COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2013

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 Nos. 2012AP494
2012AP495

Cir. Ct. No. 2005FA65

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

2012AP494:
IN RE THE MARRIAGE OF:

JUDITH A. LADWIG,

PETITIONER-RESPONDENT,

V.

DANIEL J. LADWIG,

RESPONDENT-APPELLANT.

2012AP495:
IN RE THE MARRIAGE OF:

JUDITH A. LADWIG,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

DANIEL J. LADWIG,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEALS and CROSS-APPEAL from orders of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Daniel Ladwig and Judith Ladwig have filed cross-appeals from post-divorce orders dealing with a motion for the modification of child support and maintenance awards and a motion to reopen the divorce judgment with respect to the sale of a marital asset.[1] In addition, Judith asks for an award of attorney fees. For the reasons discussed below, we affirm the circuit court in all respects and decline to award attorney fees.

BACKGROUND

¶2 Because this is the third appellate decision we have issued in this matter, we will not repeat the general background information about the parties' marriage discussed in prior cases. *See* ***Ladwig v. Ladwig***, 2010 WI App 78, ¶¶3-4, 325 Wis. 2d 497, 785 N.W.2d 664; ***Ladwig v. Ladwig***, Nos. 2006AP2237 and 2006AP2726, unpublished slip op. ¶1 (WI App Nov. 14, 2007). Rather, we will simply incorporate the facts relevant to each of the issues presented on this appeal into our discussion below.

[1] Although the appeals were briefed separately, the panel determined at conference that they could be most efficiently addressed in a single opinion. We therefore consolidate the appeals upon our own motion.

STANDARD OF REVIEW

¶3 Both child support and maintenance determinations fall within the discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will uphold a discretionary decision so long as the circuit court applied a proper standard of law to the relevant facts and used a demonstrated rational process to reach a reasonable conclusion. ***Id.*** In considering the relevant facts, we will not disturb any credibility determination and will accept the circuit court's factual findings unless they are clearly erroneous. *See* ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238 (regarding credibility); WIS. STAT. § 805.17(2) (regarding factual findings) (2011-12).[2]

¶4 We likewise review a circuit court's discretionary decision whether to reopen a judgment under WIS. STAT. § 806.07 with great deference, and will uphold it so long as it was supported by a reasonable basis. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610.

DISCUSSION

Modification of Maintenance

¶5 "In order to modify a maintenance award, the party seeking modification must demonstrate that there has been 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; *see also* WIS.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

STAT. § 767.32(1)(a). In the typical case, the focus of the substantial change inquiry will "be on any financial changes the parties have experienced." *See. e.g.*, ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶30. In addition to the recipient's need for support, "[f]airness must be considered with respect to the situations of both parties in determining whether maintenance should be continued indefinitely, continued for a limited amount of time, reduced, or terminated." ***Id.***, ¶31.

¶6 After the original maintenance order issued by Judge J. Mac Davis had been overturned on appeal, Judge Paul F. Reilly set maintenance in the amount of $4,700 per month for a term of fifteen years. The maintenance award was based upon findings that: the standard of living during the marriage was an annual budget of approximately $300,000; Daniel had an annual income of $900,000 at the time of the divorce that was more than sufficient with a proposed monthly budget of $15,000; Judith had an actual annual income of $21,480, but would have an earning capacity of $31,000 upon completing additional schooling, which was not adequate to allow her to achieve the marital standard of living; Judith would also be receiving child support; and Judith had a reasonable post-divorce monthly budget of $13,584. Following another appeal and remand, Judge Linda Van De Water adjusted the maintenance award to $4,062 per month, to reflect real estate tax deductions and dependency exemptions.

¶7 Judge Van De Water also heard and decided a motion for the modification of maintenance and child support that had been pending since 2006, before the initial appeal. By the time of the hearing, Daniel's annual income had been reduced first to $745,000 and then to $675,906, due to a change in jobs, while Judith's income was imputed to be $29,640. Comparing the circumstances from the time of the initial maintenance award to those at the time of the hearing following the second remand, Judge Van De Water found that Daniel's gross

annual income had decreased, as had his child support obligations, while Judith's income had increased and her housing costs had decreased due to the sale of the marital home. The court concluded, however, that none of the changes were significant enough to warrant a modification of maintenance "given the parties' significant estate and significant income."

¶8 Daniel contends that Judge Van De Water erred in determining that the changes that had occurred in the parties' financial circumstances were not "substantial," while Judith argues that the court should not even have been considering events that occurred years after the modification motion had been filed when considering whether there had been a substantial change of circumstances. We need not resolve the question presented by Judith regarding the proper timeframe for comparison because we conclude that the circuit court's decision represented a reasonable exercise of discretion even looking at the timeframe most favorable to Daniel, from 2006 to 2011.

¶9 Daniel's arguments on appeal ignore several key facts. First, Judge Reilly explicitly stated that Judith's earning capacity was $31,000 when the court set the maintenance award. Therefore, the fact that her actual earned income had increased from $21,480 to a high point of $29,640 was an anticipated event, not a substantial change of circumstances.

¶10 Second, the maintenance award was based upon the amount of money that would be reasonably necessary to maintain Judith at the marital standard of living, without depriving Daniel of sufficient income to allow him to also maintain the marital standard of living. The amount to maintain Judith's standard of living was found to be $13,584 per month. The fact that Judith's actual living expenses decreased because she had chosen to sell the marital home

and buy a more modest house did not alter the fact that she was equitably entitled to the amount that would allow her to maintain a larger home if she chose to do so. Likewise, the fact that Daniel's income had decreased did not represent a substantial change for maintenance purposes so long as it was still sufficient for him to maintain the marital standard of living.

¶11 Finally, the circuit court was not required to consider any additional stream of revenue derived from Judith's portion of the property settlement (i.e., investments from the sale of the marital residence) for maintenance purposes.

Modification of Child Support

¶12 The circuit court may modify a child support order upon finding a substantial change in circumstances. WIS. STAT. § 767.59(1f)(a). Once a substantial change in circumstances has been established, the circuit court applies the same standards applicable to initial child support determinations. Section 767.59(2)(a); *see also* WIS. STAT. §§ 767.511(1j) and (1m) and WIS. ADMIN. Code § DCF 150.

¶13 On the first remand, Judge Reilly set child support at $8,455 per month, in accordance with the child support guidelines. Following the second remand, when considering the still-pending 2006 modification motion, Judge Van De Water implicitly determined that there had been a substantial change in circumstances for child support purposes based upon the graduation of the oldest child from high school, and reduced the amount of child support to $4,442 per month.

¶14 Daniel argues that Judge Van De Water erroneously exercised her discretion by refusing to deviate from the child support guidelines to further

reduce the award. However, this court has already affirmed on appeal Judge Reilly's determination that the key point in the deviation determination was that Daniel was able to pay the guideline amount without impairing his ability to meet his own budget. The changes in Judith's income and expenses did not change that calculus.

¶15 In addition, we are satisfied that it was reasonable for Judge Van De Water to view the decrease in Daniel's gross income by $155,000 between 2006 and 2010 as being largely offset by the increase in his disposable base income by $147,865 due to the termination of his child support obligations for two adult children from a prior marriage. Judge Van De Water also reasonably refused to address a subsequent further reduction in Daniel's income as part of its deviation from guidelines analysis because Daniel had not provided proper notice—although the court did use the further reduced figure of $675,906 for child support purposes going forward.

¶16 We do not find it necessary to individually address each of Daniel's additional allegations regarding specific changes in the parties' respective incomes and budgets because we are satisfied that Judge Van De Water reasonably exercised her discretion in looking at the big picture to determine whether a deviation from the child support guidelines was warranted.

Relief from Property Division

¶17 The martial estate included a property located in Destin, Florida that the parties agreed was to be sold. Daniel had estimated the value of the property at $500,000 on his financial disclosure sheet, while Judith had provided no valuation. Judge Davis ordered that the first $300,000 of proceeds from the sale of

the property be awarded to Daniel, with the rest to be divided equally between the parties.

¶18 The Florida property remained on the market for about six years before it finally sold for $100,000. The realtor testified that, in addition to generally difficult market conditions, the notorious oil spill in the Gulf of Mexico had a tremendously negative impact on the price.

¶19 Daniel contends that the sale of the property for an amount insufficient to equalize the property division as contemplated by Judge Davis warrants relief from the divorce judgment under WIS. STAT. § 806.07(h), which permits a circuit court to reopen an order or judgment based upon any reason "justifying relief from the operation of the judgment." Section 806.07(h) is a catchall provision that should be employed only when extraordinary circumstances are present, taking into account: (1) whether the judgment was the result of the conscientious, deliberate, and well informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) whether there had been any judicial consideration of the merits and the interest of deciding the case on the merits outweighs the interest in finality of judgments; (4) whether there was a meritorious defense to the claim; and (5) whether there are intervening circumstances making it inequitable to grant relief. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493.

¶20 Here, the parties—who were both represented by counsel—made a deliberate choice not to obtain an appraisal of the Florida property because they planned to sell it and split the proceeds. Judge Davis engaged in substantial consideration of the merits of the property division, and was well aware that there was no appraisal of the Florida property. Daniel had no grounds to object to the

court's treatment of the Florida property at the time of the divorce because the court relied upon Daniel's own estimate of the property's value, which was in turn reasonably based upon its listing price. The fact that the property declined in value due to market conditions was not an extraordinary circumstance. It is well understood that property values can fluctuate substantially over time. If the property had greatly increased in value for some unanticipated reason, Daniel would likewise have been entitled to keep the extra money without any revision of the property division. In sum, Daniel has not shown that any of the relevant factors for granting relief from judgment weigh in his favor.

Attorney Fees

¶21 Finally, Judith asks this court in one of her respondent's briefs to award her attorney fees on the grounds of overtrial. However, a request for attorney fees as a sanction must be raised by separate motion, not merely in the briefs, and must be filed no later than the filing of the respondent's brief. ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621; WIS. STAT. RULE 809.25(3). Therefore, we do not address that matter further.

By the Court.—Orders affirmed.

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