

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 2016

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 No. 2015AP2144

Cir. Ct. No. 2012FA215

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

TIMOTHY R. BOYLE,

PETITIONER-RESPONDENT,

V.

SHARI A. BOYLE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County:
NICHOLAS J. BRAZEAU, JR., Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. Shari Boyle appeals an order granting Timothy Boyle's motion to modify maintenance based on an approximate \$69,000

reduction in his annual income. The order modified maintenance from \$12,000 per month to \$10,000 per month and continued to impute \$50,000 in annual income to Shari. In spite of the undisputed drop in Timothy's pay, Shari had sought at the modification hearing to have the circuit court keep maintenance at \$12,000 per month or raise it to \$14,000 per month. She argued that the value of Timothy's employment benefits should be counted as income and that Shari's earning capacity is actually zero. Shari argues on appeal that the order modifying maintenance failed to accomplish the support and fairness objectives of maintenance. We affirm the order.

BACKGROUND

¶2 At the time of the Boyles' divorce, the court determined Timothy's annual income to be \$372,158. At the time of the divorce, Shari, a pharmacist licensed in two states, was determined to have health-related work limitations but to be capable, working part-time, of earning \$50,000 per year. The judgment of divorce was entered January 31, 2014. Shari filed a notice of appeal, but the appeal was dismissed on her motion after she decided not to proceed.

¶3 In 2015 Timothy moved to modify a \$12,000-per-month maintenance order arising from the divorce. Evidence submitted in support of the motion showed that Timothy's employer had reduced his pay for 2015 to \$303,011, following salary cuts in 2014 (when he earned \$328,321) and in 2013 (when he earned \$354,806). Following an evidentiary hearing, the court stated, "In reviewing the statutory factors regarding maintenance, the Court does not believe much has changed since the divorce, except for Timothy Boyle's gross income." On that basis, the court modified maintenance to \$10,000 per month. The court noted that the revised order would give Shari "a slightly higher

percentage of the total income” and concluded that the modified maintenance order is “fair and supports the parties.”

DISCUSSION

¶4 “The court’s power to modify the provisions of the judgment of divorce is not the power to grant a new trial or to retry the issues determined by the original hearing, but only to adapt the decree to some distinct and definite change in the financial circumstances of the parties or children.” *Thies v. MacDonald*, 51 Wis. 2d 296, 302, 187 N.W.2d 186 (1971). “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. STAT. § 767.59(1c)–(1f) (2013-14);¹ *Rosplock v. Rosplock*, 217 Wis. 2d 22, 32, 577 N.W.2d 32 (Ct. App. 1998). Modification of maintenance is committed to the sound discretion of the circuit court. *Gerth v. Gerth*, 159 Wis. 2d 678, 681, 465 N.W.2d 507 (Ct. App. 1990). “[O]nce a substantial change in the parties’ financial circumstances is demonstrated, the circuit court must consider the dual maintenance objectives of support and fairness when modifying a maintenance award.” *Kenyon v. Kenyon*, 2004 WI 147, ¶3, 277 Wis. 2d 47, 690 N.W.2d 251.

¶5 We will sustain a discretionary determination if the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

rational process, reached a conclusion a reasonable judge could reach.” *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987).

¶6 The relevant facts were considered by the circuit court. There is no dispute that Timothy’s income has been reduced to \$303,011 per year. The facts suggested by Shari as a basis for leaving in place or increasing the maintenance were before the circuit court at the time of the divorce. Shari does not allege that Timothy now receives employment benefits in addition to salary that he did not receive at the time of the divorce.² There is no dispute that there has been no change to the work restrictions that the circuit court used as a basis for imputing to Shari the ability to work part-time. Shari continues to have the earning capacity of a pharmacist. Shari’s move to another state occurred before the judgment of divorce, and therefore her residence is not a substantial change in circumstances. Shari’s medical expenses relate to a longstanding condition and were also well documented during the trial, and there is no evidence of a substantial change in that regard.

¶7 The law regarding modification motions is that a court must keep in mind the “dual maintenance objectives of support and fairness,” *Kenyon*, 277 Wis. 2d 47, ¶3, but is not “to retry the issues determined by the original hearing,” and is “only to adapt the decree to some distinct and definite change in the financial circumstances of the parties.” See *Thies*, 51 Wis. 2d at 302. The drop in

² The record reflects that the issue of the value of Timothy’s employment benefits was never raised at trial. The determination of what was included in Timothy’s income was made at the original hearing. A challenge to that determination would have been properly raised on appeal, not in a modification hearing. Shari decided not to proceed with an appeal.

Timothy's compensation was the "distinct and definite change in the financial circumstances of the parties" that was the basis for adapting the decree.

¶8 The process employed by the circuit court was to review the statutory factors regarding maintenance and the tax calculation information. The court then calculated maintenance using the \$303,011 annual income for Timothy and the \$50,000 per year as originally imputed to Shari. The court noted that, with maintenance of \$10,000 per month, the result would be monthly disposable income for Shari of \$9,933 and monthly disposable income for Timothy of \$9,881. It also noted that those sums were sufficient to meet each party's monthly budgets, which the court had reviewed.

¶9 We conclude that the circuit court examined the relevant facts concerning each party's earning capacity, that it considered the dual maintenance objectives of support and fairness, and that its conclusion was one that a reasonable judge could reach based on a demonstrated rational process. We conclude for these reasons that the circuit court did not erroneously exercise its discretion in modifying the maintenance order.

By the Court.—Order affirmed.

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

