponderance of the evidence.” *Id.*

Andrew complains that Roberta failed to establish her earning capacity, such that the court should have set it at \$42,320, her last annual salary before she retired. This suggests he now thinks it unreasonable that Roberta retired. The record is clear, however, that, while Roberta and Andrew still were married and living together, she suffered permanent nerve damage during a surgical procedure, so they jointly decided that she would retire as soon as she became eligible to draw her pension. Further, Roberta's prior employment dealt with State of Illinois rules and regulations, a position not easily transferable to other employment. The court's findings regarding her earning capacity as impacted by her health and employment restrictions are not clearly erroneous. Contrary evidence that Roberta has not searched for work or that Andrew believes she is more physically able than what she testified to is not sufficient to command reversal.

We also reject Andrew's challenge to the increased, indefinite maintenance award. The court considered the factors set forth in WIS. STAT. § 767.56. It also considered that, with Andrew's pension no longer available to Roberta, she has an extra need in view of the disparity

between their ages and individual abilities to earn additional amounts, as Andrew remains able to work, earn overtime, and increase his retirement account. The court also noted that if Roberta makes a recovery for lost wages in her pending medical malpractice lawsuit, Andrew may seek review of this decision. The court thus gave weight to the two objectives of maintenance, fairness and support. See *LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987).

Finally, Andrew argues that the trial court erred in ordering him to pay the \$1600 per month arrearage created by its recalculation of maintenance, contending it made no finding of his ability to pay and, in fact, gave no rationale at all. His argument falls short. It is not enough for a challenging party to assert that the trial court failed to adequately explain a maintenance decision. “When the circuit court does not explain its reason for a discretionary decision, we may search the record to determine whether it supports [the] circuit court’s decision.” *Finley v. Finley*, 2002 WI App 144, ¶19, 256 Wis. 2d 508, 648 N.W.2d 536.

While the trial court did not explicitly make a finding of ability to pay, the record supports its decision. In establishing the maintenance order, the court deemed Andrew’s annual salary as a police detective to be \$92,248.00, explaining that it arrived at that figure by multiplying his current base monthly salary of \$3,548.40 by twenty-six paychecks. The court expressly excluded the payouts from Andrew’s overtime and vacation and sick leave, to provide him an incentive to continue working and taking overtime hours. A paycheck stub dated October 2, 2015, ten days before the second day of trial, showed that, year-to-date, he had earned an additional \$34,890.23 in overtime, vacation time, sick time, and other miscellaneous income. Andrew’s ability to pay finds support in the record.

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals