COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1916 **Cir. Ct. No. 2011FA55**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

MICHAEL J. KLEIN,

PETITIONER-RESPONDENT,

V.

CLAUDINE LYNN KLEIN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

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

¶1 PER CURIAM. In this postdivorce judgment proceeding, Claudine Klein appeals an order denying her motion for additional placement with her children and an increase in maintenance. We affirm the order.

¶2 Claudine and Michael J. Klein divorced in 2012.[1] At divorce, the circuit court ordered Michael to pay Claudine $3500 monthly maintenance and awarded sole legal custody and primary physical placement of the minor daughter and son, then fourteen and ten, respectively, to Michael and supervised placement to Claudine.

¶3 The postdivorce period has been peppered with motions and hearings, several dealing with Claudine's continuing efforts to have placement and maintenance modified. Her most recent motion on these matters was filed in February 2015 when she requested, among other things, an award of additional, and unsupervised, placement and an increase in maintenance.

¶4 The parties agreed at an October 26, 2015 hearing that it was in the children's best interests to modify the placement schedule. An order signed December 3, 2015, reflected that agreement. Evidentiary hearings on placement were held on January 26 and May 17, 2016.

¶5 On June 29, 2016, an evidentiary hearing was held in regard to maintenance, after which the court ruled on both maintenance and placement. In the order entered August 18, 2016, the court stated that "[f]or the reasons fully

[1] The argument portions of Claudine's briefs refer to herself as "Appellant" and Michael as "Appellee." We remind Claudine that appellate briefs are to refer to the parties by name, not party designation. WIS. STAT. RULE 809.19(1)(i) (2015-16).

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

stated on the record," there was no substantial change in circumstances to warrant a modification of the existing placement schedule set forth in the December 3 order or any need for Claudine's placement periods to be supervised; it was neither in the children's best interests to modify the physical placement schedule nor in the son's best interest to expand physical placement with Claudine; and, despite a substantial increase in Michael's earnings, Claudine's request for increased maintenance was denied.

¶6 Claudine takes her appeal from the above-described August 18 order. She first challenges placement, contending the circuit court erroneously exercised its discretion by failing to act in the son's best interest by not awarding him "meaningful time" with her and by finding the son unable to psychologically cope with her proposed modification-of-visitation request.[2]

Placement

¶7 WISCONSIN STAT. § 767.451(1)(b), which governs revision of physical placement after the initial two-year period following a final divorce judgment, provides, in relevant part:

> **(1)** SUBSTANTIAL MODIFICATIONS.
>
> ….
>
> (b) *After 2-year period.* 1…. [A] court may modify ... an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:

[2] The children's guardian ad litem (GAL) advised this court that she did not intend to file a brief, as Michael's brief adequately covered any response she would have made on the children's behalf.

> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of ... the last order substantially affecting physical placement.

¶8 Whether a party seeking to modify an existing physical placement order has established a substantial change in circumstances is a matter of law we review de novo. ***Pero v. Lucas***, 2006 WI App 112, ¶23, 293 Wis. 2d 781, 718 N.W.2d 184. We must "give weight to a [circuit] court's decision," however, as it is "heavily dependent upon an interpretation and analysis of underlying facts." ***Id.*** (citations omitted). As to the best-interest determination, "we consider whether the [circuit] court has properly considered and weighed the appropriate factors to determine what is in the [children]'s best interest[s], using the erroneous exercise of discretion standard." ***Id.***

¶9 The record is silent as to what informed the circuit court's decision. The partial January 26, 2016 hearing transcript contains only the testimony of the daughter's therapist, who testified that placement recommendations were beyond the scope of her training. We have no transcript of the May 17, 2016 placement hearing, at which five witnesses testified. As our scope of review necessarily is confined to the record before us, when an appeal is brought on an absent or incomplete transcript, we must assume that "every fact essential to sustain the [circuit court's] exercise of discretion is supported by the record." ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). As the incomplete record renders us unable to discern the underpinnings of the circuit court's decision as to placement, Claudine's challenge necessarily fails.

Maintenance

¶10 Claudine also contends the circuit court erroneously exercised its discretion by failing to grant her request for increased maintenance, given the increase in Michael's income, and by failing to examine whether her need for additional maintenance was warranted because she "is studying for the bar exam, is looking for legal jobs, and intends to practice Human Rights Law."[3]

¶11 A request for a change in a maintenance award rests within the circuit court's discretion. ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996), *abrogated on other grounds by* ***Kruckenberg v. Harvey***, 2005 WI 43, 279 Wis. 2d 520, 694 N.W.2d 879. "A circuit court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record." ***King v. King***, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999). A modification can be made "only upon a positive showing" of a substantial change in the parties' financial circumstances, a burden borne by the party seeking modification. ***Haeuser***, 200 Wis. 2d at 764. "We will uphold a [circuit] court's findings regarding a change in circumstances unless they are clearly erroneous." ***Murray v. Murray***, 231 Wis. 2d 71, 77, 604 N.W.2d 912 (Ct. App. 1999). Whether the change is substantial is a question of law that we review de novo, but we give weight to the court's decision because the legal determination is intertwined with the court's factual findings. ***Id.*** "The correct test regarding modification of maintenance should consider fairness to *both* of the

[3] Claudine testified only that she is studying for the LSAT, the Law School Admission Test, a precursor to applying to law school, and "would like" to work as a legal assistant and to pursue further education to become a human rights lawyer.

parties under all of the circumstances." ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶32, 269 Wis. 2d 598, 676 N.W.2d 452 (emphasis added).

¶12 When evaluating a substantial change in the parties' financial circumstances during a maintenance modification proceeding, "the appropriate comparison is to the set of facts that existed at the time of the most recent maintenance order, whether that is the original divorce judgment or a previous modification order." ***Kenyon v. Kenyon***, 2004 WI 147, ¶27, 277 Wis. 2d 47, 690 N.W.2d 251. The circuit court "should compare the facts regarding the parties' current financial status with those surrounding the previous order in determining whether the movant has established the requisite substantial change in circumstances so as to warrant modification of the maintenance award." ***Id.***, ¶2.

¶13 The parties read ***Kenyon*** differently as it relates to what date should be used as a point of comparison. Claudine insists Michael's current financial situation should be compared to what it was in May 2012 when the court set the original maintenance payment. Michael lobbies for a comparison with his financial picture either in January 2014 when the court entertained, but denied, Claudine's request for an upward adjustment or in February 2014 when the order on that decision was entered. He argues that an order from a modification hearing supplants the original order, regardless of whether a modification was made. Claudine contends the original date holds when, as here, the court reconsiders but does not modify the original order.

¶14 We leave that dispute for another time. The ***Kenyon*** rule does not control our decision because Claudine did not sufficiently support her contention that she is entitled to maintenance above the currently ordered $3500.

¶15 The court found that: at the time of the divorce, Michael was made responsible for both parties' debts, some a result of Claudine's actions and poor spending decisions, and since the divorce has been "solely and exclusively responsible" for the children's expenses, including private schooling, counselors, and most of their GAL fees; Claudine refused to submit evidence or otherwise cooperate throughout the proceedings, dragging them out and leading to significant attorneys' fees and the appointment of a GAL for her; Claudine wasted her income and the "significant" assets awarded to her in the divorce, and did not avail herself of the "significant period of time" the court allowed her to find employment; had she diligently sought employment, her current financial position would be far better; despite Michael's recently increased income, Claudine's $3500-a-month maintenance is not "an insignificant amount" when she "d[oes]n't have to really walk out the door of [her] apartment"; and Michael had to make up the deficit from the marital residence being sold at a loss due to the "significant damage" done to it after he moved out. The court thus concluded that the current indefinite maintenance sufficiently provides Claudine with a standard of living reasonably comparable to that enjoyed during the marriage.

¶16 These findings are not clearly erroneous. We agree that Claudine failed to make a positive showing that there was a substantial change in the parties' financial situation. We also agree that the current maintenance award provides adequate support and is fair to both parties under all of the circumstances.

By the Court.—Order affirmed.

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