

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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.

**Appeal No. 2015AP2195
STATE OF WISCONSIN**

Cir. Ct. No. 2004FA350

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ANN L. FENLEY,

PETITIONER-APPELLANT,

V.

ROBERT A. FENLEY,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Ann L. Fenley appeals from a postjudgment order declining to find Robert A. Fenley in contempt, modifying and terminating Robert's maintenance payments to Ann, and denying Ann's request that she be

awarded credit for the cost of certain home repairs and improvements from the marital residence sale proceeds. Ann also appeals the circuit court's order denying reconsideration. We affirm.

¶2 Ann and Robert were married in 1982 and divorced in 2005. At the time of the divorce, two of their three children were at least eighteen years old and the third was in high school. The original judgment ordered Robert to pay monthly family support in the amount of \$4600 to Ann from July 1, 2005, to December 31, 2007. Robert would then make monthly maintenance payments to Ann at \$3500 for 2008, \$3000 for 2009, \$2500 for 2010, and \$2000 thereafter. Ann would continue to reside in the marital home with the understanding that the house would be listed for sale in the spring of 2007 and that in the meantime, Ann would refinance the mortgage to advance a \$25,000 payment to Robert from his share of the eventual sale proceeds.

¶3 In 2014, Ann filed an order to show cause requesting that Robert be found in contempt for failing to provide notice of changes in address, employment, and income. Alleging an unreported increase in Robert's earnings, Ann requested a retroactive increase in family support and maintenance. She also sought an increase in future maintenance payments based on an asserted substantial change in Robert's financial circumstances. In turn, Robert filed a motion requesting that the marital home be listed for sale and that his maintenance obligation be modified or terminated.

¶4 Following an evidentiary hearing and post-trial briefing, the circuit court ordered the sale of the marital residence. The circuit court declined to find Robert in contempt or to order that he pay retroactive family support and maintenance to Ann based on his allegedly contemptuous conduct. Based on

changes in Ann’s financial circumstances, including her cohabitation with her fiancé and anticipated reduction in living expenses due to the pending sale of the marital residence, and after considering the original divorce court’s maintenance decision and rationale, the circuit court reduced Robert’s maintenance obligation from \$2000 to \$500 per month commencing September 1, 2014, and ordered that maintenance would terminate in the month following the sale of the marital residence. Finally, the circuit court ordered that Ann would be solely responsible for the cost of repairs and improvements she unilaterally made to the marital residence after the date it was to be sold, or July 1, 2007.¹ Ann moved for reconsideration which, following a hearing, the circuit court denied. Ann appeals.

The circuit court properly exercised its discretion in determining that Robert was not in contempt for failing to provide employer and address updates.

¶5 As required by WIS. STAT. § 767.58,² the divorce judgment provided:

Both parties shall notify the office of the clerk of court, the county child support agency under WIS. STAT. § 59.53(5), and the other party in writing of any change of address within 10 business days of such change and shall further report such change to WI SCTF Further, the payer shall notify the county child support agency ... and the other party within 10 business days of any change of employer and of any substantial change in the amount of his or her income such that his or her ability to pay family support or maintenance is affected. Such notification of any substantial change in the amount of the payer’s income

¹ Based on the parties’ agreement, the circuit court used July 1, 2007, as the “cut-off” date.

² Since the parties’ divorce, WIS. STAT. § 767.58 has undergone minor alterations irrelevant to this appeal. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

will not automatically result in a change of the order unless a revision of the order is sought.

It is undisputed that following the divorce, Robert did not send written notice to Ann of his several address and employer changes. Ann argues that the circuit court erred in finding that Robert was not in contempt for failing to provide such notice. We disagree.

¶6 Contempt of court refers to the intentional “[d]isobedience, resistance or obstruction of the ... order of a court.” WIS. STAT. § 785.01(1)(b). We review the circuit court’s use of its contempt powers for an erroneous exercise of discretion. *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995). “We look for reasons to sustain a discretionary ruling.” *Board of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶19, 355 Wis. 2d 800, 850 N.W.2d 112. *See also State v. Nantelle*, 2000 WI App 110, ¶12, 235 Wis. 2d 91, 612 N.W.2d 356 (we will independently search the record for reasons supporting the circuit court’s exercise of discretion).

¶7 Here, the circuit court expressly found that while Robert “may not have given the necessary notices his failure was not in willful, contemptuous behavior of the Court’s orders.” In reaching its decision, the circuit court found that based on information provided to her directly by Robert, their children, or her family, Ann “was always and keenly aware of [Robert’s] location, employment (or unemployment) and other facts attributable to his employment.” The court’s findings are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Further, it is undisputed that though Ann had the ability to contact Robert, she never asked for his employment or income information, or tax returns or wage statements. She continued to reside in the marital home past the judgment’s date of sale. Though Robert lost his job at the end of 2005 and was again unemployed in 2008, he

continued to make his court-ordered support payments. The circuit court reasonably determined that Robert “was [not] egregious in any way with regard to his attention to his obligations under the judgment which was to the prejudice of [Ann] with regard to her needs and budget.”

¶8 In an effort to skirt the deferential review we afford a circuit court’s contempt determination, Ann asserts that the circuit court erroneously exercised its discretion by relying on an improper legal standard. Specifically, Ann asserts that under *Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85, the circuit court should have held Robert in continuing contempt for failing to provide her with updated employment and income information and should have ordered as a remedial sanction a retroactive increase in family support and maintenance. We agree with Robert that Ann’s attempt to apply *Frisch* to the instant case is a “Herculean effort and stretch.”

¶9 In *Frisch*, over a period of years, the husband continuously violated repeated court orders requiring him to provide his personal and corporate tax returns by a date certain each year.³ After multiple hearings and a series of contempt motions filed by the wife, the circuit court found that the husband “had engaged in a substantial amount of misrepresentation, fraud, and game-playing as

³ For example, at the time of the parties’ divorce in *Frisch v. Henrichs*, 2007 WI 102, ¶6, 304 Wis. 2d 1, 736 N.W.2d 85, the husband alleged that his annual income was \$11,000. The parties’ entered into an agreement requiring the husband to pay child support and provide the wife a copy of his yearly tax returns together with all schedules. *Id.*, ¶6. Less than one year later, the husband obtained a residential mortgage based on his sworn statement that his annual income was \$70,225 per year, and the wife moved for an increase in child support and a finding of contempt. *Id.*, ¶7. After finding that the husband fraudulently misrepresented his income, the circuit court revised child support and, to monitor the situation, ordered the husband to provide his annual personal and corporate tax returns by a date certain each year. *Id.*, ¶8. At a subsequent hearing which resulted in a stipulated moratorium on litigation, the court reiterated the husband’s continuing obligation to provide the wife with his tax returns. *Id.*, ¶9.

to what constitutes income.” *Id.*, ¶20. The circuit court found that the husband engaged in overtrial and was in contempt for failing to supply the court-ordered information. *Id.*, ¶¶20, 23. Determining that the husband would have owed an additional \$222,000 had child support been based on his true income, the circuit court ordered a \$100,000 sanction to compensate the wife and children for losses suffered as a result of the husband’s contempt. *Id.*, ¶23.⁴ The Wisconsin Supreme Court sustained the circuit court’s sanction, holding that the circuit court was authorized “to fashion an alternative purge condition of \$100,000.” *Id.*, ¶81. The Supreme Court explained that its holding “promote[d] the intent behind the contempt statute, which is to provide the court with a mechanism, or toolbox, to effect compliance with court orders.” *Id.*, ¶82.

¶10 Though there exist myriad factual differences between *Frisch* and the instant case, a central distinction is that here, the circuit court declined to find Robert in contempt. *Frisch* is not reasonably construed as holding that a violation of a divorce judgment’s notice provisions requires a finding of contempt by the circuit court. It certainly does not stand for the proposition that any time a recipient spouse learns of a prior increase in the payor’s income, the circuit court must find the payor in contempt and order remedial sanctions to effectuate a retroactive increase in family support or maintenance.

⁴ The circuit court concluded that though it was without authority to modify child support retroactively, its remedial contempt powers permitted the large sanction against the husband. *Frisch*, 304 Wis. 2d 1, ¶23.

*The Circuit Court Properly Modified and Then Terminated Robert's
Maintenance Obligation.*

¶11 The circuit court determined that Ann's cohabitation with her fiancé and anticipated reduction in living expenses due to the sale of the marital residence constituted a substantial change in her financial circumstances justifying modification of maintenance. Ann argues that the circuit court's decision overvalued the relevance of her cohabitation and did not account for the parties' actual financial circumstances. We disagree.

¶12 A family court may modify a maintenance award upon a demonstration by the movant of "a substantial change in circumstances warranting the proposed modification." *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. Typically, the focus of the inquiry will "be on any financial changes the parties have experienced." *Id.* To the extent cohabitation may change a recipient former spouse's economic status, it is a relevant and permissible factor for the court to consider in determining whether to terminate maintenance. *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 197, 327 N.W.2d 674 (1983). "[W]here the cohabitation does enhance the recipient's financial condition, payments that are no longer needed for support should not have to be made." *Id.* This holds true even where the recipient spouse asserts that cohabitation was "forced" or necessitated by his or her inability to support him or herself despite a maintenance award. *See Popp v. Popp*, 146 Wis. 2d 778, 802-03, 432 N.W.2d 600 (Ct. App. 1988). Because the trial court has broad discretion to determine the amount and duration of maintenance, our review is limited to considering "whether there was sufficient evidence from which the circuit court could reasonably find a substantial change in the parties' circumstances that would justify" the modification. *Rohde-Giovanni*, 269 Wis. 2d 598, ¶17.

¶13 It is undisputed that Ann's fiancé of four and one-half years has lived with her since he sold his home in May 2013. Ann testified that since moving in, her fiancé has paid her \$2500 per month for "rent" or "shared living expenses." She stated he also pays for food, some vacation trips, and occasionally "pays for additional expenses that come up with the house." According to Ann, her fiancé receives an annual income from pension benefits and trust annuities totaling about \$114,000. Ann also testified that she obtained her masters degree in taxation in 2007 and worked full-time from January 2008 through July 2009. In 2012 through 2014, Ann worked ten to twelve weeks per year, during tax season. She agreed that her job search over the last three years consisted of providing her name and criteria to job search websites which would send her an email if they found a match. She agreed she had not taken further steps to find full-time employment.

¶14 We conclude that the circuit court properly modified and terminated maintenance. The circuit court considered that the original divorce judgment was crafted to allow Ann to become self-supporting at the standard of living comparable to that enjoyed during the marriage and found that Ann had achieved that standard. The court considered that the original divorce judgment anticipated Ann would work full-time after obtaining her masters degree and found that she made a conscious decision not to work full-time, but to live and share expenses with her fiancé. This finding is not clearly erroneous. Though Ann complains it is unfair to require that she "liquidate capital by selling the former marital home to obtain funds to pay for living expenses" while Robert retains a full salary and shares in the sale proceeds, the original divorce judgment acknowledged that Ann's budgetary needs outstripped Robert's ability to pay, and specifically

contemplated the 2007 sale of the marital residence as a means of decreasing Ann's expenses.

The Circuit Court Properly Exercised Its Discretion When Establishing the Division of Proceeds From the Sale of the Marital Residence.

¶15 In addition to ordering that the marital residence be listed for sale in the spring of 2007, the divorce judgment provided:

3. Ann shall advance the cost of agreed upon repairs for the property. She will receive reimbursement for the repairs from the sales proceeds (after payment of the usual and customary costs, commissions, mortgage, and expenses) when the home sells in the year 2007. To illustrate, in the event the cost of the repairs is \$20,000, and the sales proceeds are \$100,000, Ann shall receive the first \$20,000, leaving \$80,000 in equity.

After charging Robert for the \$25,000 advance, the parties were to equally split the balance.

¶16 Ann submitted and sought reimbursement for an itemized list of expenses she incurred in maintaining the home since the divorce. The expenses totaled \$75,793.75. Of that amount, \$53,855.39 was incurred after July 1, 2007. The circuit court ordered Ann solely responsible for any repairs or maintenance after July 1, 2007:

The basis for the Court's opinion is that, notwithstanding the party's mutual forbearance on the sale, [Ann] has exercised sole dominion and control over the premises and has enjoyed the use of the premises. The aging of the premises is at the risk of [Ann] under these circumstances. Any repairs beyond maintenance or which may be deemed is also the obligation of [Ann]. There was no agreement by [Robert] to improve the premises for [Ann], to improve the premises to enhance a sales price, or to improve the premises for any reason whatsoever. Knowledge of repairs or improvements is not consent by [Robert] to accept the costs. Again, [Ann] enjoyed the use

and full domain of the premises and any election she made to improve the premises is her responsibility to stand the cost of those improvements at this time; even if the improvements result in a higher sales value than that that would have been achieved in 2007. This Court is not inclined to modify the original judgment as it related to the residence based on the parties' forbearance. Each party should benefit from the sale of the home as set forth in the judgment in the ratio of their ownership less the credits set forth in the judgment.

¶17 The circuit court's decision was a proper exercise of discretion. Despite Ann's detailed list, she presented evidence of only one time that she asked for Robert's agreement on any repairs, that being that they would pay their son to paint the house. The circuit court's finding that Robert never "agreed to" the cited repairs and improvements is not clearly erroneous, and its construction of the judgment as requiring Robert's consent as a prerequisite to reimbursement comports with the provision's plain language.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

