COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2670-FT

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

IN RE THE MARRIAGE OF:

NANCY LEIBLY,

PETITIONER-RESPONDENT,

V.

RONALD P. LEIBLY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Ronald P. Leibly appeals from an order granting the motion of Nancy Meinerz f/k/a Nancy Leibly to increase Ronald's child support payments. Ronald claims that the trial court erroneously exercised its

discretion when it ordered the modification. Because the trial court erroneously exercised its discretion, we reverse the order and remand with directions.

BACKGROUND

Ronald and Nancy were married on May 26, 1984. They had one child, Daniel Paul, born May 28, 1985. They were divorced on July 20, 1989, and incorporated a Final Marital Settlement Agreement into the divorce judgment. Pursuant to the Agreement, Ronald was to pay $200 per month child support to Nancy. This was a deviation from the 17% statutory amount. The marital settlement agreement stated that the parties agreed to the deviation because: Ronald was also paying support for a daughter from another marriage; Ronald would incur direct care costs related to Daniel; of Daniel's and Nancy's inherited wealth; Ronald gave up his claim to attack the pre-nuptial agreement; and Ronald waived his right to ask for maintenance.

In August 1997, Nancy moved for modification of child support, requesting that Ronald begin paying the statutory amount in support of Daniel. Nancy argued that there was a substantial change in circumstances, based on the fact that Ronald's daughter had attained the age of majority and he no longer was required to support her, and that, contrary to what was believed at the time of the Agreement, Ronald failed to incur any direct costs related to Daniel. She also relied on a recent case, ***Luciani v. Montemurro-Luciani***, 199 Wis.2d 280, 544 N.W.2d 561 (1996), which indicated that the placement parent's personal financial wealth did not make it unfair to require the statutory amount from the payer spouse. After a hearing, Assistant Family Court Commissioner Janice M. Rustad granted the motion and ordered Ronald to pay child support of 17% of gross income commencing October 1, 1997. Ronald did not appear for the hearing.

Ronald filed a motion for *de novo* review in the trial court. Through counsel, Ronald agreed to submit the child support issue to the trial court on briefs alone.[1] Ronald argued that Nancy's request should be denied because the Agreement stated that the only basis for a change of circumstances would be a decrease in Nancy's financial circumstances by non-voluntary means of not less than $50,000. The trial court ordered the modification, requiring Ronald to pay 17% of his gross income in support of the minor child, to commence July 1998. Ronald appeals from that order.

DISCUSSION

The issue in this case is whether the parties are bound by the Agreement regarding how "change in circumstances" was defined. The modification of child support based on a substantial or material change of circumstances is within the discretion of the trial court. *See* ***Thibadeau v. Thibadeau***, 150 Wis.2d 109, 114-15, 441 N.W.2d 281, 283 (Ct. App. 1989). However, the construction of a written contract is normally a matter of law for the court. *See* ***Levy v. Levy***, 130 Wis.2d 523, 528, 388 N.W.2d 170, 172 (1986). The appellate court may determine questions of law independently with no deference to the conclusions reached by the trial court. *See* ***id.*** at 529, 388 N.W.2d at 172-73.

This case presents an unusual circumstance. The parties stipulated to what would constitute a "substantial change of circumstances" in the future. The Agreement in this case provided:

[1] The parties also dispute whether, by this submission, Ronald waived his right to a *de novo* review. Because of our disposition, however, we need not address this issue.

> F. In setting child support the parties have deviated from the percentage standards, finding them unfair to the respondent [Ronald]. The parties have considered the substantial estate of Daniel Leibly, the substantial income and assets of the petitioner, the respondent's support obligation for his daughter from a prior marriage, and the respondent's direct care expenses related to Daniel. The parties have also considered the fact the respondent is not challenging the prenuptial agreement of the parties and is not claiming maintenance from the petitioner.
>
> *The parties expressly agree that the present child support obligation shall not be increased in the future unless there is a substantial change in circumstances relative to the petitioner's net worth. A substantial change in circumstances means that petitioner's net worth has decreased by non-voluntary means to less than $50,000.00.*

(Emphasis added). The emphasized provision is clear. A substantial change in circumstances, warranting modification of child support, exists only if there is a change to Nancy's financial circumstances. It is undisputed that this has not occurred. It is also not disputed that Daniel does not need the money attributable to the trial court's increase in Ronald's child-support burden. Thus, we do not have a situation where an agreement between a husband and wife unfairly diminishes the amount of money available for the child. Instead, Nancy argues that the other referenced factors have changed. That is, Ronald no longer has to support his daughter from a prior marriage because the daughter has reached the age of majority, and Ronald has not incurred direct costs for the care of Daniel because he has not exercised his placement rights. With respect to Ronald's other child reaching her majority, the parties could have anticipated this happening but, nevertheless, did not include it in their definition of substantial change in circumstances. Moreover, the parties did not include in their definition of "substantial change" in circumstances a failure by Ronald to pay "direct care expenses." Nancy also argues that Ronald's salary must have increased over the years, and that the ***Luciani*** case makes the Agreement unfair. We reject this claim too. The fact that Ronald's salary presumably increased over the years is also not

sufficient to alter the clear terms of the agreement and, therefore, cannot constitute a substantial change in circumstances. Further, like the termination of Ronald's support obligation to his daughter, this fact also could have been anticipated at the time the Agreement was executed.

Finally, we do not agree that the ***Luciani*** case alters the law so as to make the Agreement unfair to Nancy. In ***Luciani***, the issue of child support was disputed and tried. *See* ***id.***, 199 Wis.2d at 286-87, 544 N.W.2d at 563-64. The trial court considered the evidence presented and adhered to the statutory percentage guidelines, finding that it would not be unfair to Luciani, the payer spouse to pay child support according to the percentage guidelines, despite the fact that his ex-wife was a physician earning a larger income. *See* ***id.*** at 296-300, 544 N.W.2d at 567-69. The instant case is not governed by ***Luciani***. The only similarity here is that the ex-wife, child support recipient, Nancy, is significantly wealthier than the payer, Ronald. The instant case is distinguishable from ***Luciani*** in every other way. Unlike in ***Luciani***, Ronald and Nancy stipulated to the issue of child support. Further, the parties agreed to what would constitute a change in circumstances. Nancy testified that the Agreement was fair and reasonable. ***Luciani*** does not alter the circumstances present when Nancy and Ronald entered into the Agreement, which was fair to the parties and to Daniel at the time, is not unfair to either the parties or Daniel now, and is binding on the parties now.

Accordingly, the trial court erroneously exercised its discretion when it set aside the clear provisions of the Agreement and modified the support requirements. The time to bring a motion asking to be relieved of the Agreement's terms has long passed. *See* § 806.07, STATS. And even if the Agreement would be subject to be re-opened, fairness would dictate that all the

clauses would be capable of being challenged. We reverse the order and remand the matter with instructions to reinstate the original child support order.

By the Court.—Order reversed and cause remanded with directions.

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