

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 12, 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. 2015AP2185

Cir. Ct. No. 1995FA360

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

RENEE E. HOEFLER F/K/A RENEE E. DOHERTY,

PETITIONER-APPELLANT,

V.

ROBERT A. DOHERTY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
JAMES J. BOLGERT, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Renee E. Hoefler appeals pro se from a post-divorce order dismissing her motion seeking to modify maintenance and to find

Robert A. Doherty in contempt. Because Renee failed to state a cognizable contempt claim or a substantial change in circumstances warranting a maintenance modification, we affirm.

¶2 Renee and Robert divorced in 1996 and Robert was ordered to pay maintenance in the amount of \$950 per month for five years. The parties' residence was to be sold and Renee was allowed to live there pending the sale. Renee did not vacate the residence, and upon further proceedings, the circuit court reaffirmed its order requiring Renee to vacate the residence and cooperate in its sale. Litigation continued and eventually, the court approved the parties' stipulation providing that Renee could keep the residence. She would pay Robert about \$10,000 in equalization with her parents as guarantors, Robert would quit his interest in the property, and Renee would become responsible for the mortgage payments.

¶3 In 2002, maintenance was extended indefinitely due to Renee's continued inability to support herself. In 2006, the monthly amount was reduced to \$750 in light of Robert's health issues and retirement plans. Renee appealed the order reducing maintenance and we affirmed. *Hoefler v. Doherty*, No. 2006AP2703, unpublished op. and order (WI App June 20, 2007).

¶4 In December 2014, Renee filed a pro se motion requesting in pertinent part an increase in maintenance and that Robert be found in contempt.¹ At the circuit court's direction, the parties provided notarized statements listing

¹ The bulk of the motion's claims related back to the original divorce judgment, requesting, for example, that the court reopen and/or reconsider the original property division and maintenance awards. We will not address these irrelevant and untimely claims further.

their income and expenses. Renee retained counsel, and a hearing on her motion was adjourned to allow counsel to file an amended motion.

¶5 In July 2015, counsel filed an amended motion requesting an increase in Renee’s maintenance, asserting as grounds that the monthly maintenance amount of \$750 had not been modified since September 2006 and that given Renee’s continuing disability, “the past nine (9) years at that monthly maintenance level have caused innumerable financial hardships” which together caused her “already very precarious financial position to deteriorate precipitously.” Asserting the need for “a correct snapshot of [Robert’s] current financial position,” the motion requested that Robert be required to disclose all of his assets.

¶6 The amended motion also sought to have Robert found in contempt for failing to notify Renee and the circuit court of his address and intention to retire early, and for allegedly “mischaracterizing his cardiovascular disorder as a ‘heart attack’” and exaggerating the effects of a back injury during a maintenance modification hearing in September 2006.

¶7 In response, Robert filed a motion to dismiss the contempt motion. The court issued an order concerning the purpose and scope of the upcoming motion hearing, stating it would only hear argument on: (1) Robert’s motion to dismiss; (2) whether Robert must disclose all of his assets; and (3) “whether the motion for maintenance states a claim upon which relief may be granted, i.e. whether or not [Renee’s] claimed change of expenses is sufficient alone to warrant a modification of maintenance.” At the motion hearing, the circuit court dismissed Renee’s claims. Given the dismissal, the circuit court did not order further disclosure of Robert’s assets. Renee appeals.

The circuit court properly declined to find Robert in contempt.

¶8 The circuit court first dismissed Renee’s contempt claim alleging that Robert mischaracterized his health problems at the September 2006 modification hearing. Reasoning that the matter was previously litigated and there was no court order Robert allegedly violated, the circuit court determined there was “no factual basis” for contempt.

¶9 We agree with the circuit court’s determination that Renee’s allegations do not constitute a cognizable contempt claim. The issue of the legitimacy of Robert’s medical issues and whether they justified a reduction in maintenance was litigated and determined years ago and affirmed on appeal. The circuit court properly declined to revisit this issue. Further, as Renee’s counsel conceded at the motion hearing, as to this claim there is no underlying court order that, if violated, would subject Robert to a contempt finding. Renee’s renewed attempt to challenge a 2006 maintenance order under the guise of a contempt motion must fail.²

¶10 Emphasizing that Robert’s maintenance payments “did not stop but have continued to be timely made,” the circuit court also rejected Renee’s claim that Robert contemptuously failed to report that he was retiring to Florida. On appeal, Renee maintains that Robert’s failure to notify her and the circuit court

² Though not well articulated, Renee may be arguing on appeal that Robert committed perjury and was in continuing contempt which affected her maintenance award, thus opening the door for remedial contempt sanction. See *Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85. This argument is unpersuasive. First, in *Frisch*, the circuit court found that the payer spouse fraudulently misrepresented his circumstances. *Id.*, ¶20. In the instant case, the court found Robert’s medical issues existed, a factual determination affirmed on appeal. Second, the payer in *Frisch* was found in contempt, a prerequisite to the monetary sanction. *Id.*, ¶20-23. Here, the circuit court explicitly declined to find Robert in contempt.

clerk of his changed address violated the divorce judgment’s provision requiring (1) both parties to provide notice of any permanent address change, and (2) the payer to provide notice of any change in employer and of any substantial change in the amount of his income such that his ability to pay maintenance is affected.

¶11 Contempt of court refers to the intentional “[d]isobedience, resistance or obstruction of the ... order of a court.” WIS. STAT. § 785.01(1)(b) (2015-16).³ We review the circuit court’s use of its contempt powers for an erroneous exercise of discretion. *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995). “We look for reasons to sustain a discretionary ruling.” *Board of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶19, 355 Wis. 2d 800, 850 N.W.2d 112. Here, the circuit court reasonably determined that given Robert’s continued payments, there was no material or willful violation of its 1996 divorce judgment sufficient to warrant a finding of contempt.

The circuit court properly dismissed Renee’s motion to modify maintenance.

¶12 The circuit court dismissed Renee’s motion to modify maintenance for failure to state a claim. The court determined that Renee’s increased expenses were attributable to her continuing to live in a house she could not afford and did not constitute a substantial change in circumstances.

Here is why: Maintenance was set 20 years ago. It was set for a five-year term or some limited term to supplement [Renee’s] income while she got back on her feet and worked. It was extended because she hadn’t or couldn’t do that for a variety of reasons.

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

It has been modified based on circumstances to [Robert], including his health concerns and his retirement, which upset [Renee], and understandably so. I suppose she was afraid he was going to move and not continue paying, but he has continued paying.

Her increased expenses are a result of her living in a house that she can't afford to live in, and I think that has been clear to all of us for a while. That is certainly her choice, but it's not a reason to modify the maintenance. The fact of the matter is, in terms of fairness, maintenance has continued for 20 years as a supplement to her—first, her ability to earn and then her disability, and that will continue.

¶13 “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. The burden of establishing a substantial change in circumstances lies with the party seeking modification. *See Murray v. Murray*, 231 Wis. 2d 71, 77, 604 N.W.2d 912 (Ct. App. 1999).

¶14 We conclude that the circuit court properly determined that Renee's motion failed to set forth a substantial change in circumstances justifying a modification of maintenance. As such, it properly dismissed the motion without further proceedings, evidentiary or otherwise. Renee's pro se affidavit averred that her original maintenance award was insufficient to cover all her expenses and caused her to fall behind on her bills. Her statement of income and expenses outlined costs related to the real estate that was awarded to her in the divorce at her insistence. Her other large expenses stemmed from credit card indebtedness accumulated since the divorce. A payer should not be required to finance imprudent financial decisions made by the recipient spouse. *Id.* at 81-83 (finding no substantial change in circumstances where the recipient spouse's own financial

decisions produced her economic difficulties). Renee’s submission to the circuit court supports its determination that her “increased living expenses are a result of her living in a house she can’t afford to live in,” a notion brought up at other points in the divorce and postjudgment proceedings. Property division choices Renee made in the original divorce should not drive an increase in her maintenance award.

¶15 Renee contends that the circuit court erred by failing to consider the statutory maintenance factors and dual objectives of support and fairness. The flaw in Renee’s argument is that the circuit court determined she failed to allege the prerequisite substantial change in circumstances. *See Kenyon v. Kenyon*, 2004 WI 147, ¶39, 277 Wis. 2d 47, 690 N.W.2d 251 (“[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.”). Renee failed to allege sufficient facts constituting a substantial change in circumstances; the circuit court properly dismissed her motion.

By the Court.—Order affirmed.

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

