COURT OF APPEALS
DECISION
DATED AND RELEASED

October 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1919

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

In re the Marriage of:

CHARLES M. OLSON,

Petitioner-Respondent,

v.

DIANE C. OLSON,
n/k/a DIANE C. WENDORF,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

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

PER CURIAM. Diane C. Wendorf appeals from a judgment modifying a 1992 judgment of divorce from Charles M. Olson. She argues that judicial substitution was improper after an appellate remand from this court and that the revised maintenance award is the result of an erroneous exercise of discretion. We conclude that judicial substitution was proper and the record

supports the revisions made to the divorce judgment. We affirm the judgment appealed from.

This is the third time this case is before this court on appeal. We have twice reversed the award of maintenance to Diane and remanded the matter to the trial court for further proceedings. The facts and circumstances of the earlier two appeals are set forth in ***Olson v. Olson***, 186 Wis.2d 287, 290-92, 520 N.W.2d 284, 285-86 (Ct. App. 1994) (***Olson II***). Significant here is that in ***Olson II*** our remand to the trial court was with instructions "to consider the fairness and support objectives as they relate to *both* parties. The trial court should also consider the tax consequences of potential awards, including deductions and social security taxes. Finally, the trial court may revisit its child support award if necessary." ***Id.*** at 297, 520 N.W.2d at 288.

Upon remittitur of the record to the trial court, Charles filed a request for judicial substitution under § 801.58(7), STATS.[1] Circuit Court Judge Robert J. Kennedy approved the request. Circuit Court Judge James L. Carlson was assigned to the case.

Diane argues that under the ***Bacon-Bahr*** line of cases,[2] judicial substitution was improper. At the outset, we reject Charles' argument that this issue is not properly before this court because Judge Kennedy's approval of the request is not brought before this court on a judgment entered by Judge Carlson. Under RULE 809.10(4), STATS., on appeal from a final judgment, all

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[1] Section 801.58(7), STATS., provides:

> If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the remittitur in the trial court whether or not another request was filed prior to the time the appeal or writ of error was taken.

[2] The ***Bacon-Bahr*** line of cases is a series of divorce cases decided between 1874 and 1977 beginning with ***Bacon v. Bacon***, 34 Wis. 594 (1874), and culminating with ***Bahr v. Galonski***, 80 Wis.2d 72, 257 N.W.2d 869 (1977). ***Parrish v. Kenosha County Circuit Court***, 148 Wis.2d 700, 703, 436 N.W.2d 608, 610 (1989).

prior nonfinal orders or rulings adverse to the appellant "made in the action or proceeding not previously appealed and ruled upon" are brought before this court. The rule is not limited to nonfinal orders entered by the same judge who entered the final judgment. Although the denial of a judicial substitution is reviewable by the chief judge of the judicial administrative district, § 801.58(2), STATS., and judicial substitution matters are subject to our supervisory jurisdiction, *see* ***State ex rel. James L.J. v. Circuit Court for Walworth County***, 200 Wis.2d 496, 503, 546 N.W.2d 460, 462 (1996), a party is not required to follow those avenues of redress. The issue is preserved for appeal by Diane's objection to substitution in the trial court.

The ***Bacon-Bahr*** rule is that § 801.58, STATS., does not apply to certain proceedings to modify divorce judgments. ***Parrish v. Kenosha County Circuit Court***, 148 Wis.2d 700, 703, 436 N.W.2d 608, 610 (1989). The rule has been extended to proceedings on remand after appeal, depending on the nature of the proceedings. ***Id.*** at 704-05, 436 N.W.2d at 610. In ***Parrish***, the rule was applied to bar judicial substitution to remand of a divorce proceeding after appeal where a clarification of the judgment is required rather than a new trial. ***Id.*** at 705, 436 N.W.2d at 611. Judicial substitution is not available "whenever a divorce judgment is reversed and remanded for further consideration of any aspect of the judgment on the strength of the record developed at trial." ***Hubert v. Winnebago County Circuit Court***, 163 Wis.2d 517, 523, 471 N.W.2d 615, 617 (Ct. App. 1991).

We agree with Charles that our remand in ***Olson II*** contemplated the taking of additional evidence to comply with the appellate mandate to consider the fairness objective as to both parties and the tax consequences. *See* ***Olson II***, 186 Wis.2d at 295, 520 N.W.2d at 287 ("the trial court may need to take further evidence about the parties' needs"). This is particularly true with respect to the tax consequences, where we noted that the trial court had proceeded without taking the further evidence it thought it needed and consequently inputted data into a computer program which was factually incomplete. ***Id.*** at 296-97, 520 N.W.2d at 288. We conclude that Judge Kennedy correctly determined that our remand required the taking of further evidence and correctly granted the substitution.

With respect to the maintenance and child support awards, Diane first argues that the trial court erroneously exercised its discretion when it made

the awards retroactive to the February 6, 1992, judgment of divorce. Diane believes it is necessary for the trial court to state reasons for making the amended awards retroactive and that it was required to consider the financial impact that retroactive awards would have on her.[3] ***DeLaMatter v. DeLaMatter***, 151 Wis.2d 576, 592, 445 N.W.2d 676, 683 (Ct. App. 1989). However, ***DeLaMatter*** did not deal with retroactivity of an amendment to an award which was timely appealed. "[I]n cases which have been timely appealed, upon remand the trial court may, in its discretion, retroactively adjust any portions of the original judgment which are covered by the remand." ***Overson v. Overson***, 140 Wis.2d 752, 759, 412 N.W.2d 896, 899 (Ct. App. 1987). The reason for doing so is to prevent unnecessary hardship on the party who prevailed on appeal. ***Id.*** That reasoning supports the trial court's retroactive amendment of the maintenance award here because that award was never finally determined. To hold otherwise would rob Charles of his success on the prior two appeals. Diane ignores the fact that maintenance was overpaid during the appeals.

Diane also claims that the trial court failed to consider the tax consequences to each party that a retroactive amendment would have. The trial court did consider those consequences and explicitly held that each party would be responsible for the changes resulting to tax returns for 1992, 1993 and 1994. Moreover, the trial court was not required to accommodate those consequences when determining the award after timely appeals. We conclude that the trial court properly exercised its discretion in making the amended awards retroactive to the date of the divorce.

The trial court set maintenance at $600 per month until January 1, 1997, when maintenance is reduced to $250 per month indefinitely. Diane argues that the maintenance award does not meet the fairness or support objectives. She claims that there was no reason given for setting maintenance at a level that does not allow her to meet her monthly budget. She also contends that it was error for the trial court to use 1992 budgets when it was looking at 1995 incomes.

[3] The retroactive amendment resulted in Diane owing Charles $9062.24 for overpayment of maintenance. Diane was ordered to pay back that sum by $250 monthly offsets against maintenance. Diane calculates that it will take her approximately three years to repay Charles.

The record reflects that the trial court used the actual incomes of the parties for the years 1992, 1993 and 1994 in determining the amount of child support based on the percentage standard for the years the case was on appeal. However, nothing supports Diane's contention that the trial court looked to current income when setting maintenance. The court looked to the 1993 income tax returns as reflecting incomes "most approximate to the divorce" and the parties' then standard of living.[4] Although Diane's 1995 earnings as reflected on her W-2 form was mentioned, it was found to approximate and support the income figure the trial court was working with. Maintenance was set at a level which was sufficient to meet what the trial court found to be Diane's level of need based on her 1992 budget.[5] The reduction in maintenance to occur in 1997 was based on an original finding that by August 1996 Diane would be able to earn $22,000 a year. There was no improper mixing of current income and past budgetary needs.

Finally, we conclude that the trial court's maintenance determination fulfills the fairness and support objectives as applied to both parties. To the extent Charles has income in excess of his expenses and maintenance and child support obligations, the trial court found that appropriate because Charles lives in a small apartment and Diane remains in the family home. Diane must accept that an unfortunate reality of divorce is that the economic status of the parties is not sufficient to support them both at precisely the same level as before the divorce. ***Bisone v. Bisone***, 165 Wis.2d 114, 120, 477 N.W.2d 59, 61 (Ct. App. 1991). The trial court's maintenance determination equalizes the burden of that reality.

By the Court.—Judgment affirmed.

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

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[4] The trial court determined that Diane's monthly wages were $684 per month. Diane argues that the trial court should have used the $621 per month income figure established at trial. The difference of $63 is de minimus. *See* ***Laribee v. Laribee***, 138 Wis.2d 46, 51, 405 N.W.2d 679, 681 (Ct. App. 1987).

[5] Diane does not argue that the trial court's finding as to either party's needs under the 1992 budgets was clearly erroneous.