COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1762 **Cir. Ct. No. 2010FA1074**

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

IN RE THE MARRIAGE OF:

JAYNE CHERKASKY,

PETITIONER-APPELLANT,

V.

ALAN CHERKASKY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jayne Cherkasky appeals an order modifying maintenance payments from her ex-husband, Alan Cherkasky. Jayne argues that there was no substantial change in circumstances and, alternatively, that a decrease in maintenance was not warranted. We conclude there was a substantial change in circumstances. However, we further hold the court relied on an improper factor when determining maintenance, and inadequately set forth its rationale for reducing maintenance and terminating it on a date-certain. Accordingly, we remand for a proper exercise of discretion regarding the modification of maintenance.

BACKGROUND

¶2 The Cherkaskys were divorced after twenty-one years of marriage. At the time of the March 2012 final divorce hearing, Alan was fifty-nine years old and Jayne was fifty-two. They were able to reach an agreement on all issues, and their comprehensive settlement was read into the record at the final hearing. As relevant, Alan stipulated to pay Jayne $7000 monthly maintenance. However, the parties agreed maintenance could be reviewed when Alan turned sixty-five.

¶3 The parties also agreed to four specific circumstances that would constitute a per se change of circumstance for purposes of reviewing maintenance: (1) "the first one is that if [Alan] has something that impacts his health … that relates to his ability to be employed and work as a physician"; (2) "if [Alan] retires, and either stops working totally as a physician or reduces his income as a physician"; (3) "if there's a significant change in [Alan's] income"; and (4) if Jayne were to cohabit with a significant other.

¶4 In November 2012, eight months after the divorce, Alan moved to modify maintenance. The motion alleged there had been a substantial change in

financial circumstances, but did not identify a change. Alan later contended modification was appropriate because Jayne was cohabiting with her significant other, Alan was suffering from several health problems, and Jayne received an inheritance after the divorce.

¶5 Following a June 2013 hearing, the circuit court determined there was a substantial change of circumstances. The court relied on Alan's various medical concerns, impending retirement, and Jayne's inheritance. Additionally, the court found Jayne was not cohabiting, but nonetheless received a financial benefit from her significant other. The court reduced Alan's maintenance obligation commencing with his next payment. The existing $7000 monthly payment was reduced to $5000 monthly, and would step down in $500 increments in January 2014, January 2015, and January 2017. The 2017 rate of $3500 would then continue until early September 2018, at which time maintenance would terminate because Alan would be age sixty-five. Jayne appeals.

DISCUSSION

¶6 Jayne argues that there was no substantial change in circumstances and, alternatively, that the facts did not support a decrease in maintenance. A party seeking modification of maintenance must demonstrate there has been a substantial change in financial circumstances. ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. The substantial change in circumstances test is the same, regardless of whether maintenance was stipulated to or contested during the divorce proceedings. ***Id.***, ¶2. The objectives of support and fairness must both be considered when considering modification. ***Id.***

¶7 The amount and duration of maintenance is entrusted to the circuit court's discretion. ***Id.***, ¶17. A circuit court engages in an erroneous exercise of

discretion when it fails to consider relevant factors, bases its award on factual errors, makes an error of law, or grants an excessive or inadequate award. ***Id.***, ¶18. Further, a "'discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Id.*** (quoting ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981)). When a question of law arises during our review of the circuit court's exercise of discretion, we decide the issue de novo. ***Id.***, ¶19.

Substantial change in circumstances

¶8 Jayne challenges each of the circuit court's bases for finding there was a substantial change in financial circumstances. We agree with the circuit court that Jayne's postdivorce inheritance constituted a substantial change.

¶9 Jayne primarily argues it was improper to consider her inheritance because the court did not permit her to testify to her understanding of the value of Alan's inheritance, which she believed was awarded to him as property separate from the marital estate. The court sustained Alan's objection, observing, "I don't really need testimony from [Jayne] regarding that. … [I]t's part of the record, it's part of the judgment." We discern no error in the court's exclusion of Jayne's testimony on the matter. The disposition of Alan's inheritance received during the marriage was irrelevant to the threshold issue of whether Jayne's postdivorce inheritance caused a substantial change of financial circumstances since the time of the divorce. Jayne fails to develop a reasoned argument or provide supporting authority for the dubious premise that postdivorce inheritances are excluded from the substantial-change-of-circumstances inquiry—under any circumstances. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994)

(appellate courts may decline to consider issue that is undeveloped in the briefs or that is not supported by citation to legal authority).

¶10 Moreover, at the motion hearing, Jayne's counsel argued her testimony was being proffered with respect to fairness when setting maintenance. Her attorney did not contend Jayne's testimony was relevant to whether there was a substantial change in circumstances in the first instance.[1] Jayne's attempt to do so now is disingenuous.

¶11 In any event, we conclude Jayne's argument, that it was improper to consider her postdivorce inheritance, is foreclosed by ***Lemm v. Lemm***, 72 Wis. 2d 457, 241 N.W.2d 593 (1976), which involved similar circumstances. Vivian Lemm's annual income had increased from $12,960 to $17,996, almost $9000 of which was earned from her estate. ***Id.*** at 460-61. Her estate had increased from approximately $41,500 to $157,000 due to a postdivorce inheritance. ***Id.*** at 458. Harold Lemm's financial situation had also improved, but to a lesser extent. ***Id.*** at 458, 460. The supreme court held:

> It is apparent from this … record that there was a substantial change in the circumstances of the parties, almost totally as the result of the inheritance received by Vivian Lemm from her parents.
>
> The record demonstrated that Harold Lemm sustained his burden of proof that there were substantially changed circumstances.

[1] Following Alan's objection to Jayne's testimony, her counsel stated: "My argument is real simple. If they are going to argue that the inheritance that [Jayne] receives creates a basis for modification of maintenance, I believe that the Court then must consider how the marital estate was divided to weigh out and balance the equities and fairness."

Id. The supreme court held that not only had the inheritance constituted a substantial change in circumstances, but that the circuit court erred in setting maintenance because it considered the income on the inheritance, but not the possibility that Vivian might be required to utilize some of the corpus as well. The court observed, "We have repeatedly stated that, where a wife has inherited a substantial estate after divorce, she may be obliged to use some or all of the principal of her inheritance if she wishes to maintain a particular standard of living." ***Id.*** at 461.

¶12 Following the parties' divorce, Jayne inherited $562,500. The proceeds were placed into an investment account from which Jayne received an annual distribution of $17,400, although she could withdraw more at any time. Additionally, the court noted it was "more likely in the future that the amount of income from that inheritance would be more in the neighborhood of $20,000 to $25,000 per year." Jayne had not worked during the marriage and was attending school at the time of the motion hearing.[2] Alan's financial situation was essentially unchanged. Under these circumstances, the circuit court correctly determined there had been a substantial change in financial circumstances. Because the inheritance alone constituted a substantial change, we need not address the other factors relied upon by the circuit court. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

[2] The court also found Jayne would have an earning capacity of $30,000 annually upon her graduation in six months from the hearing.

Maintenance determination

¶13 Jayne argues the circuit court erroneously reduced maintenance based on financial benefits she received from her significant other, despite the court's finding they were not in a "marriage-like relationship." After making this finding, the court explained:

> [B]oth Mr. Frankenthal and [Jayne] testified that they haven't named each other as beneficiaries in a will. They don't have a joint bank account …. They haven't invested … jointly, and they do not for each other provide services such as cleaning, meal preparation or things like that.
>
> [H]owever, despite that, … there is a significant financial benefit to [Jayne] deriving from her relationship with Mr. Frankenthal.
>
> If I look only at the acknowledged contribution to vacation expenses for [Jayne], including food, airfare, and acknowledged gifts provided by Mr. Frankenthal from March 12, 2012 to March 10th, 2013, the amount of only that contribution to [Jayne's] lifestyle exceeds $9,000.
>
> And I also note that [Jayne's] actual expenditures for entertainment and food as testified to [by] her on direct examination are minimal, and it appears to this Court, and I'm reaching the conclusion that it is because Mr. Frankenthal has contributed to most of those expenses, particularly, entertainment expenses.
>
> There's no doubt that Mr. Frankenthal also contributes to other routine entertainment expenses … that were not documented in front of the Court. The Court is including that at a minimum Howard Frankenthal is spending $10,000 of his money to benefit [Jayne] on an annual basis.
>
> The credible evidence is also that [Jayne] based upon vacations and other activities done with Mr. Frankentahl spends at least one third of each month with Mr. Frankenthal either at his residence, on vacation, with him on other travel, and I find that, in fact, the economic conditions of [Jayne's] life have improved based upon her relationship with Mr. Frankenthal, and that, that relationship has elevated her lifestyle.

¶14 We agree with Jayne that the circuit court erroneously attributed $10,000 annual income to her based upon Frankenthal's entertainment contributions. Jayne's argument relies on a series of cases, including primarily, ***Van Gorder v. Van Gorder***, 110 Wis. 2d 188, 327 N.W.2d 674 (1983), which involved somewhat analogous facts. Significantly, however, whereas Jayne and Frankenthal maintained separate households, Shirley Van Gorder was cohabiting with her significant other. ***Id.*** at 191. The circuit court terminated maintenance solely because Shirley was cohabiting and her significant other had the ability to contribute to her support. ***Id.*** at 190. The supreme court reversed, holding cohabitation alone did not warrant termination of maintenance. ***Id.*** at 199. The court explained:

> Since the act of cohabiting often encompasses a myriad of situations with varying economic consequences, the task of determining whether maintenance payments should be changed is not necessarily an easy one. The trial judge should initially determine whether, in fact, the economic conditions of the former spouse receiving maintenance have improved. … Where the cohabiting couple shares expenses, it may be appropriate to decrease or terminate maintenance payments, since under some circumstances, two people living together can live cheaper than if they lived separately.

Id. at 197-98.

¶15 As Alan emphasizes, all of the cases Jayne relies on are cohabitation cases. He emphasizes that the circuit "court's ruling could not have been any clearer" in that it found Jayne was not cohabiting with Frankenthal. The problem with Alan's argument is that he cites no case where maintenance was reduced based upon financial contributions from a significant other who was *not* cohabiting with the payee former spouse. In all of the cases the parties rely on, cohabitation was merely the first step of a two-part inquiry. This is particularly

detrimental to Alan's position given Frankenthal was not only not cohabiting, but was not contributing to any of Jayne's ordinary living expenses. Rather, the court found all of Frankenthal's financial contributions to Jayne were entertainment-related. Under these circumstances, it was improper to conclude Jayne's need for financial support had decreased.

¶16 Stated otherwise, it was improper to reduce maintenance based on a relationship that was not "marriage-like," where the couple did not cohabit or share financial accounts, and the only financial benefits received by the payee spouse were entertainment expenses. If we were to accept Alan's position, any gifts from a friend could result in a review of maintenance, even in the absence of cohabitation or a mutual-support relationship. There would be no logical stopping point.

¶17 Additionally, we agree with Jayne's arguments that the circuit court inadequately explained how it arrived at the specific amounts of maintenance and decreased future maintenance, and why it terminated maintenance outright after Alan's sixty-fifth birthday. As to the latter, we observe that the parties explicitly stipulated in the divorce settlement to a *review* of maintenance upon Alan's retirement, not to a termination. From our review of the record, it does not appear the court adequately considered the parties' respective financial circumstances upon Alan's anticipated retirement.

¶18 In summary, we conclude the circuit court properly held Jayne's inheritance constituted a substantial change in financial circumstances. However, under the facts of this case, we conclude it was improper to consider Jayne's entertainment-related financial benefits from her significant other. Accordingly, we reverse and remand for the circuit court to reconsider maintenance and to

explain how it arrives at the specific amount(s).[3] Neither party shall recover WIS. STAT. RULE 809.25 (2011-12) costs.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[3] While Jayne prevails in part, we observe her appellate briefs are deficient in several respects. Several pages of her initial brief do not match up from one page to the next. Consequently, some argument is repeated, while other portions are omitted. Further, the online version of her brief does not match the written version, and it contains no page numbers.

Additionally, Jayne improperly refers to an "abuse of discretion" standard of review, and continues to do so in her reply brief despite being corrected by Alan. Wisconsin has applied an "erroneous exercise of discretion standard" since 1992. *See* ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

Jayne also misrepresents the record. She cites substantial rental income for Alan, while omitting the circuit court's finding that Alan received no net income from the rental.

Jayne also misrepresents case law. Analogizing to the facts here, Jayne tells us: "[I]n ***Van Gorder*** the court of appeals clearly stated that the totality of the circumstances failed to demonstrate a financial benefit to the recipient …." Not only does Jayne provide no citation in support of this assertion, but ***Van Gorder*** held no such thing. Rather, the supreme court merely held the trial court had erred by terminating maintenance based solely on cohabitation without considering the attendant financial circumstances. *See* ***Van Gorder v. Van Gorder***, 110 Wis. 2d 188, 199, 327 N.W.2d 674 (1983) ("The true issues as to changed economic circumstances in this motion have never been considered by the trial court. … The case is remanded to the trial court to conduct a hearing on the motion consistent with this opinion.").