

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 12, 2010**

David R. Schanker  
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. 2009AP646**

**Cir. Ct. No. 2004FA119**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**BARBARA J. BECK,**

**PETITIONER-APPELLANT,**

**V.**

**THOMAS R. BECK,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Outagamie County:  
MITCHELL J. METROPULOS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Barbara Beck appeals from an order modifying the amount of maintenance paid by her ex-husband pursuant to a divorce settlement

agreement. We conclude the circuit court properly exercised its discretion in ordering the modification, and affirm.

### **BACKGROUND<sup>1</sup>**

¶2 Barbara Beck and Thomas Beck divorced on February 10, 2005. Pursuant to a divorce settlement agreement, Thomas, whose income varied between \$60,000 and \$72,000 in the years preceding the divorce, was to make monthly family support payments of \$1,389.58. Barbara was to continue her employment as an accountant for her ex-husband's construction company, Beck Builders, LLC, with a salary of \$20,000 per year. Although Barbara has suffered from a medical condition that causes her some degree of physical discomfort and prevents her from working full-time, at the time of divorce she supplemented her income with earnings from a part-time restaurant job. Under the settlement, Barbara also received a one-time equalization payment and ownership of a duplex from which she would receive rental income.

¶3 Barbara was terminated from Beck Builders in June of 2005. The circuit court increased the monthly maintenance payments upon finding unemployment compensation would pay only a fraction of her salary under the divorce settlement. The maintenance order was again modified on January 1, 2007, when Thomas suffered a heart attack that required bypass surgery and temporarily incapacitated him. The family court commissioner suspended

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<sup>1</sup> We note Barbara has cited only to her brief's appendix and has failed to provide any citations to the record in her brief-in-chief. Her brief does not comply with WIS. STAT. RULE 809.19(1)(d), which requires "a statement of facts relevant to the issues presented for review, with appropriate references to the record." Future violations of the Rules of Appellate Procedure contained in WIS. STAT. ch. 809 could result in sanctions. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

maintenance payments between January and April 2007 while Thomas recovered. Thomas received clearance from his physician to return to work, but restrictions limited him to working forty hours per week instead of the eighty to one-hundred hours he worked prior to the heart attack. Beginning May 1, 2007, the commissioner ordered Thomas resume maintenance at a rate of \$1,200 monthly plus \$500 per month toward Barbara's health insurance.

¶4 On July 7, 2008, Thomas filed a motion in which he alleged he suffered a change in financial circumstances that required modification of the maintenance order. The circuit court concluded future maintenance payments were required because Barbara's "ability to generate income has [been] drastically reduced based primarily on her health conditions, and ... she really has [no] significant ability to enhance her economic circumstance ...." However, the court also concluded the current maintenance payments were unsustainable in light of Thomas's health condition:

There has been a change in circumstance, particularly due to the Respondent's health condition, he had a heart attack ... and that caused him to be incapacitated for some period of time and has caused him to not work the hours he had been working previously; therefore, his income has changed and has gone down. However, I do not find that his income ... basically ... his net worth, has gone down to the point where it simply should be forgiven maintenance or have it drastically reduced as the Respondent has requested.

....

[B]ased on the long-term marriage ... of 23 years, I do find that it is appropriate that he incur a \$1,000 per month maintenance obligation. I don't find that that is unduly burdensome on him with that rough estimate of what his salary would be, for what his wages would be, and I would find that that amount will hopefully give [Barbara] enough income where she can live somewhat comfortably.

The circuit court estimated Thomas's gross income at approximately \$50,000 after concluding his reported income of \$15,000 was not a reasonable reflection of his worth given his ownership of other assets. As a result, the court modified Thomas's maintenance payments between May 1, 2007, and July 31, 2008, to \$1,000 plus \$500 toward the cost of Barbara's health care. From August 1, 2008, forward, the court ordered Thomas to pay \$1,000 per month in maintenance.

### DISCUSSION

¶5 Although Barbara finds numerous faults in the circuit court's decision, her claims amount to a contention that the circuit court erroneously exercised its discretion when modifying the maintenance award. "The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court" and will not be reversed absent an erroneous exercise of discretion. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987).

¶6 A court may modify a maintenance award upon finding there has been a substantial change in circumstances from the time when the maintenance was last set. *Gerrits v. Gerrits*, 167 Wis. 2d 429, 437, 482 N.W.2d 134 (Ct. App. 1992). When modifying a maintenance award, a court must consider the same factors governing the original determination of maintenance set forth in WIS. STAT. § 767.56. *Poindexter v. Poindexter*, 142 Wis. 2d 517, 531, 419 N.W.2d 223 (1988). These factors include, without limitation, the length of the marriage, the parties' age and physical and emotional health, the earning capacity of the party seeking maintenance, and the feasibility of, and length of time necessary for, the party seeking maintenance to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. WIS. STAT. § 767.56.

“While the court is not obligated to consider all the factors enumerated in [§ 767.56], it must consider those factors which are relevant to the case.” *Poindexter*, 142 Wis. 2d at 532. “The determination of the amount and duration of maintenance is entrusted to the sound discretion of the trial court” and will not be reversed absent an erroneous exercise of discretion. *LaRocque*, 139 Wis. 2d at 27.

¶7 Barbara first contends the circuit court failed to find that a “substantial change in circumstances” justified modification of the maintenance award. Barbara argues the court’s statement that “there has been a change in circumstance” is insufficient to support modification of a maintenance order. In essence, Barbara claims we must reverse any modification of a maintenance order unless the circuit court utters the magic words, “substantial change in circumstances.” However, Barbara points to no authority requiring a court to use specific words when modifying a maintenance order. Thus, we will affirm the circuit court if there is a reasonable basis in the record for the court’s decision. *Hacker v. Hacker*, 2005 WI App 211, ¶6, 287 Wis. 2d 180, 704 N.W.2d 371.

¶8 Here, the record supports the circuit court’s determination that a substantial change in circumstances had occurred. Since the previous modification to the maintenance order, both parties have experienced health issues that have changed their respective financial circumstances. Thomas is no longer able to work the many overtime hours he previously worked and often suffers from fatigue during a standard eight-hour workday. Barbara’s condition has worsened and prevents her from finding suitable employment. In addition, the circuit court heard evidence that Thomas’s business has been affected by the general construction slump in the current economy. The record therefore supports

the circuit court's determination that a substantial change in circumstances warranted modification of the maintenance order.

¶9 Barbara also contends the circuit court made inadequate findings with respect to the parties' earning capacity. Our review of the record confirms the court considered all relevant factors in reaching its decision. The court noted the parties had a long-term marriage of twenty-three years. It took account of the parties' physical health and noted both parties suffered from health conditions that diminished their respective incomes. In addition, it analyzed the parties' respective earning capacities and, finding Thomas's reported income was not a reasonable reflection of his wealth, effectively imputed income based on the value of his business and properties. In concluding a \$1,000 per month maintenance payment would permit Barbara to live "somewhat comfortably," the court acknowledged that Barbara's health situation limited her ability to improve her economic situation. The court also noted Barbara's receipt of Social Security and rental income. The record reflects the circuit court made a thorough examination of all relevant statutory factors.

¶10 Barbara asserts the circuit court should have imputed more income to Thomas. Although the earning capacity of the supporting party is not a factor identified in WIS. STAT. § 767.56, it is plainly relevant to the maintenance determination because an award above the supporting party's ability to pay would defeat the supporting party's incentive to be productive. *See Bahr v. Bahr*, 107 Wis.2d 72, 83-84, 318 N.W.2d 391 (1982). Here, the circuit court found Thomas's reported income was not a true representation of his ability to pay and estimated Thomas's earnings at approximately \$50,000 per year. Thus, the court attributed an additional \$35,000 in annual earnings to Thomas despite his reported income of only \$15,000. We conclude the circuit court did not erroneously

exercise its discretion in determining whether, and what amount of, additional income should be imputed to Thomas.

*By the Court.*—Order affirmed.

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

