

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 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. 2015AP1814

Cir. Ct. No. 2012FA857

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE MARRIAGE OF:
BRAND MACMILLAN WINDMILLER,**

PETITIONER-RESPONDENT,

V.

MARY FAYE WINDMILLER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
GREGORY E. GRAU, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Curley, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. This case concerns post-judgment litigation in a
divorce case. Mary Faye Windmiller appeals from a trial court order that:

(1) reduced the amount of maintenance that her ex-husband, Brand MacMillan Windmiller, is required to pay her; and (2) found her in contempt and imposed remedial sanctions against her.¹ As to the maintenance issue, we conclude that the trial court did not adequately identify the substantial change in circumstances affecting Brand or explain why Mary's loss of employment was not a substantial change in circumstances. The trial court also did not discuss and apply the statutory factors that must be considered before maintenance can be modified. Therefore, as to the maintenance issue only, we reverse the portions of the trial court's order that granted Brand's motion to reduce his maintenance payments and denied Mary's motion to modify the maintenance she receives. We remand the case back to the trial court so that it can further consider and explain whether there has been a substantial change in circumstances with respect to either party and, if so, whether the factors in WIS. STAT. § 767.56(1c) (2013-14) justify modifying maintenance.² We reject Mary's challenge to the remedial contempt portion of the order. Finally, because we affirm in part and reverse in part, we direct that neither party is entitled to costs on appeal.

BACKGROUND

¶2 After contentious divorce proceedings that included both parties filing motions for remedial contempt against each other, the Windmillers reached a settlement in February 2014, when both parties were sixty-two years old. The final divorce hearing took place on February 26, 2014, and the judgment of

¹ While this court generally does not refer to parties by their first names, we will do so in this case because the parties share the same last name.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

divorce was entered on April 25, 2014. The judgment, which incorporated the parties' marital settlement agreement, provided that Brand would pay Mary indefinite maintenance of \$1000 per month. His right to seek maintenance was held open.

¶3 The judgment provided that the parties would immediately place the marital residence on the market for sale. Brand was given the right to occupy the residence until it sold. Mary was given ninety days to retrieve her property from the home. Brand and Mary were ordered to contribute \$2190 and \$1095 each month for the mortgage, respectively. Rather than have the parties exchange payments, Mary was ordered to pay Brand \$95 per month, representing her share of the mortgage payment minus the maintenance she receives.

¶4 At the final divorce hearing, it was acknowledged that Brand suffered from some health problems. The judgment explicitly provided that Mary was "prohibited from having any communication orally, electronically, or in written form about [Brand's] medical condition to any third party." Additional provisions of the judgment will be discussed as necessary below.

¶5 Shortly after the judgment was entered, the parties had difficulty negotiating when and how Mary would retrieve her property from the marital residence. On August 1, 2014, Mary filed a motion seeking the trial court's assistance retrieving her property and arranging a time for her to view the property so that she could sign a real estate condition report to facilitate the sale of the home. A hearing was set for October 13, 2014.

¶6 On September 17, 2014, Brand filed a motion for remedial contempt, alleging that Mary had "intentionally failed to meet her obligations" under the judgment in numerous ways. The parties subsequently had a conference with the

trial court at which they discussed options for Mary to retrieve her property, such as having an independent third party present at the property.³ The hearing on the parties' motions was rescheduled for March 12, 2015.

¶7 On October 7, 2014, Brand filed two additional motions. He sought to reduce the amount of maintenance he had to pay Mary, based on his allegation that he did not have sufficient resources to pay his monthly bills. He also sought sanctions under WIS. STAT. § 802.05, alleging that Mary's August 1, 2014 motion was frivolous.

¶8 In January 2015, Mary's counsel moved to withdraw from the case at Mary's request, based on Mary's inability to pay for her services. Counsel was permitted to withdraw.

¶9 On February 15, 2015, Mary filed two *pro se* motions.⁴ First, she moved to revise the judgment, asserting that her employment ended on February 12, 2015, and that as a result, she was going to have to move in with her mother in North Dakota. Mary asked that Brand be responsible for paying her share of the mortgage and that the payment not count as maintenance to her, as she could not pay the income taxes on that \$1000 per month.⁵ Mary's second motion sought sanctions pursuant to WIS. STAT. § 802.05.

³ The conference was not transcribed, but subsequent testimony indicated that the trial court suggested the use of an independent third party to facilitate the property exchange.

⁴ Mary represented herself in February and March 2015, but she retained counsel for this appeal.

⁵ Mary's motion addressed other topics that are not at issue on appeal, which we will not discuss.

¶10 On March 12, 2015, the trial court conducted a hearing on the six pending motions. Mary and Brand both testified. The parties were permitted to provide written arguments after the hearing. On May 11, 2015, the trial court addressed the motions in an oral decision. It denied Mary's motions and granted two of Brand's motions. Both parties' motions for sanctions under WIS. STAT. § 802.05 were denied. The trial court said that Mary's testimony was "muddled and confused at best" and that she was not a credible witness. Conversely, the trial court found that Brand was a credible witness.

¶11 With respect to the parties' motions concerning maintenance, the trial court said:

Based upon [Brand's] testimony, I find a substantial change of circumstances relative to the issue of maintenance.

I find that the change in circumstances has justified the reduction of maintenance to \$200 per month, effective June 1, 2015. A significant part of the change relates to the circumstances surrounding the marital house. Accordingly, when the house sells, there is the real possibility that the maintenance could increase provided the matter is appropriately brought back before the Court.

Then, as to [Mary's] motion ... [she] advances the proposition that her financial situation has changed to such an extent that it justifies the Court modifying existing orders pertaining to her financial situation; however, she has not convinced the Court to the requisite burden of the issues she brings. Accordingly, all issues she raises that are predicated on a change of her financial circumstances are denied.

¶12 With respect to Brand's motion for remedial contempt, the trial court found that Mary intentionally violated the judgment in seven ways. Those seven violations were outlined in the written order memorializing the trial court's decision:

- (1) Failed to pay \$95.00 per month to [Brand] as required in the Judgment and instead paid \$95.00 per month as additional payments against the mortgage.
- (2) Failed to establish an account for her one-half of the real estate taxes.
- (3) Failed to remove her personal property from the marital residence.
- (4) Failed to reimburse [Brand] for out-of-pocket expenses relative to the upkeep of the marital residence.
- (5) Failed to timely provide proof that she secured necessary life insurance as required.
- (6) Continued to discuss [Brand's] medical condition to other third parties.
- (7) Failed to act in good faith concerning the sale of the former marital residence.

¶13 Based on its contempt findings, the trial court ordered a remedial sanction of \$5000, *see* WIS. STAT. § 785.04(1), but it stayed the sanction and established the following purge conditions:

- (1) Remaining in full compliance with all terms of existing orders in this case for the next 120 days.
- (2) By completing and signing a property condition report for the sale of the marital residence within 21 days.
- (3) By paying in full her one-half of the costs for marital property upkeep within 60 days.
- (4) By establishing an account for purposes of repayment of real estate taxes within 30 days.
- (5) By signing any offer made on the former marital residence that [Brand] deems acceptable.
- (6) By allowing [Brand] to act as the sole agent in all matters relating to the sale of the former residence.

The trial court also ordered Mary to pay \$1500 toward Brand's attorney fees, although it said the payment would be reduced to \$750 if the house sold within

120 days. Finally, the trial court issued an injunction “absolutely prohibiting [Mary] from discussing with or providing any information to any other person about anything whatsoever pertaining to [Brand’s] medical condition at any time unless the Court so authorizes.” This appeal follows.

DISCUSSION

¶14 The trial court’s order addressed many issues, but only two are at issue on appeal. Mary argues first that the trial court erroneously exercised its discretion by reducing the maintenance award rather than increasing it. Mary also argues that the trial court erred when it found her in contempt. We consider each issue in turn.

I. Maintenance.

¶15 Generally, issues involving maintenance are addressed to the trial court’s discretion. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We will sustain a discretionary determination if the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987).

¶16 When a former spouse seeks to modify a maintenance award, the former spouse must first “demonstrate that there has been a substantial change in circumstances warranting the proposed modification.” *Kenyon v. Kenyon*, 2004 WI 147, ¶12, 277 Wis. 2d 47, 690 N.W.2d 251 (citation omitted). If the former spouse does so, the trial court must then determine whether modification of maintenance is appropriate, which the court does after reconsidering the factors used to arrive at the initial maintenance award. *Id.*, ¶13.

¶17 Mary argues that the trial court “failed to identify for the record” what the substantial change of circumstances was in Brand’s case, noting that the trial court “did not make any specific findings of fact.” Mary also asserts that she offered evidence that she needed increased support, such as testimony that after losing her job, she had been forced to relocate to North Dakota to live with her mother because Mary could not afford to pay rent, health insurance, or taxes. In addition, Mary asserts that the trial court erroneously exercised its discretion by failing to consider the statutory factors outlined in WIS. STAT. § 767.56(1c) when deciding whether a modification of maintenance was appropriate.

¶18 In response, Brand argues that he demonstrated that “he had been in financial straits since the finalization of the divorce.” He asserts that his “credible testimony regarding his deficit spending, borrowing, and the burden of the mortgage payment in the face of Mary’s refusal to refinance demonstrated a substantial change in circumstance warranting a reduction in his maintenance obligation.” Brand also suggests that Mary failed to demonstrate a substantial change in circumstances, noting that her “expenses significantly decreased as she moved in with her mother.”

¶19 Although this court gives deference to a trial court’s exercise of discretion, we conclude that the trial court’s findings are insufficient on the issue of maintenance. The trial court did not identify the particular “substantial change in circumstances” for Brand, except to reference expenses related to the home. The fact that Brand may need to borrow money to meet expenses does not automatically mean that his circumstances have changed. Brand suggests the trial court was relying on “Mary’s refusal to refinance,” but the trial court did not discuss that factor in its decision. The trial court also did not adequately explain why Mary had failed to show a change in circumstances. While the trial court said

she was not credible, it was undisputed that Mary lost her job and was forced to move in with her mother to avoid having to pay rent.⁶ At a minimum, a more thorough explanation of why Mary has not shown a substantial change in circumstances, and how Brand has, is necessary for us to review this issue.

¶20 Moreover, after finding a substantial change in Brand's circumstances, the trial court did not cite or discuss the statutory factors outlined in WIS. STAT. § 767.56(1c). Without an analysis of those statutory factors, we cannot adequately consider the trial court's exercise of discretion. *See Hartung*, 102 Wis. 2d at 67 ("It is not enough that the relevant factors upon which discretion could have been based [in making a maintenance decision] may be found obscurely in the record. If the exercise of discretion is to be upheld, it must be demonstrated on the record that those factors were considered in making the discretionary determination.").

¶21 For the foregoing reasons, we reverse the portions of the trial court's order that granted Brand's request to reduce his maintenance payments and denied Mary's motion to modify the maintenance she receives. We remand the case back to the trial court so that it can further consider and explain whether there has been a substantial change in circumstances with respect to either party and, if so, whether the factors in WIS. STAT. § 767.56(1c) justify modifying maintenance.

⁶ Indeed, on appeal Brand relies on those undisputed facts to suggest Mary needs less maintenance because her expenses have decreased.

II. Contempt.

¶22 As noted above, the trial court found Mary in contempt for violating the judgment in seven ways and it imposed a remedial sanction with purge conditions. On appeal, Mary challenges some of the trial court’s findings on the grounds that the judgment of divorce did not specify a timeline or require certain actions. She challenges other findings on the grounds that her “alleged violations” were not “continuing” violations and therefore were not appropriate for remedial sanctions. See *Christensen v. Sullivan*, 2009 WI 87, ¶¶4, 53, 320 Wis. 2d 76, 768 N.W.2d 798 (recognizing that “[r]emedial sanctions are ‘imposed for the purpose of terminating a continuing contempt of court,’” while punitive sanctions are “imposed to punish a past contempt of court” and must be “brought exclusively by ‘[t]he district attorney of a county, the attorney general or a special prosecutor appointed by the court’”) (quoting Wis. Stat. §§ 785.01(2) & (3) and 785.03(1)(b)) (emphasis omitted; second set of brackets in original).

¶23 We have carefully reviewed the record. At a minimum, it supports the trial court’s findings that Mary violated the judgment in several ways. For instance, the judgment required Mary to retrieve certain personal property “within 90 days of the divorce judgment” and to cooperate with the sale of the marital residence. While the parties had difficulty arranging a time and circumstances under which the property exchange could occur, it is undisputed that after meeting with the trial court in October 2014, they hired a retired police officer to serve as a neutral third party who would be present when Mary retrieved her property and inspected the home. The record contains the \$90 invoice for the former officer’s three hours of service on November 1, 2014. The invoice also states that Mary retrieved only “two black, plastic milk crates and one green bag from [the] pallet in [the] garage containing paper items.” Brand’s undisputed testimony was that

Mary did not retrieve most of her property and still had not completed the property condition report.⁷

¶24 In addition, the judgment clearly provided that Mary was “prohibited from having any communication orally, electronically, or in written form about [Brand’s] medical condition to any third party.” At the hearing, Brand produced copies of email exchanges Mary had with numerous relatives about Brand’s health. Those emails were sent in April, May, June, and August of 2014.

¶25 On appeal, Mary asserts that “following the divorce, she did not continue to discuss [Brand’s] health or medical condition.” This assertion is clearly contradicted by the email exchanges she had with her relatives between April and August of 2014. Mary also asserts that “[n]o evidence was presented that [Mary’s discussion of Brand’s medical condition] was either current or continuing.” We are not persuaded. While the last set of emails was sent in August 2014, Mary continued to discuss Brand’s health in her filings with the trial court—both before and after the March 2015 hearing—and at the hearing itself, even after the trial court told her at the hearing that it was “not letting [her] go into these health issues.” The record supports the trial court’s finding that her violation of the judgment was continuing.

¶26 The judgment also required both parties “to maintain the other party as a beneficiary of no less than \$50,000.00 of face value insurance until the marital residence is sold” and “provide the other with proof of accomplishing same.” It

⁷ While Mary ultimately told the trial court at the motion hearing that she would abandon her right to retrieve her personal property, the fact remains that she failed to retrieve it as required by the judgment and it will now fall upon Brand to dispose of it.

was undisputed that as of September 2014, Mary had not yet provided Brand evidence that she had secured the necessary life insurance, although she subsequently provided that information. However, at the motion hearing Brand expressed concern that because the proof of life insurance Mary provided in the fall of 2014 included some coverage through her employer and some coverage from a private provider, she may no longer have full coverage because her employment had ended.⁸

¶27 Mary confirmed the validity of Brand's concern when she told the trial court, "I don't have anything at this point." She asked the trial court to relieve her of the burden of buying life insurance and instead order that upon her death, the \$50,000 would come from her estate. She explained: "For me to go buy \$50,000 worth of whole life insurance ... or term insurance, it's still going to cost me money." Mary's own testimony supports the trial court's finding that she was in violation of the judgment's life insurance provision.

¶28 The record supports the trial court's findings with respect to these examples of Mary's continuing violations of the judgment. The parties debate the trial court's additional findings, but we decline to resolve every one of the facts and issues raised. At a minimum, the facts outlined above, which are supported by the record, justify the trial court's finding that Mary was in contempt and that a remedial sanction was appropriate.⁹ Therefore, we affirm that portion of the order finding Mary in remedial contempt and sanctioning her for that contempt.

⁸ The letter terminating Mary's employment, which she provided in support of her motions, indicated that her life insurance would end on February 28, 2015.

⁹ Mary does not offer a separate argument about the specific sanction and purge conditions chosen by the trial court.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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

