COURT OF APPEALS
DECISION
DATED AND RELEASED

March 21, 1996

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

NOTICE

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

No. 95-0636

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

MARILYN C. GOETSCH,

Petitioner-Appellant-Cross Respondent,

v.

HOWARD N. GOETSCH,

Respondent-Respondent-Cross Appellant.

APPEAL and CROSS-APPEAL from an order of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed in part and reversed in part*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

VERGERONT, J. Marilyn Goetsch appeals from an order reducing the maintenance she receives from her ex-husband, Howard Goetsch. Howard cross-appeals from that part of the order denying his motion to terminate maintenance. The issues are: (1) whether the trial court erred in

determining that Marilyn's financial circumstances have substantially changed as a result of her cohabitation with a male companion; (2) whether the trial court's finding that Marilyn has not married her cohabiter solely to prevent termination of maintenance is clearly erroneous; and (3) whether the trial court erred in refusing to consider Marilyn's monthly pension fund benefits as income for maintenance purposes. We conclude the trial court's factual findings regarding Marilyn's improved financial circumstances are clearly erroneous; the finding regarding the intent of Marilyn's cohabitation is not clearly erroneous; and the trial court properly refused to consider Marilyn's pension fund benefits as income for maintenance purposes. We therefore affirm the part of the trial court's order denying Howard's motion to terminate maintenance and reverse the part reducing the amount of maintenance Marilyn receives from Howard.

BACKGROUND

Marilyn and Howard Goetsch were divorced on February 2, 1989. The divorce judgment directed Howard to make $900 bi-weekly maintenance payments to Marilyn. On April 12, 1990, Howard moved to terminate or reduce his maintenance on the grounds that Marilyn had failed to seek employment and was cohabiting with Harlan Attleson. Howard argued that Marilyn's relationship with Attleson reduced her financial needs and was fashioned to prevent a modification of maintenance, in violation of ***Van Gorder v. Van Gorder***, 110 Wis.2d 188, 327 N.W.2d 674 (1983). The trial court denied his motion and Howard appealed.

We reversed and remanded because the trial court had failed to use the standards set forth in ***Van Gorder***. *See* ***Goetsch v. Goetsch***, No. 90-1139, unpublished slip op. (Wis. Ct. App. Jan. 15, 1991). We directed the trial court to review whether Marilyn's cohabitation had caused a substantial improvement in her financial circumstances, and whether she was cohabiting, rather than marrying, solely to avoid termination of maintenance. *See* ***Van Gorder***, 110 Wis.2d at 197-98, 327 N.W.2d at 679.

On remand, the trial court applied the ***Van Gorder*** test and found that Marilyn had not benefitted financially by cohabiting with Attleson and had not avoided marrying Attleson solely to prevent the loss of her maintenance. We affirmed the trial court's maintenance decision on appeal. *See* ***Goetsch v.***

Goetsch, No. 91-2782-FT, unpublished slip. op. (Wis. Ct. App. May 14, 1992). The supreme court denied Howard's petition for review of our opinion pursuant to RULE 808.10, STATS.

On July 13, 1994, Howard filed a second motion to terminate or reduce maintenance on the ground that Marilyn's financial circumstances had substantially improved as a result of her cohabitation with Attleson. Marilyn, in turn, filed a motion to increase maintenance on the ground that her expenses had increased since the divorce and that Howard's income had increased substantially since the divorce.

The trial court found that Marilyn receives approximately $524 per month as a result of her cohabitation with Attleson, but that her relationship with Attleson was not fashioned to avoid losing maintenance. The trial court denied Howard's motion to terminate maintenance, but reduced his bi-weekly maintenance obligation from $900 to $650. Both parties appealed.

STANDARD OF REVIEW

A maintenance award may be revised after a divorce judgment, but only upon a finding of a substantial change in circumstances. Section 767.32(1), STATS. The burden of showing a substantial change in circumstances rests with the party seeking modification. *See* ***Thibadeau v. Thibadeau***, 150 Wis.2d 109, 115, 441 N.W.2d 281, 283 (Ct. App. 1989). The cohabitation of a recipient spouse is not, by itself, a sufficient change of circumstances that justifies the termination of maintenance, but it is a relevant factor bearing on maintenance. ***Van Gorder***, 110 Wis.2d at 197, 327 N.W.2d at 678.

Whether there has been a substantial change in circumstances involves a comparison of the facts when the maintenance order was entered with the present facts. *See* ***Licary v. Licary***, 168 Wis.2d 686, 692, 484 N.W.2d 371, 374 (Ct. App. 1992). We review the "before" and "after" circumstances, and whether a change has occurred, under the clearly erroneous standard. ***Harris v. Harris***, 141 Wis.2d 569, 574, 415 N.W.2d 586, 588-89 (Ct. App. 1987). Whether a change is substantial is a legal standard. ***Id.*** We defer to the trial court's

conclusion that a change in circumstances is substantial, but we are not bound by that conclusion. ***Id.*** at 574-75, 415 N.W.2d at 589.

MARILYN'S APPEAL

Marilyn contends the trial court erred in determining that her financial circumstances have improved as a result of her cohabitation with Attleson. We agree.

The trial court found that Marilyn "receives approximately $524.00 per month as a result of living with Mr. Attleson." The trial court broke this sum down into the following amounts:

Estimate for rent	$300.00	
Monthly share of real estate taxes		$ 85.00
Insurance	$ 25.00	
Electricity	$ 40.00	
Heat		$ 54.00
Telephone	$ 20.00	
TOTAL	$524.00	

The trial court did not explain how it arrived at these amounts and our search of the record does not reveal evidence to support them. Marilyn testified that she began cohabiting with Attleson in approximately November 1989, and that they have no plans for marriage. Marilyn's arrangements with Attleson are essentially the same as they were at the time the trial court denied Howard's first motion to terminate or reduce maintenance. Marilyn and Attleson own and maintain separate residences. Each separately pays the expenses associated with each residence, including real estate taxes, insurance, electricity, heat and base telephone charges. Marilyn and Attleson spend most weekends at Marilyn's residence, as well as a week and one-half of Attleson's vacation at Marilyn's, and the remainder of the time at Attleson's residence. Marilyn pays for her telephone charges if she uses Attleson's phone. Marilyn and Attleson each pays his or her share of the couple's expenses for travel,

entertainment, food, clothing and automobiles. Marilyn does most of the household chores in both residences, while Attleson does the lawn work and repairs. Marilyn's legal residence is at her home. She receives mail there, uses that address on her driver's license and on her car and boat registration, and keeps her clothing there. Marilyn and Attleson have no joint bank accounts or joint assets. Neither is the beneficiary of the other's will. Each testified that neither provides financial assistance for the other.

This testimony was undisputed. While the amounts listed by the trial court appear to have been taken from the monthly expenses listed on Marilyn's financial disclosure form,[1] the trial court did not explain why these expenses are reduced when Marilyn cohabits with Attleson part of each month, and we discern none. The only way Marilyn would not incur these expenses is if she were to sell her home. Since our review of the record does not reveal evidence to support the trial court's findings, we must conclude they are clearly erroneous.[2]

Howard contends that Marilyn admitted to a substantial decrease in monthly living expenses when she testified that she no longer has a car payment or a $130 house payment, and no longer takes an expensive medication. However, the trial court recognized that while Marilyn no longer has a car payment, her car has more than 100,000 miles on it and Marilyn expects to purchase a replacement vehicle in the near future. Regarding the $130 house payment listed on Marilyn's 1989 financial disclosure form, Marilyn had already paid this off by the time of the trial court's 1991 order denying Howard's motion to reduce or terminate maintenance. Finally, while Marilyn

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[1] The figures for real estate taxes, insurance, electricity and heat appear to have been taken directly from Marilyn's financial disclosure form, offered as an exhibit at the hearing. The figure for telephone expense is one-half of the amount listed on the form. It is not clear why the trial court decided to halve the amount listed for telephone expense when it did not do so for real estate taxes, insurance, electricity and heat. No mortgage payment appears on the financial disclosure form and Marilyn testified she does not have a mortgage on her home. We are unable to correlate the rent reduction figure with any testimony or exhibit.

[2] We also note that while the court found that Marilyn receives $524 per month as a result of her cohabitation with Attleson, the court states later in its memorandum decision that Marilyn's monthly expenses were reduced by $500. Moreover, the maintenance reduction of $250 bi-weekly does not equate to $524 per month or $500 per month.

testified that she no longer takes an expensive medication for some form of bronchial asthma, she was only on the medication for approximately two years prior to the hearing. Thus, the fact that Marilyn no longer takes the medication does not bear on whether there has been a substantial change in circumstances since the award of maintenance.

HOWARD'S CROSS-APPEAL

I. Reason For Cohabitation

Howard contends the trial court's finding that Marilyn's cohabitation was not fashioned solely for the purpose of avoiding the termination of maintenance is clearly erroneous. We disagree.

In ***Van Gorder***, the court stated that cohabiters should not be able to fashion their relationship and finances in a manner that is intended *solely* to prevent the modification of maintenance. ***Van Gorder***, 110 Wis.2d at 197, 327 N.W.2d at 678-79 (emphasis added). The trial court denied Howard's motion for termination of maintenance on the ground that "[t]he testimony in this case indicates the living arrangement was fashioned by Mrs. Goetsch and Mr. Attleson for the purpose of avoiding having to pay for the other's nursing home care if either one of them required it." This finding is not clearly erroneous. Marilyn and Attleson were both sixty-one years old at the time of the hearing and both testified that at least one of the reasons for not getting married was that they did not want to pay for the other's nursing home care if either one of them required it. It was within the trial court's discretion to accept this evidence as credible. ***Laribee v. Laribee***, 138 Wis.2d 46, 54-55, 405 N.W.2d 679, 683 (Ct. App. 1987). If deemed credible, this testimony was sufficient to demonstrate that the parties were not cohabiting solely to avoid termination of maintenance.

II. Rebuttable Presumption

Howard asks that we establish a rebuttable presumption that cohabitation enhances the financial circumstances of the parties who cohabit. We decline this invitation. In ***Van Gorder***, the court stated that cohabitation is only one factor to consider in determining whether there has been a sufficient change of circumstances to justify a modification of maintenance. We are

bound by decisions of the Wisconsin Supreme Court. ***State v. Olsen***, 99 Wis.2d 572, 583, 299 N.W.2d 632, 638 (Ct. App. 1980). Howard's argument would be more appropriately addressed to the supreme court or the legislature. *See* ***Employers Health Ins. Co. v. Tesmer***, 161 Wis.2d 733, 740-41, 469 N.W.2d 203, 206 (Ct. App. 1991).

III. Pension Fund Benefits

At the time of the divorce, Howard received a monthly pension payment of $2,099.47 from the Wisconsin Retirement System based on his past years of service with the Wisconsin State Patrol. The pension was treated as a marital asset for property division purposes. In a memorandum decision following the parties' divorce, entered February 23, 1990, the trial court divided the pension payments equally between Marilyn and Howard. At that time, this amounted to approximately $1,050 per month to each.

Howard contends that the trial court erred in failing to consider the monthly payments Marilyn receives from the Wisconsin Retirement Service in determining her income.[3] Citing our decision in ***Pelot v. Pelot***, 116 Wis.2d 339, 342 N.W.2d 64 (Ct. App. 1983), Howard takes the position that "the entirety

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[3] In its memorandum decision, the trial court stated:

> Because there has been a substantial change of Mrs. Goetsch's financial circumstances, it is appropriate that maintenance in this case be modified. In reaching this conclusion no weight is given to the increase of the pension benefits Mrs. Goetsch receives. Although under ***Pelot v. Pelot***, 116 Wis.2d 339, 342 N.W.2d 64 (Ct. App. 1983), it is possible that retirement fund payments may be considered as income even when they were divided in property division the court cannot consider such payments as income until recipient spouse has recovered the full value assigned to his or her share of the retirement account. In this case there is no proof as to what the value of Mrs. Goetsch's retirement fund was in 1989, at the time of the divorce, and accordingly there is no proof as to whether or not Mrs. Goetsch has recovered her interest in the retirement fund.

of the pension income is to be considered as income for maintenance purposes since, in any event, the `full value' of the pension must have long since been received." This argument is without merit.

In ***Pelot***, when the parties were divorced, the value of the husband's pension ($9,680) was included in the marital estate for purposes of property division. At the time the husband moved for a maintenance modification, the value of his pension fund was $15,191. We held that in calculating the husband's income for purposes of revising maintenance, the husband's monthly retirement benefits should be excluded until the benefits he received each month reached the value of the fund when it was assigned to him in the divorce, $9,680. ***Pelot***, 116 Wis.2d at 342-43, 342 N.W.2d at 66. *See also* ***Olski v. Olski***, 197 Wis.2d 237, 540 N.W.2d 412 (1995).

The trial court properly excluded Marilyn's monthly pension receipts in determining maintenance, but its analysis was flawed. Citing ***Pelot***, it stated that since "there is no proof as to what the value of Mrs. Goetsch's retirement fund was in 1989, at the time of the divorce, ... there is no proof as to whether or not Mrs. Goetsch has recovered her interest in the retirement fund." However, in ***Pelot***, the value of the husband's pension fund at the time of the divorce was relevant only to avoid "double counting" an asset that was already included in the marital estate for property division purposes. In this case, the trial court did not include the present value of Howard's pension in the marital property division. Rather, it divided all future pension payments equally between the parties as a marital asset. The expected increases in the pension benefits over time were accounted for in the property division. It is therefore improper to include the increase in pension payments received by either Marilyn or Howard in determining whether to revise maintenance.

Howard's reliance on ***Hommel v. Hommel***, 162 Wis.2d 782, 471 N.W.2d 1 (1991), is incorrect. In ***Hommel***, the court held that investment income from assets awarded to a spouse as part of an equal division of property in a divorce settlement generally can be included in calculating that spouse's income for purposes of revising a maintenance award to the payee spouse. ***Id.*** at 793, 471 N.W.2d at 5. Marilyn's monthly pension benefits are not investment income

from assets awarded as part of a property division, but are the asset itself, received in the form of an income stream.[4]

By the Court.—Order affirmed in part and reversed in part.

Not recommended for publication in the official reports.

[4] Howard does not contend that any increases in the monthly pension benefits are attributable to interest. *Cf.* ***Dowd v. Dowd***, 167 Wis.2d 409, 481 N.W.2d 504 (Ct. App. 1992) (annual interest earned on pension fund awarded in the property division can be used to determine ability to pay maintenance).