

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 11, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 97-3609**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**JAMES D. KURTZWEIL,**

**PETITIONER-RESPONDENT,**

**V.**

**NANCY M. KURTZWEIL,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Monroe County:  
STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Nancy Kurtzweil appeals from a post-divorce order extending the maintenance obligation of her ex-husband, James Kurtzweil, for one year. She contends that the trial court erroneously exercised its discretion in extending maintenance for only one year. We disagree and affirm.

## BACKGROUND

James and Nancy Kurtzweil were divorced in 1992 after nineteen years of marriage. James made \$40,000 a year at the time of the divorce, while Nancy was primarily a homemaker. The judgment of divorce required James to pay Nancy maintenance for five years, with payments terminating on July 15, 1997. With regard to the limited term of the maintenance, the trial court stated: “She’s going to need some time to get herself straightened around and try to get a decent job and maintain herself. So I think five years is an appropriate level at which to place it. And I will give it for the limited term of five years.”

On May 20, 1997, Nancy filed a motion to extend maintenance beyond the scheduled termination date. Nancy contended that her circumstances had substantially changed because she was unable to become self-supporting as contemplated by the original order granting limited-term maintenance. The only change in circumstances found by the trial court was that the parties needed to support their son for one more year than anticipated because he graduated from high school one year later than scheduled. Accordingly, the court extended maintenance for one year. Nancy appeals, arguing that the circuit court should have extended maintenance indefinitely.

## STANDARD OF REVIEW

The trial court may modify a maintenance award only upon a positive showing of a substantial change in the financial circumstances of the parties. *Haeuser v. Haeuser*, 200 Wis.2d 750, 764, 548 N.W.2d 535, 541-42 (Ct. App. 1996). A substantial change in circumstances should be such that it would be unjust or inequitable to strictly hold either party to the original maintenance award. *Rosplock v. Rosplock*, 217 Wis.2d 22, 33, 577 N.W.2d 32, 37 (1998). The

burden of proof lies with the party seeking modification. *Haeuser*, 200 Wis.2d at 764, 548 N.W.2d at 542.

We will uphold the trial court's findings regarding whether there has been a change in circumstances unless they are clearly erroneous. *Rosplock*, 217 Wis.2d at 33, 577 N.W.2d at 37. We give weight to the trial court's determination of whether the change in circumstances is substantial, although the trial court's decision is not controlling. *See id.*; *Harris v. Harris*, 141 Wis.2d 569, 574-75, 415 N.W.2d 586, 589 (Ct. App. 1987).

Even when there has been a substantial change in circumstances, the trial court's decision regarding the modification of maintenance lies within its discretion. *See Seidlitz v. Seidlitz*, 217 Wis.2d 82, 88, \_\_\_ N.W.2d \_\_\_, \_\_\_ (1998). We will uphold the trial court's exercise of discretion when the record shows that it undertook a reasonable inquiry and examination of the facts in coming to a reasonable, legally sound conclusion. *Haeuser*, 200 Wis.2d at 765, 548 N.W.2d at 542. We will generally look for reasons to sustain a trial court's discretionary decision. *Id.*

## DISCUSSION

Nancy argues that the trial court erroneously exercised its discretion because its exercise of discretion was based on an error of law. In setting forth the reasoning for its determination, the trial court stated: "Limited maintenance is not to guarantee that the parties' incomes are equal or to wait and see what the spouse is actually earning .... [I]nstead, there must be a substantial change in the circumstances." Nancy contends that, contrary to the trial court's assertion, the purpose of limited-term maintenance is to "wait and see" if the recipient has been

able to become self-supporting as well as to provide incentive for the recipient to find employment.

Nancy relies primarily on *Fobes v. Fobes*, 124 Wis.2d 72, 368 N.W.2d 643 (1985), to support her argument. In *Fobes*, the trial court changed a limited-term maintenance award to a permanent maintenance award, concluding that the recipient needed permanent maintenance because she had not been able to become self-supporting, as the parties had contemplated at the time of the divorce. *Id.* at 81, 368 N.W.2d at 647. On appeal, the supreme court concluded that the trial court properly exercised its discretion in modifying the divorce judgment. *Id.* Nancy argues that, like the limited-term maintenance recipient in *Fobes*, she has been unable to become self-supporting. Accordingly, Nancy contends that she also should receive permanent maintenance.

We conclude that *Fobes* is distinguishable because here, unlike in *Fobes*, the trial court did not conclude that Nancy obtained an education, accepted as much employment as she was able to obtain, and yet was unable to become self-supporting. At the time of the divorce, Nancy indicated that she intended to pursue an education. However, she failed to do so. The trial court believed that Nancy did not do what she was capable of to become self-supporting. The court stated:

I think that the wife has tried to get a job. I don't think she has exerted the effort that [the court] anticipated she would [at the time of the divorce], and I think she is capable of going to a career studies and going to technical school to improve her situation beyond where she is now. But I don't think she shirked. She just did not attack this with the aggressiveness that everybody anticipated and hoped that she would....

... If she took the course at vocational schools and colleges, she would be able to meet her own expectations.

I think the court in this case anticipated it. I think it wasn't realized to the extent that it was possible by her ....

Among the purposes of limited-term maintenance are to provide an incentive for the recipient spouse to become self-supporting, to limit the responsibility of the payor to a time certain, and to avoid future litigation. *See Bentz v. Bentz*, 148 Wis.2d 400, 406, 435 N.W.2d 293, 295 (Ct. App. 1988). Courts would lessen the recipient's incentive to become self-supporting during the maintenance period were they to extend the term of maintenance when the recipient was capable of obtaining increased earnings, but did not use the necessary efforts to do so. Here, the trial court found that Nancy was capable of improving her situation, but did not pursue a career with the effort that the court anticipated at the time of divorce. Because the trial court found that Nancy could have improved her situation while receiving limited-term maintenance, we conclude that trial court properly exercised its discretion in refusing to award permanent maintenance.

Nancy also contends that the trial court should have considered factors such as the length of the marriage, the length of time she was absent from the workplace, and the contributions she made to James's career. But in deciding whether to modify maintenance, "the issue is whether the parties met their burden of establishing a substantial change in circumstances *after the divorce* warranting a modification of maintenance; it has nothing to do with contributions, economic or noneconomic, made during the marriage." *Johnson v. Johnson*, 217 Wis.2d 124, 128, 576 N.W.2d 585, 587 (1998) (emphasis added). Accordingly, it would have been inappropriate for the trial court to consider these factors that existed at the time of the divorce.

Finally, Nancy argues that the trial court erroneously exercised its discretion in extending maintenance for only one year. Nancy notes that the trial court found that she had not had enough time to realize her potential, but did not make any findings regarding whether a one-year extension would be sufficient to achieve that end. Because the trial court did not find that she could become self-supporting in one year, Nancy contends that the trial court erroneously exercised its discretion in extending maintenance for only one year.

Nancy's argument fails to recognize the basis for the trial court's extension of maintenance. The trial court did not extend maintenance for one year because a five-year term of maintenance was insufficient for Nancy to become self-supporting. Rather, the trial court extended maintenance for one year because the parties' son graduated from high school one year later than anticipated. By extending maintenance for one year, the trial court gave Nancy the same amount of time to become self-supporting without supporting her son that the court originally contemplated at the time of divorce. The trial court determined in 1992 that a five-year term of maintenance was a sufficient time period for Nancy to become self-supporting. If Nancy had thought that there was insufficient evidence to support the five-year maintenance award in the divorce judgment, she should have appealed from that judgment. But it is the order modifying maintenance, not the original divorce judgment, that is the subject of this appeal.

Nancy contends that *Plonka v. Plonka*, 177 Wis.2d 196, 501 N.W.2d 871 (Ct. App. 1993), is controlling. We are unpersuaded. In *Plonka*, Gerald and Arline Plonka were divorced in July 1987, and the judgment of divorce provided maintenance for Arline of \$1,150 per month. *Id.* at 198-99, 501 N.W.2d at 872. In 1991, Gerald filed a motion to terminate maintenance on the grounds that his anticipated retirement constituted a substantial change in circumstances.

*Id.* at 199, 501 N.W.2d at 873. The trial court found that there had been a substantial change in circumstances and modified the judgment by granting Arline limited-term maintenance of \$500 per month for six months. *Id.* On appeal, we concluded that the trial court erroneously exercised its discretion because the record revealed “no evidence substantiating Arline’s earning capacity or her ability to obtain full-time employment in the six-month time frame required by the trial court.” *Id.* at 203, 501 N.W.2d at 874.

This case is distinguishable from *Plonka* because here, the decision to award limited-term maintenance was made at the time of divorce, while in *Plonka*, the decision to award limited-term maintenance was made only upon the payor’s motion to terminate maintenance. In *Plonka*, the court deciding the motion needed to consider the relevant factors when determining whether to grant limited-term maintenance, including the ability of the recipient to become self-supporting by the end of the maintenance period.<sup>1</sup> Here, the decision to award limited-term maintenance was made at the time of divorce, and the trial court needed to consider the relevant factors at that time. However, in deciding Nancy’s

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<sup>1</sup> In *LaRocque v. LaRocque*, 139 Wis.2d 23, 41, 406 N.W.2d 736, 743 (1987), the supreme court stated:

In determining whether to grant limited-term maintenance, the circuit court must take several considerations into account, for example, the ability of the recipient spouse to become self-supporting by the end of the maintenance period at a standard of living reasonably similar to that enjoyed before divorce; the ability of the payor spouse to continue the obligation of support for an indefinite time; and the need for the court to continue jurisdiction regarding maintenance.

Because limited-term maintenance is relatively inflexible and final, the circuit court must take particular care to be realistic about the recipient spouse’s future earning capacity. The circuit court must not prematurely relieve a payor spouse of a support obligation lest a needy former spouse become the obligation of the taxpayers.

modification motion, the trial court's task was not to revisit the original decision to award maintenance for the limited term of five years; the trial court only needed to determine whether there had been a substantial change in circumstances since the time of divorce.

In summary, we conclude that the trial court properly exercised its discretion in extending maintenance for one year. We therefore affirm the trial court's order.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.



ROGGENSACK, J. (*dissenting*). The majority opinion affirms the circuit court's exercise of discretion wherein it reasoned:

If she took the course at vocational schools and colleges, she would be able to meet her own expectations. I think the court in this case anticipated it. I think it wasn't realized to the extent that it was possible by her ....

In so doing, it ignores that there is absolutely no evidence in the record from which the circuit court could have concluded that taking vocational or other educational classes would have increased Nancy's earning capacity or that it would have resulted in increased job opportunities that paid more than she was earning. It also ignores the increase in James's income by fifty percent, from \$40,000 to \$60,000 a year. However, the circuit court did make a finding that has ample support in the record: that Nancy did not shirk her responsibility to find gainful, full-time employment.<sup>2</sup>

Section 767.32, STATS., permits the modification of a limited term maintenance award "as long as the petition to revise or alter limited maintenance payments is filed prior to the termination date of limited maintenance under the judgment." *Dixon v. Dixon*, 107 Wis.2d 492, 508, 319 N.W.2d 846, 854 (1982). The majority correctly notes that the standard for modification is a substantial change in the circumstances of the parties. *Fobes v. Fobes*, 124 Wis.2d 72, 76,

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<sup>2</sup> After the divorce, she obtained employment at Wal-Mart, and then J.C. Penney, gradually increasing her wages to \$7.00 an hour plus full benefits, and increasing her hours to full-time employment (\$15,000 per year). Nancy also took advantage of the in-house training offered by J.C. Penney and had increased her earnings from those efforts. She also periodically checked the classifieds, looking for employment where she would earn more.

368 N.W.2d 643, 645 (1985). As the court said in *Fobes*, “the factual finding by the court of Mrs. Fobes’ inability to become self-supporting, which was the predicate for the limited maintenance provision, constituted a substantial change in circumstances since the time the divorce was granted.” *Id.* at 81-82, 368 N.W.2d at 647; *see also Hefty v. Hefty*, 172 Wis.2d 124, 137, 493 N.W.2d 33, 38 (1992) (maintenance is designed to maintain the recipient spouse at an appropriate standard of living until the recipient reaches a level of income where support is no longer required).

The majority opinion does not acknowledge that, absent shirking, the lack of success of a recipient spouse to become self-supporting when that was a basis for the limited maintenance award,<sup>3</sup> constitutes a substantial change in circumstances sufficient to extend maintenance. *Fobes*, 124 Wis.2d at 81-82, 368 N.W.2d at 647. Instead, the majority opinion attempts to distinguish *Fobes* on the grounds that Nancy did not obtain an education<sup>4</sup> during her term of limited maintenance, but Clarice Fobes did. However, there is absolutely no evidence in the record to support the conclusion that Nancy would have found a higher paying job than she has if she had taken additional educational courses. And the court is not free to jump to that conclusion without a factual record to support it. *See Plonka v. Plonka*, 177 Wis.2d 196, 203, 501 N.W.2d 871, 874 (Ct. App. 1993) (concluding it is an erroneous exercise of discretion to terminate maintenance after six months when the record contains no evidence substantiating the payee’s

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<sup>3</sup> At the time of divorce, the circuit court said, “She’s going to need some time to get herself straightened around and try to get a decent job and maintain herself. So I think five years is an appropriate level at which to place it. And I will give it for the limited term of five years.”

<sup>4</sup> Nancy testified that, even with maintenance, her income was insufficient to allow her to pursue higher education, but that she did obtain in-house training at J.C. Penney.

earning capacity or ability to obtain sufficient employment to become self-supporting in six months).

The majority also suggests Nancy should have appealed the judgment of divorce if she disagreed with the circuit court's finding that she could become self-supporting within five years. I believe that such advice ignores current precedent and if followed, would load this court with appeals from many more limited term maintenance awards than we currently review.

In conclusion, the premise upon which the circuit court made the limited term maintenance award on the date of divorce has not been fulfilled. Because Nancy did not shirk her responsibility to attempt to become self-supporting at a standard of living comparable to that enjoyed during the marriage, precedent of the supreme court holds she has made a showing of a substantial change in circumstances. *Fobes*, 124 Wis.2d at 81-82, 368 N.W.2d at 647. Additionally, the circuit court refused to extend maintenance without a factual record sufficient to support the rationale upon which its decision was based; and therefore, it erroneously exercised its discretion. *Plonka*, 177 Wis.2d at 203, 501 N.W.2d at 874. Therefore, I must respectfully dissent.

