

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 4, 1997

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(1), 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. 96-1416-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GEORGE W. SCHMIDT,

Petitioner-Appellant,

v.

LINDA L. SCHMIDT,

Respondent-Respondent.

APPEAL from a judgment and an order of the circuit court for Oconto County: EUGENE F. MC ESSEY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. George Schmidt appeals a 1993 order reopening a 1992 divorce judgment as to maintenance. George also appeals a judgment awarding his former wife, Linda Schmidt, \$250 a month in maintenance and \$8,500 in retroactive maintenance.¹ George contends that no factual basis existed to reopen the divorce judgment or to award maintenance and that the trial court erroneously exercised its discretion in doing so. Because

¹ This is an expedited appeal under RULE 809.17, STATS.

a factual basis existed to reopen the divorce judgment and order maintenance, we conclude the trial court did not erroneously exercise its discretion and affirm the judgment and order.

George and Linda Schmidt were divorced in 1992, after twenty-six years of marriage. At the time of the divorce, both were working in the couple's joint carpet laying business. George was awarded the business and both parties expressly waived any right to maintenance in the marital settlement agreement. The parties were divorced in September and George terminated Linda's employment in December. Linda attempted to draw upon her social security account but was informed that her account did not have sufficient funds. During the years Linda worked in the carpet business, her social security had been paid into George's account rather than her own. Linda moved to reopen the divorce judgment and to receive maintenance. The court granted both of these motions and awarded retroactive maintenance as well.

Linda asserts that George's appeal should be dismissed as untimely. We disagree. The judgment against George was entered on April 30, 1996, and his notice of appeal was filed on May 14, 1996. *See* § 808.04(1), STATS.

George contends the settlement agreement did not provide for Linda's continued employment in the carpet business and that her termination is not a basis to reopen the maintenance issue of the settlement. Linda argues that her waiver of maintenance was done under the expectation that she would have her job in the carpet business. The trial court found that Linda was mistaken as to her continued employment in the business and as to the status of her social security account when she agreed to the marital settlement.

The reopening of a judgment under § 806.07, STATS., is a matter addressed to the discretion of the trial court. *Breuer v. Town of Addison*, 194 Wis.2d 616, 625, 534 N.W.2d 634, 638 (Ct. App. 1995). The trial court may grant relief from a judgment "upon such terms as are just" for "[m]istake, inadvertence, surprise, or excusable neglect." *Id.* at 625-26, 534 N.W.2d at 638 (quoting § 806.07(1)). The court is to use its "equitable powers to secure substantial justice between the parties under all the circumstances." *Id.* (quoting *Paschong v. Hollenbeck*, 13 Wis.2d 415, 424, 108 N.W.2d 668, 673 (1961)). An

appellate court will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). "The determination of the amount and duration of maintenance is [also] entrusted to the sound discretion of the trial court" *Plonka v. Plonka*, 177 Wis.2d 196, 200, 501 N.W.2d 871, 873 (Ct. App. 1993).

George contends that the trial court erroneously exercised its discretion by opening the judgment. We disagree. There is ample evidence in the record to support the trial court's determination to reopen the judgment. Although the settlement agreement made no express mention of Linda's continued employment in the carpet business, her continued employment was certainly a factor in her decision to waive a claim to maintenance. Further, Linda's termination occurred a mere three months after the divorce.

George's failure to make payments into Linda's social security account is also a factor. Linda mistakenly believed that these payments had been made into her account during her service in the carpet shop. After her employment was terminated, however, she learned that these payments had been made into George's account. Because the evidence supports the trial court's discretionary determination to open the divorce judgment on either a theory of mistake or in the interest of justice, we affirm the reopening of the divorce judgment.

Additionally, the court's award of maintenance is supported by the record. The trial court examined the factors set forth in § 767.26, STATS., such as length of marriage, property division, and earning capacity of the party seeking maintenance, among other factors and concluded that Linda was entitled to \$250 a month retroactive to June 10, 1993. This determination was also within the trial court's discretion and is affirmed.

By the Court. – Judgment and order affirmed.

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