

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-1990

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

XIAOXIA YU,

PETITIONER-RESPONDENT,

V.

JIAYOU ZHANG,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ

¶1 PER CURIAM. Jiayou Zhang appeals an order which increased the amount and duration of his maintenance payments to his ex-wife Xiaoxia Yu, held him in contempt for failing to provide evidence of life insurance, and awarded Yu \$350 toward her attorney's *pro bono* legal services. He claims the trial court

should instead have decreased maintenance and held his ex-wife in contempt for failing to produce school photos of the children and for lying under oath.¹ Yu moves for an award of attorney fees on the grounds that the appeal is frivolous. Although we affirm the trial court's order on all points, and consider the majority of the appellant's arguments to be frivolous, we do not award attorney fees because the maintenance issue meets the threshold of arguable merit.

BACKGROUND

¶2 Zhang and Yu divorced in 1996 after a ten-year marriage which had begun in China. The original judgment of divorce placed the children with their father during the school term and required Zhang to pay Yu \$1,250 per month in maintenance for a period of seven years. The judgment and incorporated stipulation also require Zhang to maintain life insurance for the benefit of the children and to produce documentation of the existence of such coverage upon Yu's request, and they require Yu to give Zhang half of the school photos of the children within her possession.

¶3 There have been a series of motions and appeals filed after the divorce judgment which the trial court has characterized as a "pattern of overlitigation" by Zhang. In the most recent set of motions, Zhang sought a decrease in maintenance and findings that Yu was in contempt for various reasons. Yu countered with requests to increase maintenance, find Zhang in contempt, and

¹ Zhang also presents argument about who had authority to approve his son's surgery. However, because that issue was not raised before the trial court, it is not properly before this court on appeal.

award her attorney fees. The trial court denied Zhang's requests and granted Yu most of the relief which she sought.² Zhang appeals.

STANDARD OF REVIEW

¶4 The trial court may modify maintenance upon a showing that a substantial change in the circumstances of the parties has rendered the original maintenance award inequitable. *See Murray v. Murray*, 231 Wis. 2d 71, 77, 604 N.W.2d 912 (Ct. App. 1999). We will uphold the trial court's factual findings as to the parties' circumstances unless they are clearly erroneous, but will independently determine whether those circumstances have undergone a substantial change, giving some deference to the trial court's determination where the factual and legal determinations are intertwined. *See id.* We will not disturb the trial court's ultimate exercise of discretion to modify maintenance so long as the record shows the trial court rationally applied the applicable legal standards to the facts of record. *See id.* at 77-78. We will similarly uphold the factual findings underlying a trial court's contempt determination unless they are clearly erroneous, and we review the ultimate contempt determination as an exercise of discretion. *See* WIS. STAT. § 805.17(2) (1997-98);³ *see also Krieman v. Goldberg*, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997).

² The trial court did not award Yu the \$16,411.95 she sought for attorney fees, but warned that it could begin awarding full fees in the future.

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

ANALYSIS

Maintenance

¶5 The original maintenance award was designed to allow Yu to improve her English skills and obtain a college degree, which would allow her to live at a standard comparable to that enjoyed during the marriage and to contribute toward child support. However, the trial court found that language barriers and the stress and distraction of the numerous post-divorce proceedings initiated by Zhang led Yu to experience considerable difficulty in completing college courses. By the time of the hearing on the present motions, she had transferred to a technical college and was attending classes only part-time. Meanwhile, Zhang's income as a biology professor at the University of Kentucky was about to increase from \$4,583 per month to \$5,339 per month, allowing Zhang to meet 85% of his projected budget compared to Yu's ability to meet only 54% of her projected budget. The trial court also found that both parties' debts had increased since the divorce. Although Zhang disputes the correct amount of Yu's budget and debts,⁴ the trial court's findings were all supported by testimony and other evidence in the record, and are therefore not clearly erroneous.

¶6 Zhang argues that the trial court erroneously exercised its discretion by basing the maintenance award on percentages, rather than the actual amounts, of each party's budget shortfalls; by failing to give proper weight to the fact that the children were suffering economic hardship under his heavy debt load; and by extending the term of maintenance even though Yu was no longer enrolled in a

⁴ Zhang complains that the amounts of Yu's claimed budget and loans from family members are not documented. However, Yu's testimony was sufficient to establish the amount of her budget and loans.

four-year college. However, there is no single methodology which must be used to calculate the proper amount of maintenance, and the weight to be accorded to various factors lies within the trial court's discretion. *See Metz v. Keener*, 215 Wis. 2d 626, 637, 573 N.W.2d 865 (Ct. App. 1997). Here, the trial court accorded weight to the fact that Zhang's repetitive litigation was a factor in Yu's inability to complete college and become self-supporting within the time period earlier envisioned by the court. In light of Yu's difficulties, the trial court determined that extra time would be needed for Yu to become self-supporting. We agree with the trial court's assessment that the record showed a substantial change in circumstances, and see no misuse of discretion in the trial court's upward modification of maintenance to \$1,400 per month until June of 2002 in order to help Yu achieve the educational goal of the original award.

Contempt

¶7 A court may impose a remedial or punitive contempt sanction against a person who has intentionally disobeyed an order of the court. *See* WIS. STAT. §§ 785.01—.02. After reviewing the record before the trial court, we conclude the trial court correctly held Zhang in contempt after finding that he repeatedly and willfully refused to verify insurance coverage, as required by the judgment of divorce, when asked to do so by Yu; it correctly refused to hold Yu in contempt for failing to produce school photos of the children after finding insufficient evidence to show that the sought photos still existed; and it correctly

held that contempt was not available for the alleged instances of lying under oath.⁵ Zhang's arguments to the contrary rest largely upon credibility determinations which are not reviewable by this court. *See Johnson v. Merta*, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980).

Attorney Fees

¶8 We cannot award fees under WIS. STAT. RULE 809.25(3)(a) unless “the entire appeal is frivolous.” *See Manor Enterprises, Inc. v. Vivid, Inc.*, 228 Wis. 2d 382, 403, 596 N.W.2d 828 (Ct. App. 1999). Here, although the bulk of Zhang's appeal frivolously attempts to challenge credibility determinations and other factual findings which were supported by Yu's testimony, we conclude that there is arguable merit to his claim that the maintenance award was inequitable. We therefore decline to award attorney fees, although we emphasize that nothing in this order should be taken to undermine the circuit court's authority to award attorney fees in the future on an issue-by-issue basis. In addition, Yu shall be entitled to the costs of the appeal under RULE 809.25(1).

By the Court.—Order affirmed.

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

⁵ Perjury is, of course, a crime. *See* WIS. STAT. § 946.31. But, as the trial court noted, the remedial contempt sanctions Zhang seeks are available only to obtain compliance with an order of the court. *See* WIS. STAT. ch. 785. We further note that Zhang's repeated attempts to portray Yu and opposing counsel as liars fall within the strongly disfavored category of *ad hominen* attacks, and do nothing to persuade this court about the merits of the issues on appeal.

