

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 10, 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, STATS.

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

No. 96-2991

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

PATRICIA A. GLASHEEN,

PETITIONER-RESPONDENT,

v.

JOSEPH J. GLASHEEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
HAROLD V. FROEHLICH, Judge. *Affirmed.*

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

MYSE, J. Joseph J. Glasheen appeals an order denying his motion to modify maintenance based upon his loss of employment because of his incarceration in the Wisconsin state prison system. Glasheen contends that the

trial court erroneously exercised its discretion by refusing to modify his maintenance obligation when he demonstrated a dramatic change in circumstances that resulted in his loss of substantially all earned income. Because we conclude that the trial court did not erroneously exercise its discretion when it ordered continued maintenance payments from Glasheen's personal assets based upon Patricia Glasheen's need for maintenance, we affirm the order.

The parties terminated their twenty-four-year marriage in 1994. In the divorce judgment, a property division was ordered that resulted in Joseph receiving approximately \$61,800 in retirement, 401K and IRA assets and a \$15,000 equalizing cash payment due from Patricia. Child support was also ordered and a \$230 per week "permanent" maintenance payment was ordered to be paid to Patricia until the death of either party or if Patricia would remarry. At the time of the divorce, Patricia was working as a part-time bank teller with a gross income of \$9,600 per year. Joseph was employed at a local paper mill earning \$43,000 annually. Because of his longevity with this employer, Joseph had significant job security.

Subsequent to the divorce, Joseph was charged with incest of one of the Glasheens' children, who was an adult at the time of the divorce. Ultimately, Joseph pled no contest to the incest charges and was sentenced to ten years' confinement in prison. Following the start of his incarceration, Joseph brought a motion to terminate or suspend his maintenance obligation. Patricia brought a countermotion requesting continued maintenance and the imposition of a constructive trust upon Joseph's assets to provide a fund from which the maintenance payments could be made. The matter was ultimately heard by the circuit court judge, who denied Joseph's motion to terminate or suspend the

maintenance payments and granted Patricia's motion to impose a trust upon Joseph's remaining assets to fund his maintenance obligation.

The question whether maintenance payments provided for in a divorce judgment should be modified is addressed to the trial court's discretion. *Harris v. Harris*, 141 Wis.2d 569, 573, 415 N.W.2d 586, 588 (Ct. App. 1987). The incarceration of a payer is sufficient to demonstrate a change of circumstances but does not automatically entitle the payer to a modification in his maintenance obligation. *Parker v. Parker*, 152 Wis.2d 1, 6, 447 N.W.2d 64, 66 (Ct. App. 1989). To withstand appellate review, a trial court's decision must be the product of a rational mental process, applying the applicable law to facts appearing in the record. *Poindexter v. Poindexter*, 142 Wis.2d 517, 531, 419 N.W.2d 223, 228-29 (1988).

In this case, Joseph argues strenuously that his loss of substantially all earned income, his incarceration in prison for an extended period of time and Patricia's subsequent cohabitation with a "significant other" are all sufficient to demonstrate a change of circumstances that vests the court with jurisdiction to modify the maintenance payments required by the divorce judgment. We agree that Joseph has adequately demonstrated a change of circumstances vesting the court with authority to modify his maintenance obligation. The existence of a change of circumstances, however, does not mandate a modification be ordered. *See Anderson v. Anderson*, 72 Wis.2d 631, 649, 242 N.W.2d 165, 174 (1976). While the trial court in its exercise of discretion does not have to consider all of the factors enumerated in § 767.26, STATS., the court must consider all of the factors that are relevant to the requested modification. *Poindexter*, 142 Wis.2d at 532, 419 N.W.2d at 229.

In this case, the uncontradicted evidence demonstrates that Joseph had available to him at the time of his motion some \$61,000 worth of assets primarily reflected in pension, 401K and IRA accounts. In addition, he had received \$15,000 in a balancing payment from Patricia but had dissipated those funds. Other assets of substantial value were gifted to other members of his family prior to his incarceration. The trial court concluded that Joseph had the financial ability to continue his maintenance payments based upon the assets in his personal estate.

The trial court found that Patricia had less than \$1,000 per month in income and that she was in need of the previously ordered maintenance payments to sustain herself. Evidence was introduced that Patricia was sharing living expenses with another. The trial court considered this fact in its determination. The totality of the evidence clearly demonstrated that Patricia had insufficient income to maintain herself and was in need of the maintenance payments provided in the divorce judgment. The trial court noted that Joseph's confinement was the result of his intentional misconduct and analogized his loss of income to a voluntary termination of employment without a reasonable basis (shirking).

While we conclude that the nature of the circumstances resulting in Joseph's incarceration may be properly considered by the court, we do not share the court's conclusion that because his criminal conduct was voluntary in nature this is a voluntary reduction of his earning capacity. While we may disagree with the court's analogy to shirking cases, it is proper for the court to consider the circumstances resulting in Joseph's incarceration and the balance of the court's analysis is sufficient to justify its discretionary decision to order payments continued from Joseph's assets. The court noted that Patricia's income was insufficient to maintain herself and that she was dependent upon the maintenance

payments required in the divorce judgment. The court also noted that Joseph's assets were sufficient to continue the stream of payments for a substantial period of time. Consideration of the payer's ability to pay and the recipient's need for such payments are proper factors to be considered in the court's exercise of discretion in reviewing a motion to modify maintenance payments. *See Poindexter*, 142 Wis.2d at 532, 419 N.W.2d at 229. Here, the court concluded that Patricia's needs, Joseph's ability to continue payments from his assets and the circumstances surrounding his confinement were sufficient to require the maintenance payments be continued. Such a conclusion is properly within the parameters of reasonableness of a trial court's discretion.

Joseph does not specifically raise the issue as to the nature of the trust imposed upon his assets. While he argues that the court erred by exercising its discretion to impose such a trust, the argument is not developed. He does not discuss the terms of the trust or his ability to withdraw assets from his estate, such as money for his support and maintenance while incarcerated or otherwise. Accordingly, we address only the court's determination to impose a trust on Joseph's assets for the purpose of continued maintenance payments. The danger that the assets would be dissipated without such a trust is sufficient to authorize the court's imposition of the trust upon those assets to assure continued payment of Joseph's maintenance obligation. *See Caldwell v. Caldwell*, 5 Wis.2d 146, 163-64, 92 N.W.2d 356, 365 (1958). Joseph's transfer of valuable assets to family members as gifts and his rapid depletion of the \$15,000 cash payment from Patricia are reasonable indicators that the remaining assets may be dissipated and unavailable to Patricia. Because the specifics of the trust are not before us, we do not consider this issue further.

Although Joseph's incarceration presented a substantial change in circumstances, the trial court was within its discretion to deny a modification of his maintenance obligation. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

