

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 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. 2009AP1216

Cir. Ct. No. 2000FA139

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

PAUL A. CHURCHILL,

PETITIONER-RESPONDENT,

V.

JOAN M. CHURCHILL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Joan Churchill appeals a judgment of divorce, arguing the circuit court erroneously exercised its discretion by suspending her maintenance based upon cohabitation. We find insufficient support to uphold the suspension of maintenance and therefore reverse and remand for further proceedings.

¶2 Joan and Paul Churchill were divorced after twenty-three years of marriage. During the marriage, Paul obtained his master's degree, which enabled him to be employed as a high school principal. At the time of the divorce, his income was \$70,000. Joan was primarily responsible for raising the couple's five children and, at the time of the divorce, her annual earning capacity did not exceed \$24,000. Based upon the Mac Davis program, the circuit court ordered Paul to pay maintenance of \$1,283 monthly for an indefinite duration. Paul was also ordered to pay \$339 monthly child support.

¶3 In 2008, the remaining minor child moved from Joan's residence to Paul's. Paul then sought child support and an order terminating maintenance. Joan countered with a motion to increase maintenance. The parties stipulated that in the event the court ordered Joan to pay child support, the appropriate amount would be \$509 monthly.

¶4 An evidentiary hearing was held on February 2, 2009. Joan testified she was living with her boyfriend, Mark, and two of Mark's children. She contributed \$955 monthly toward Mark's household expenses. They did not have plans to get married. Joan also testified her primary income came from seasonal road construction labor. Her total income for 2008 was \$35,988. She testified that she anticipated 2009 would be "very slow." Joan did not know what Mark's

income was but estimated it to be \$50,000 to \$70,000 annually as a carpenter. Joan testified, “his job is ‘iffy.’”

¶5 At the time of the hearing, Paul earned \$86,000 annually plus benefits as a high school principal. Paul’s current wife earned approximately \$32,000 annually. She had two children from a previous marriage living in the household and she was entitled to receive child support, but chose not to.

¶6 Joan submitted a Mac Davis calculation that would have required a \$2,515 monthly maintenance payment from Paul. The circuit court declined to raise Joan’s maintenance and instead suspended it entirely. Joan was not, however, required to pay child support. The court concluded:

But I would think a three-year continuous relationship – and I can’t imagine what difference there is between that and a marriage, really. If you look at marriage as an economic relationship, I don’t see it much different than what Mr. Churchill’s currently involved in.

What I think would be the best way to handle this – these are always somewhat difficult, but the best way, I think, to handle it is that he wouldn’t – she wouldn’t have to pay any child support in return for him not paying any maintenance in this case.

I’m going to terminate maintenance, require her not to pay any child support, as long as these circumstances are similar. And I won’t require her to pay variable expenses, either. That, he’s got the ability to pay that, and I won’t require her to make any contributions toward that.

....

Maintenance is not permanently terminated in this case. It’s terminated as of this time because I don’t think she has a need for it as we sit here today. That may change. And because of the fact it’s a 23-year marriage, if it significantly changes, she should be entitled to come back to Court and ask for maintenance again, should her circumstances warrant that.

¶7 A circuit court may modify a maintenance award upon proof that the parties' financial circumstances have changed substantially. See *Haeuser v. Haeuser*, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996). Once a substantial change in circumstances is established, the decision to grant a modification of maintenance lies within the circuit court's discretion. See *Seidlitz v. Seidlitz*, 217 Wis. 2d 82, 88, 578 N.W.2d 638 (Ct. App. 1998). When the circuit court considers whether to modify a maintenance award, it applies the same factors in WIS. STAT. § 767.56 that govern the original determination of maintenance.¹ *Rohde-Giovanni v. Baumgart*, 2003 WI App 136, ¶8, 266 Wis. 2d 339, 667 N.W.2d 718, *aff'd*, 2004 WI 27, 269 Wis. 2d 598, 676 N.W.2d 452. The court need not consider all the statutory factors, but it must consider those relevant to the case. *Poindexter v. Poindexter*, 142 Wis. 2d 517, 532, 419 N.W.2d 223 (1988). A court may not relieve a maintenance obligation solely on the basis of cohabitation. *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 197, 327 N.W.2d 674 (1983). Cohabitation is "only a factor to consider to the extent it may change a recipient former spouse's economic status." *Id.*

¶8 Here, we find insufficient support for the suspension of maintenance. The court did not identify any particular financial benefit Joan received from her living arrangement with Mark. The court equated cohabitation with marriage as a

¹ WISCONSIN STAT. ch. 767 was substantially renumbered and revised by 2005 Wis. Act 443. References to Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

general proposition,² and it appears the court assumed that Joan benefitted financially from the cohabitation. In fact, the court performed no financial analysis and its decision does not reflect consideration of the statutory factors contained in WIS. STAT. § 767.56.

¶9 We therefore conclude the circuit court erroneously exercised its discretion in suspending maintenance, and reverse and remand for further proceedings. Upon remand, the court shall examine all the circumstances surrounding Joan's financial status, and the record must reflect the court's consideration of the factors set forth in WIS. STAT. § 767.56, with the fairness and support objectives of maintenance in mind.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

² The circuit court stated it could not “imagine what difference there is between [cohabitation] and a marriage, really. If you look at marriage as an economic relationship, I don't see it much different than what Mr. Churchill's currently involved in.” However, the court's findings are unsupported. For example, it is unclear what legal obligation Joan's boyfriend has to support her, and Joan has no apparent property interest in his home, salary, benefits or retirement plan. More importantly, the court made no finding that Joan's cohabitation was “fashioned” for the purpose of “preventing the cessation of maintenance payments.” See *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 197-98, 327 N.W.2d 674 (1983).

