

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 99-0724

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

MARGARET HENKEL, F/N/A MARGARET WEST,

PETITIONER-RESPONDENT,

V.

WILLIAM WEST, M.D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Affirmed.*

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

¶1 DYKMAN, P.J. In this divorce action, William West appeals from an order increasing his maintenance payments to his former wife, Margaret Henkel, and requiring him to contribute to her attorney fees. He argues that the

trial court erroneously exercised its discretion by increasing maintenance, based its decision on erroneous findings of fact, and unfairly required him to pay one-half of Margaret's attorney fees. We conclude that the trial court properly exercised its discretion in increasing maintenance and awarding attorney fees, and that its findings were not clearly erroneous. Accordingly, we affirm.

I. Background

¶2 After nearly twenty-three years of marriage, Margaret and William divorced in 1991. The trial court incorporated the marital settlement agreement (MSA) of Margaret and William as part of the judgment of divorce. The MSA provided that William would pay \$4,000 per month in maintenance. The MSA states, in part:

Maintenance payable hereunder shall be for an indefinite period. But, it may be reviewed by either party after September 1, 1994. The parties anticipate that prior to that time, Margaret will have completed her Masters' degree or other educational program and either located full-time employment or taken steps to locate full-time employment. The parties further contemplate that in so doing, Margaret will over time, become self-supporting at a standard of living reasonably comparable to that enjoyed by the parties during the marriage. The maintenance payable hereunder is based on the fact that William has a present and projected gross income for 1992 from his employment of \$144,000.00 per year and that Margaret is enrolled as a student at the University of Montana with no present earned income. It is the intention of the parties to renegotiate a gradual reduction of the maintenance payments after Margaret has completed her Masters' Degree or other educational program. If the parties are unable to agree upon a modification of maintenance, the matter may be submitted for resolution to the Court on motion of either party after September 1, 1994.

Nothing in this provision is intended to preclude either party from seeking a modification of the maintenance order for change of circumstances significant enough to warrant a modification to be entered by the Court.

Notwithstanding the foregoing, it is agreed that when Margaret becomes employed after completing her Masters' Degree or other educational program, there shall be a dollar-for-dollar reduction in the amount of maintenance paid by William to Margaret for employment income earned by her.

¶3 After the divorce, Margaret moved to Bozeman, Montana. She enrolled in business courses at Montana State University, although she did not obtain a master's degree. In 1994 and 1995, she worked at a computer technology company.

¶4 In 1994, William filed a motion seeking to have his maintenance payments terminated or reduced. He argued that his salary was going to be substantially reduced and that Margaret had failed to comply with the terms of the MSA by not diligently working towards independence and completing an "educational program." After a hearing, Circuit Court Judge Patrick J. Rude ordered William's maintenance payments reduced to \$2,000 per month. Judge Rude found that, under the MSA, the parties intended the maintenance payments to terminate at some point in time, and that Margaret "would get a masters degree and thereby become at least partially self-sufficient." However, Judge Rude stated that he would not address the potential termination of the maintenance payments or set a fixed maintenance term. He explained, "I can't under the terms of this agreement. I can only do what you asked and reduce it, and I dealt with that issue." Judge Rude also found that, at the time the divorce was granted, the \$4,000 per month maintenance payments called for in the MSA were reasonable, but that Margaret and William intended the maintenance payments to be reduced based on their respective incomes. Since, in 1994, Margaret was earning \$15,000, Judge Rude reduced the maintenance payments by \$2,000.

¶5 At the hearing, Judge Rude also made the following statements:

The choice was made in this case by the respondent—or the petitioner, to go to Montana. That’s fine. No problems with that. But, when she did this, she knew full well—and she’s an intelligent woman—she knew full well that the employment base there was going to be limited. She went to the university. And, clearly, that was not a major goal for her, as evidenced by the fact that she did not make, in the court’s mind, every attempt to finish her masters degree or her—her associate degree. She has a 3.9 plus grade point average which, in the court’s mind, would allow her to be admitted in any—any university in this country, grade point-wise, and is certainly capable—is certainly capable of getting into a business college.

And if she wants to work at that, she can do that. And, in the court’s mind, she certainly can’t complete it within two years. A masters degree is not certainly unachievable in two years.

Now, whether or not that’s going to produce the type of income that she’s looking for, I don’t know. It may not be in Boise or Bozeman. It may not be there. I don’t know that either. She may be absolutely correct in that, if it’s a college town and, therefore, they hire cheap and pay little, and—but that’s not unlike the University of Wisconsin. Yet the University of Wisconsin area, of the Madison area, pays some very hefty salaries. They don’t rely upon their students to—supplement their business.

The day and age of setting in one spot and saying, “This is where I’m going to stay. The jobs will have to come to me,” for the professional person or the business person are gone. You are going to have to go where the jobs are, where you can get the jobs that will pay the kind of money that you are looking for.

If you want to accept lesser amounts, that’s fine. You can do so.

¶6 On January 28, 1998, William filed another motion seeking the termination of his maintenance payments. On March 3, 1998, Margaret filed a motion seeking an increase in the maintenance amount. By this time, Judge Rude had died. After a hearing, Circuit Court Judge Richard T. Werner ordered that William’s maintenance payments be increased to \$2,300 per month. Judge

Werner found that, at the time of the divorce, William earned \$144,000, but that in 1998, his projected income would be \$111,000. He also found that evidence produced at the hearing demonstrated that Margaret's health had deteriorated for various reasons since the divorce, limiting her earning capacity to \$1,070 per month.

¶7 Judge Werner concluded that Margaret's deteriorating health was a substantial change in financial circumstances since the divorce. He found that, although Margaret had not completed a master's degree program, she had achieved her goal of obtaining an education that would help her in the business world by completing an "educational program" at Montana State University. However, he also concluded that, by limiting her earning capacity, Margaret's health problems left her unable to become self-supporting. Judge Werner stated that the MSA's maintenance provisions established Margaret's standard of living at \$4,000 per month. Since her earnings were limited to \$1,070 per month, he concluded that William could expect to pay up to \$2,930 per month in maintenance under the MSA. However, Judge Werner assessed Margaret's need and determined that maintenance payments of \$2,300 per month would be sufficient to supplement her income. He explained that an "amount higher would bear similarities to an 'annuity.' An amount lower would not allow petitioner to maintain a standard of living similar to that enjoyed during the marriage." Judge Werner also ordered William to contribute \$6,500 to Margaret's attorney fees. William appeals.

II. Analysis

A. *Modification of Maintenance*

¶8 William argues that the findings on which Judge Werner based his decision to increase the maintenance payments to \$2,300 per month were clearly erroneous. William contends that Judge Rude made several findings at the 1994 hearing that became the law of the case, and that Judge Werner erred by making conflicting findings in 1998. In particular, William asserts that Judge Rude found that Margaret had not complied with her obligations under the MSA because she had not made every attempt to complete a master's or associate's degree program, and had chosen to live in Montana despite the limited employment opportunities. William argues that Judge Rude found that the maintenance payments would end, that the end was forthcoming, and that Margaret should have been able to complete a master's degree program within two years of the 1994 hearing. William claims that Judge Werner was bound by Judge Rude's findings and erred in determining that Margaret had essentially complied with the MSA by completing an "educational program" at Montana State University.

¶9 William also contends that Judge Werner erroneously exercised his discretion by increasing maintenance from \$2,000 to \$2,300 per month. He asserts that Margaret did not live up to her end of the MSA and ignored Judge Rude's admonitions that she obtain a master's degree within two years. He argues that her failure to abide by the MSA and Judge Rude's warnings should not be rewarded with an increase in maintenance.

¶10 Under § 767.32(1)(a), STATS., after a judgment of divorce is entered, a trial court can modify a maintenance award upon a showing of a substantial change in the financial circumstances of the parties. *See Gerrits v. Gerrits*, 167

Wis.2d 429, 437, 482 N.W.2d 134, 138 (Ct. App. 1992). The question of whether there has been a substantial change in circumstances is a mixed question of fact and law. *See Rosplock v. Rosplock*, 217 Wis.2d 22, 32-33, 577 N.W.2d 32, 37 (Ct. App. 1998), *review denied*, 219 Wis.2d 922, 584 N.W.2d 123 (1998). We will not upset the trial court's findings regarding the "before" and "after" circumstances and whether a change has occurred unless they are clearly erroneous. *Id.* at 33, 577 N.W.2d at 37. However, whether that change is substantial is a question of law that we review de novo. *See id.* Since the purpose of maintenance is to permit a former spouse to maintain a standard of living comparable to that enjoyed during marriage, the trial court should compare the circumstances at the time of the request for maintenance modification to those existing during marriage. *See Gerrits*, 167 Wis.2d at 439, 482 N.W.2d at 138; *Harris v. Harris*, 141 Wis.2d 569, 577, 415 N.W.2d 586, 590 (Ct. App. 1987).

¶11 Upon a showing of a substantial change in circumstances, the level at which to set the maintenance payments is within the discretion of the trial court. *See Seidlitz v. Seidlitz*, 217 Wis.2d 82, 88, 578 N.W.2d 638, 641 (Ct. App. 1998). We will not disturb the trial court's decision regarding the amount of maintenance absent an erroneous exercise of discretion. *See id.* at 86, 578 N.W.2d at 640. The trial court has appropriately exercised its discretion if, in its explanation of its decision, it demonstrates that it considered the relevant facts and reached a reasonable conclusion that is consistent with the applicable law. *See Gerrits*, 167 Wis.2d at 441, 482 N.W.2d at 139.

1. Factual Findings

¶12 We conclude that the findings on which Judge Werner based his decision to modify the maintenance payments were not clearly erroneous. Upon a

motion for a modification of maintenance, the trial court must make findings of whether the financial circumstances of the parties have changed since the original maintenance award was made. See **Rosplock**, 217 Wis.2d at 33, 577 N.W.2d at 37; **Harris**, 141 Wis.2d at 577, 415 N.W.2d at 590. In this case, Judge Werner found that both William and Margaret's financial circumstances had changed. William's projected income had dropped by over \$30,000, and Margaret's health had deteriorated such that her earning capacity was limited to \$1,070 per month.

¶13 William does not contend that Judge Werner's findings that William and Margaret's financial circumstances had changed were clearly erroneous. Nor could he, as they are supported by evidence in the record. The MSA establishes that William's income at the time of the divorce was \$144,000 per year, and William testified that his projected income in 1998 was only \$111,000. The MSA indicates that Margaret was a student with no earned income at the time of the divorce, but nothing in the record from the divorce indicates that Margaret might have health problems that would limit her earning capacity. In contrast, in 1998, William submitted a medical report in which a doctor concluded that Margaret "suffers from some impairments." The doctor examined Margaret, reviewed her medical history, and determined that she could work an eight-hour work day, but was restricted in the amounts she could lift and in using her hands. Based, in part, on her review of the doctor's report and a meeting with Margaret, a vocational consultant in Montana testified that Margaret's health problems limited her to earning between \$5.15 and \$7.25 per hour. Judge Werner used an average of \$6.20 per hour to determine that Margaret's earning capacity was \$1,070 per month. Judge Werner's findings that both William and Margaret's financial circumstances had changed since the divorce were not clearly erroneous.

¶14 We disagree with William’s contention that Judge Rude made factual findings that became the law of the case¹ and were binding on Judge Werner in his decision to modify the maintenance payments. William’s argument misconstrues the nature of a motion to modify maintenance. As we have explained, in order to modify maintenance, the trial court must first find a change in the financial circumstances of the parties. Judge Werner did so. We do not agree that Judge Rude’s comments regarding Margaret’s educational or employment diligence were “findings.” Even if they were, they do not conflict with Judge Werner’s determination that William and Margaret’s financial circumstances changed. We also do not agree that, by commenting on Margaret’s ability to obtain a master’s degree in two years, Judge Rude placed any time limit on the maintenance payments. In fact, Judge Rude stated that he could not set a time limit on the payments under the terms of the MSA.

¶15 We agree with William that Judge Werner’s finding that Margaret’s coursework at Montana State University constituted an “educational program” as contemplated by the MSA appears to conflict with Judge Rude’s finding that, under the MSA, the parties intended Margaret to obtain a master’s degree. However, this apparent conflict does not make Judge Werner’s decision to modify maintenance erroneous. A marital settlement agreement or stipulation that is “incorporated into a divorce judgment is in the nature of a contract.” *Rosplock*, 217 Wis.2d at 30, 577 N.W.2d at 36. However, unlike with contract law, in a divorce, a trial court can modify certain terms of the agreement based on a

¹ Generally, the “law of the case” doctrine holds that “a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.” *Univest Corp. v. General Split Corp.*, 148 Wis.2d 29, 38, 435 N.W.2d 234, 238 (1989).

“substantial change in circumstances” despite the original intentions of the parties. *See* § 767.32(1)(a), STATS. Thus, Judge Rude’s finding regarding Margaret and William’s intent when they entered into the MSA has no effect on Judge Werner’s findings regarding the motion to modify maintenance. At issue in this case is whether the circumstances of the parties changed since the divorce, not whether the parties abided by their original intentions.

¶16 William argues that, without regard to Judge Rude’s findings, Judge Werner based his decision on clearly erroneous findings of fact. William asserts that Judge Werner found that Margaret “had essentially lived up to her part of the maintenance contract.” He argues that such a finding is erroneous because she did not actively pursue an educational program that would lead to full time employment and because she quit her full-time job with the computer technology company. He also argues that Judge Werner erroneously concluded that Margaret’s need was \$4,000 per month because the \$4,000 figure provided for in the MSA was based on considerations that no longer applied at the modification hearing.

¶17 We disagree with William’s assertions. Judge Werner’s written decision does not indicate that he found that Margaret “lived up to” her part of the MSA. In fact, such a finding would not be relevant to Judge Werner’s determination that the parties financial circumstances had changed. In addition, Judge Werner did not find that Margaret’s current financial need was \$4,000. He stated that the MSA “establishes petitioner’s standard of living at \$4,000 per month.” However, he explained that the MSA established her standard of living only at the time of divorce. After examining Margaret’s 1998 budget, Judge Werner concluded that “\$2,500 ...will meet her needs.”

2. Substantial Change

¶18 We conclude that Judge Werner correctly determined that Margaret's change in circumstances was "substantial" for purposes of modifying maintenance. The purpose of maintenance is to allow a former spouse to maintain a standard of living similar to that enjoyed during the marriage. See *Gerrits*, 167 Wis.2d at 439, 482 N.W.2d at 138. In this case, Margaret's deteriorating health limited her earning capacity to \$1,070 per month. Margaret's health problems were not anticipated in the original maintenance provision, and they compromised her ability to become self-supporting and maintain her standard of living. Under such circumstances, it was appropriate for Judge Werner to re-evaluate the maintenance award.

¶19 William argues that Judge Werner incorrectly concluded that Margaret was unable to become self-supporting. He asserts that the MSA indicates that Margaret can and will become self-supporting. However, Judge Werner was not bound by the MSA once he found a substantial change in circumstances. Whether or not William and Margaret thought she would become self-supporting when they entered into the MSA, she now has health problems that prevent her from doing so. Judge Werner appropriately took Margaret's health problems into consideration.

3. Discretionary Decision To Increase Maintenance

¶20 After having determined that Margaret's health problems constituted a substantial change in circumstances, Judge Werner addressed the level of maintenance. We conclude that he appropriately exercised his discretion by raising William's maintenance payments to \$2,300 per month. Judge Werner found that Margaret's earning capacity was limited to \$1,070 per month. He

explained that were he to simply subtract the amount Margaret can now earn from the \$4,000 maintenance level set at the time of divorce, then William would pay \$2,930 in maintenance. However, Judge Werner examined Margaret's budget and determined that her needs would be met with a total of \$2,500 a month in income, rather than \$4,000. After calculating tax consequences, Judge Werner determined that \$2,300 in maintenance plus Margaret's \$1,070 in earnings would give her sufficient monthly net income to meet a \$2,500 budget. Considering his detailed explanation, Judge Werner's decision to set maintenance at \$2,300 per month was reasonable.

¶21 William's contention that Margaret's failure to live up to her part of the MSA or to follow Judge Rude's admonitions to get a master's degree within two years rendered the increase in maintenance erroneous misconstrues the nature of Judge Werner's decision. Whether Margaret abided by the MSA or by Judge Rude's warnings² was not relevant to Judge Werner's decision to modify maintenance. Margaret's health problems caused a substantial change in her financial circumstances. Under § 767.32(1)(a), STATS., Judge Werner appropriately re-evaluated the maintenance award based on that change.³

² We do not accept William's assertions that Margaret did not abide by the MSA or Judge Rude's admonitions to obtain a master's degree in two years as fact. The record does not appear to support the assertion that Judge Rude "admonished" Margaret to get a master's degree within two years and whether Margaret complied with the MSA is an issue that we need not resolve here.

³ It appears that William takes issue with what he perceives to be contrasting views of the case by one judge and that judge's successor. However:

It is well established that a successor judge in a circuit court proceeding has the authority to modify or reverse decisions, judgements or rulings of a predecessor judge, so long as the predecessor judge was empowered to make such modifications. The rationale supporting this law is that the power to modify a judicial ruling belongs to the court, not to any individual judge.

(continued)

B. Attorney Fees

¶22 William argues that Judge Werner erred by ordering him to contribute \$6,500 to Margaret’s attorney fees. He asserts that it was unfair for Judge Werner to punish him for seeking to terminate maintenance when Judge Rude implied that the maintenance payments would end two years after the 1994 hearing.

¶23 We will not upset a trial court’s decision to award attorney fees under § 767.262, STATS.,⁴ absent an erroneous exercise of discretion. *See Kastelic v. Kastelic*, 119 Wis.2d 280, 290, 350 N.W.2d 714, 719 (Ct. App. 1984). In exercising its discretion, the trial court must make findings regarding “the need of the spouse seeking contribution, the ability to pay of the spouse ordered to pay, and the reasonableness of the total fees.” *Id.*

¶24 We conclude that Judge Werner made the appropriate findings and properly exercised his discretion in making the attorney fees award. He found that Margaret had a need for contribution because she had few liquid assets other than her retirement funds and little income with which to pay her attorneys. He also found that William had significant liquid assets and, thus, the ability to make a

Dietrich v. Elliott, 190 Wis.2d 816, 822, 528 N.W.2d 17, 20 (Ct. App. 1995) (citation omitted). In this case, the judge who granted the judgment of divorce, or any successor, is empowered to modify the maintenance terms based on a substantial change in circumstances. *See Gerrits v. Gerrits*, 167 Wis.2d 429, 437, 482 N.W.2d 134, 138 (Ct. App. 1992).

⁴ Section 767.262, STATS., provides, in part:

(1) The court, after considering the financial resources of both parties, may do the following:

(a) Order either party to pay a reasonable amount for the cost to the other party of maintaining or responding to an action affecting the family and for attorney fees to either party.

contribution. Finally, Judge Werner found that Margaret's \$12,231 in total fees and \$1,320 in costs were reasonable considering the circumstances. He pointed out that Margaret had to defend against William's motion to terminate maintenance, as well as carry the burden on her own motion. Preparation for the motion hearing involved significant discovery, review of medical records, tax calculations, and the use of a vocational consultant. Based on these findings, Judge Werner concluded that William should be responsible for the fees and costs associated with his motion, but not for those associated with Margaret's motion. Thus, Judge Werner ordered William to pay approximately half of Margaret's fees and costs. Considering Judge Werner's findings, such a conclusion was reasonable.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

