

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2017

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. 2015AP2557

Cir. Ct. No. 2013FA364

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

ESSA SHOUKRY YACOUB,

PETITIONER-APPELLANT,

V.

MARY ELENA YACOUB,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Essa Yacoub appeals a postdivorce order modifying child support and dismissing his motion for modification of spousal

maintenance. He argues the circuit court erroneously exercised its discretion. We disagree and affirm.

BACKGROUND

¶2 Essa and Mary Yacoub were married for eleven years and during their marriage had three children together. Their February 3, 2014 divorce judgment incorporating the terms of the parties' marital settlement agreement awarded the parties joint legal custody and equal shared physical placement of their children.

¶3 Pursuant to the terms of the marital settlement agreement, Essa agreed to pay \$1200 per month in child support and all mutually agreed upon variable expenses incurred for the parties' children. The agreement provided for an annual modification of child support based upon a substantial change in either party's income. Additionally, the agreement required Essa to pay \$600 per month in non-modifiable maintenance for a period of six years. However, maintenance would terminate earlier in the event of Mary's death or remarriage.

¶4 In April 2015, Mary filed a motion to modify child support. Essa subsequently filed a motion to modify child support and maintenance. At the July 6, 2015 hearing on the parties' motions to modify child support and maintenance, the court indicated it would like to proceed by hearing arguments from both parties and then, if necessary, have relevant witnesses testify.¹ Neither party objected to the court proceeding in this manner.

¹ At the hearing, the circuit court also addressed other motions the parties filed subsequent to their motions to modify child support and maintenance. However, those motions and the court's decisions on them are not at issue in this appeal.

¶5 The circuit court first asked the parties to address the requests to modify child support. Mary argued that Essa's increase in income, coupled with the parties' inability to mutually agree upon variable expenses for the children, constituted a substantial change in circumstances supporting an increase in child support. She also requested the court require each party to equally share the mutually agreed upon variable expenses for the children. Although Essa addressed the issue of shared expenses, he did not specifically address the basis for his requested reduction in child support. The parties stipulated that Mary's annual income was \$30,000 for purposes of determining child support.

¶6 The circuit court then addressed Essa's request to modify maintenance. Essa argued that Mary was in a de facto marriage and, under the parties' marital settlement agreement, this constituted "remarriage" entitling him to cease paying maintenance. Mary argued that she was not, in fact, remarried and, as a result, Essa was still required to make maintenance payments pursuant to the parties' agreement. The court did not issue a ruling at the end of the hearing, and took the matter under advisement.²

¶7 On July 13, 2015, Mary wrote to the circuit court indicating that Essa's tax returns and financial disclosure statement established Essa's income at \$11,833 per month and requested that the court calculate child support based on that figure. The next day, Essa wrote to the court conceding that his income was \$11,833 per month. However, he argued that other factors, including his new

² Although the circuit court informed the parties at the beginning of the hearing they could present relevant witness testimony after first presenting their legal arguments, neither party presented formal witness testimony at the hearing.

growing family and two home mortgages, weighed in his favor in regards to recalculating child support.

¶8 On July 17, 2015, the circuit court issued a written order concluding that, with regard to child support, a substantial change in circumstances occurred due to the increase in Essa's income and the inability of the parties to mutually agree upon variable expenses incurred for the children. As a result, the court noted that it intended "to issue a guideline child support award." At the request of the court, the parties submitted briefs on the maintenance and child support issues.

¶9 On November 12, 2015, the circuit court issued another written order. The court modified Essa's child support to \$1,812.51 per month and ordered each party to equally share the mutually agreed upon variable expenses incurred for the children. The court also denied Essa's motion to modify maintenance. Essa now appeals.

DISCUSSION

I. Timeliness of Appeal

¶10 Essa filed his notice of appeal on December 9, 2015—more than ninety days after the circuit court's July order. As a result, Mary argues we lack jurisdiction to consider the issues discussed in that court order. *See* WIS. STAT. § 808.04(1) (2015-16);³ WIS. STAT. RULE 809.10(1)(e). We disagree. The court's July order did not modify child support and explicitly stated the court would issue a future decision regarding modification of maintenance once the parties had a

³ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

chance to submit briefs on the issue. Because the July order did not dispose of all of the substantive issues between the parties, the court's order was not a "final" order. See *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶33 n.10, 299 Wis. 2d 723, 728 N.W.2d 670 (noting that "where substantive issues remain, a document ... cannot constitute a final order or final judgment for purpose of appeal"). Therefore, Mary's argument that we lack jurisdiction to address the issues discussed in the court's July order is without merit.

II. Child Support

¶11 A circuit court may modify a child support order if the court determines there has been a substantial change in circumstances. See WIS. STAT. § 767.59(1f)(a). Whether a change in circumstances is substantial is a question of law we review de novo. *Jalovec v. Jalovec*, 2007 WI 206, ¶22, 305 Wis. 2d 467, 739 N.W.2d 834 (citing *Greene v. Hahn*, 2004 WI App 214, ¶23, 277 Wis. 2d 473, 689 N.W.2d 657). However, "[a] circuit court's findings of fact regarding what changes have occurred in the circumstances of two parties will not be disturbed unless they are clearly erroneous." *Benn v. Benn*, 230 Wis. 2d 301, 307, 602 N.W.2d 65 (Ct. App. 1999) (citation omitted). "Once a substantial change in circumstances has been shown, the trial court must exercise its discretion as to modification of child support." *Jalovec*, 305 Wis. 2d 467, ¶21 (citation omitted). "The court's exercise of discretion will be affirmed where the decision of the court reflects a 'reasoning process dependent on facts in, or reasonable inferences from, the record and a conclusion based on proper legal standards.'" *Abitz v. Abitz*, 155 Wis. 2d 161, 174, 455 N.W.2d 609 (1990) (quoting *Ashraf v. Ashraf*, 134 Wis. 2d 336, 340-41, 397 N.W.2d 128 (Ct. App. 1986)).

¶12 Essa first argues the circuit court erroneously exercised its discretion⁴ by failing to make an explicit determination that a substantial change in circumstances had occurred.⁵ The record belies his assertion. In its July order, the circuit court explicitly determined that a substantial change in circumstances had occurred regarding child support because Essa's income had increased and because of the parties' inability to agree upon variable expenses incurred by the parties' children.

¶13 Essa next argues the circuit court erroneously exercised its discretion by modifying child support notwithstanding the fact that both parties' income had increased, citing *Jantzen v. Jantzen*, 2007 WI App 171, 304 Wis. 2d 449, 737 N.W.2d 5. However, in *Jantzen*, we concluded that based on the specific facts in that case, an increase in both of the parties' income failed to constitute a substantial change in circumstances supporting a modification of *maintenance*. See *id.*, ¶¶14-19, 22. Thus, *Jantzen* does not support Essa's argument regarding child support.

¶14 Essa further argues the circuit court erroneously exercised its discretion by failing to consider the parties' changed financial circumstances. Once again, the record belies his assertion. The parties stipulated that Mary's annual income was \$30,000, and Essa conceded his income was \$11,833 per

⁴ Both parties use the phrase "abuse of discretion" in their respective briefs. We have used the phrase "erroneous exercise of discretion" in place of "abuse of discretion" since 1992. See *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

⁵ We note that some of the parties' legal citations fail to include appropriate pinpoint citations. See WIS. STAT. RULE 809.19(1)(e); SCR 80.02(3)(a)-(c). We admonish the parties' respective counsel that future violations of the Rules of Appellate Procedure may result in sanctions. See WIS. STAT. RULE 809.83(2).

month. The court expressly determined that a substantial change in circumstances had occurred because Essa's income had materially increased and because of the parties' inability to agree upon variable expenses incurred by their children.

¶15 Essa asserts that since the parties' divorce, their children have resided with him more than Mary, even though the parties' divorce judgment granted the parties equal physical placement of the children. Therefore, he contends, the circuit court erroneously exercised its discretion by declining to award him credit under WIS. STAT. § 767.59(1r)(e) for some of the child support payments he made prior to Mary's motion to modify child support. However, both in his motion to modify child support and at the July 6, 2015 hearing, Essa failed to request that the court grant him credit under § 767.59(1r)(e) for past child support payments. Moreover, when Essa finally requested in his letter briefs that the court grant him "back [child] support"—with no reference to § 767.59(1r)(e)—he failed to request an evidentiary hearing to establish that, in fact, the children resided with him more than Mary, and if so, to what extent. Based on these failures, we conclude the circuit court did not erroneously exercise its discretion by declining to award Essa credit for past child support payments under § 767.59(1r)(e).⁶

¶16 Essa next appears to argue that the circuit court erroneously exercised its discretion by failing to take into account his remarriage, expected

⁶ On November 24, 2015, Essa requested that the circuit court award him credit under WIS. STAT. § 767.59(1r)(e) for some of the child support payments he made prior to Mary's motion to modify child support. However, Essa's request for credit under § 767.59(1r)(e) occurred after the court had already modified child support in its November 12, 2015 order. Because there was no action to modify child support currently before the circuit court on November 24, 2015, the court properly declined to award Essa credit under § 767.59(1r)(e). *See* WIS. STAT. § 767.59(1r).

new child, and increased expenses. However, what factors a circuit court deems relevant, and what weight the court affords a factor, in determining whether there has been a substantial change in circumstances supporting a modification of child support is committed to the court's discretion. *See* WIS. STAT. § 767.59(1f)(c)4.; *Molstad v. Molstad*, 193 Wis. 2d 602, 606, 535 N.W.2d 63 (Ct. App. 1995). Additionally, an increase in a child support payer's income is a factor that may constitute a substantial change in circumstances, *see* WIS. STAT. § 767.59(1f)(c)1., and it is undisputed Essa's income had increased. Furthermore, spouses who remarry despite existing child support obligations are generally considered to have assumed the risk of such enterprises, retaining in full the obligation to the children of the first marriage. *See Besaw v. Besaw*, 89 Wis. 2d 509, 279 N.W.2d 192 (1979). Thus, the court did not erroneously exercise its discretion by choosing to rely, in part, on Essa's increased income to modify child support, rather than relying on the factors Essa proffered.

¶17 Finally, Essa argues that pursuant to the parties' marital settlement agreement, the circuit court was precluded from modifying child support because it did not also modify maintenance. The parties' marital settlement agreement states in relevant part: "All of the agreement's terms are intertwined and interconnected and shall not be severed or modified. It is agreed that the terms and provisions are interdependent." The agreement further states: "A modification ... of any of the provisions of this agreement shall be effective only if made in writing and executed with the same formality as this agreement." However, the agreement also explicitly: (1) provided for annual modification of child support based on a substantial change in either party's income; and (2) required Essa to pay \$600 per month in non-modifiable maintenance for a period of six years, unless Mary earlier dies or remarries.

¶18 “The construction of a written contract presents a question of law which we review de novo.” *Rosplock v. Rosplock*, 217 Wis.2d 22, 30, 577 N.W.2d 32 (Ct. App. 1998) (citation omitted). If the contractual terms are clear and unambiguous, as they are here, we interpret the contract without considering extrinsic sources. *See id.* at 31. While the parties’ marital settlement agreement precludes modification of the agreement’s *terms* without first creating a new formal written agreement, the marital settlement agreement explicitly permits annual modification of child support and requires that Essa pay non-modifiable maintenance for a period of six years, unless Mary dies or remarries before that period of time lapses. Therefore, the circuit court was not precluded from modifying child support merely because it did not also modify maintenance.

III. Maintenance

¶19 “In order to seek a modification of a maintenance award, the party seeking the modification must demonstrate that there has been a substantial change in circumstances warranting the proposed modification.” *Cashin v. Cashin*, 2004 WI App 92, ¶41, 273 Wis.2d 754, 681 N.W.2d 255 (citation omitted). “[W]e affirm the trial court’s decision on whether there is a substantial change in circumstances if there is a reasonable basis in the record for the trial court’s decision.” *Id.*, ¶44 (citation omitted).

¶20 Essa argues the circuit court erred when denying his motion for modification of maintenance by failing to fully examine Mary’s financial circumstances, including her cohabitation with another adult. However, the parties’ marital settlement agreement explicitly requires Essa to pay \$600 per month in non-modifiable maintenance for a period of six years, unless Mary earlier dies or remarries. It is uncontested that Mary is alive and has not

remarried. Therefore, the court properly denied Essa's motion for modification of maintenance based upon her cohabitation with another adult.

¶21 However, Essa asserts that "he never knowingly agreed or intended to agree to support Mary through a de facto remarriage or create a legal distinction between remarriage and cohabitation with financial benefit." We are unpersuaded for three reasons. First, the marital settlement agreement provision relating to non-modifiable maintenance does not refer to cohabitation; it only refers to "remarriage." Second, according to the parties' agreement, Essa entered into the agreement of his "own volition with full knowledge and information." Finally, Essa was represented by counsel at the final divorce hearing. We therefore reject Essa's argument that the circuit court erred by refusing to modify maintenance.

By the Court.—Order affirmed.

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

