

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 2004

Cornelia G. Clark
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. 03-2528-FT
STATE OF WISCONSIN**

Cir. Ct. No. 94FA000039

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

CONSTANCE R. SMITH,

PETITIONER-APPELLANT,

V.

PHILIP G. SMITH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
JOHN A. DES JARDINS, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Constance Smith appeals an order reducing her maintenance award.¹ Constance argues there was no substantial change in circumstances and the court failed to make appropriate findings to support a modification of maintenance. We agree and reverse the order.

¶2 After twenty-two years of marriage, Philip and Constance Smith divorced in November 1994. The court awarded Constance \$272 per month maintenance. In August 1998, Philip moved to modify maintenance on the ground that Constance had a live-in boyfriend. That motion was denied.

¶3 In August 2002, Smith again requested reduction or termination of maintenance. Constance was still living with the same boyfriend. The court found that “she has been living in a marital type of relationship now for five years. They are sharing some common expenses.” The court added: “I suspect that there might be more than what she actually admits.” The court reduced Constance’s maintenance to \$136. Constance appeals.

¶4 WISCONSIN STAT. § 767.32(1)(a) allows the family court to modify maintenance when it concludes that there has been a substantial change in circumstances. Absent a substantial change in circumstances, a provision in a judgment for maintenance payments that was based on a stipulation may not be modified. *Id.*

¶5 The question whether there has been a substantial change of circumstances presents a mixed question of fact and law. *See Harris v. Harris*,

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987). The trial court’s findings of fact regarding the “before” and “after” circumstances and whether a change has occurred will not be disturbed unless they are clearly erroneous. *Id.* However, whether the change is substantial is ordinarily a question of law. *Id.* When a trial court concludes circumstances have substantially changed, whether an award modification should occur and the amount of the modification are discretionary. *Fobes v. Fobes*, 124 Wis. 2d 72, 80-82, 368 N.W.2d 643 (1985).

¶6 We conclude that the court’s findings are inadequate to support its determination. Here, the court made no finding of substantial change in economic circumstances. It is error to reduce maintenance solely on the fact that the recipient cohabitates. *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 199, 327 N.W.2d 674 (1983). The party seeking to modify maintenance must prove that cohabitation substantially changed the recipient’s economic circumstances. *See id.* at 197-98. Although the court found that Constance shares expenses, there are no facts found from which this court could conclude that because Constance shares living quarters and expenses with another individual, her own expenses have been reduced. Because there are no findings from which to conclude that the sharing of expenses has substantially changed Constance’s economic circumstances, the court’s determination to reduce maintenance was an erroneous exercise of discretion.

By the Court.—Order reversed.

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

