

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 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. 2017AP1382-FT

Cir. Ct. No. 2013FA23

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

RANDE L. PURDY,

PETITIONER-APPELLANT,

V.

LISA J. PURDY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Rande Purdy appeals an order denying his post-divorce motion to terminate or reduce maintenance to his former wife, Lisa Purdy.¹ Rande argues the circuit court erred by finding Rande had not met his burden of establishing a substantial change in the parties' circumstances to support modification of his maintenance obligation. We reject Rande's argument and affirm the order.

BACKGROUND

¶2 Rande and Lisa divorced in July 2014, after thirty-four years of marriage. At the time of the divorce, Rande was Director of Sales at Saratoga Liquor Company, Inc., earning a gross yearly income of \$80,362.32. Lisa, who suffers from degenerative osteoarthritis, was a licensed practical nurse at Mayo Clinic and earned a gross yearly income of \$36,608.04. The divorce judgment, incorporating the parties' Marital Settlement Agreement, awarded Lisa \$1,000 monthly maintenance to "continue until further order of the Court" or until either party's death or Lisa's remarriage. In July 2016, Rande moved to terminate or reduce maintenance. The motion was denied after a hearing, and this appeal follows.

DISCUSSION

¶3 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.*

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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 we review de novo, but we give weight to the circuit court’s decision because the legal determination is intertwined with the circuit court’s factual findings. *Id.* “The correct test regarding modification of maintenance should consider fairness to both of the parties under all of the circumstances.” *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶32, 269 Wis. 2d 598, 676 N.W.2d 452.

¶4 When determining whether there has been a substantial change in the parties’ financial circumstances, “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.

¶5 In his motion to terminate or reduce maintenance, Rande stated that, after the divorce, he was demoted from Director of Sales at Saratoga Liquor to “chain manager,” which caused a slight pay cut. Rande added that based on staff

changes within the family-owned business, he questioned the stability of his employment at Saratoga Liquor. Rande also stated that the new position required significant travel and increased hours, both of which had a negative impact on his health. Rande consequently resigned from his employment at Saratoga Liquor and began working as a “cook/maintenance/manager” at Cheers Bar & Grill with a gross annual income of \$52,000—a reduction of \$28,362.32 since the divorce. Conversely, Rande stated that Lisa was now earning a gross annual income of \$47,242.42—an increase of \$10,634.38 since the divorce.

¶6 At a hearing on Rande’s motion, Lisa testified that although her yearly income had increased, her hourly income had actually decreased by \$2.50 per hour, causing her to work more hours “to earn money to live.”

¶7 Rande testified that Cheers Bar & Grill is owned by his fiancée, Judy Smith. Rande further testified that he and Smith have a 75% and 25% interest, respectively, in RJ Tagalong, LLC, which owns the property in which Cheers Bar & Grill is located. Rande explained that payments RJ Tagalong, LLC owes pursuant to a land contract are made with rent from Cheers Bar & Grill, resulting in “a wash.” Rande testified that “at this point,” he receives no income from his interest in the real estate.

¶8 In its decision denying Rande’s motion, the circuit court concluded there was no evidence as to Rande’s “true income.” Rande disagrees, arguing the circuit court “simply ignored the undisputed facts and testimony” that Rande received no income from his ownership interest in the LLC. It is the province of the fact-finder, however, to determine not only the credibility of witnesses and all disputed facts, “but all conflicting inferences reasonably drawn from undisputed or admitted facts.” *O’Brien v. Chicago & N.W. Ry. Co.*, 92 Wis. 340, 344, 66 N.W.

363 (1896). Thus, even when only a single witness testifies, a circuit court may choose to believe some assertions of the witness and disbelieve others. *Nabbefeld v. State*, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978). This choice is especially true when the witness is the sole possessor of the relevant facts. See *Ring v. State*, 192 Wis. 391, 394, 212 N.W. 662 (1927).

¶9 Here, the circuit court noted the “interesting” circumstance of Rande’s fiancée owning the corporation for which he was employed and setting his salary, while Rande, in effect, owned the real estate. The court added: “From an accounting perspective, if you separate the fact that in this particular instance [Rande] owns the real property, his companion owns the corporation, [Rande] is the landlord and the companion is the tenant.” Because Rande had a 75% interest in the LLC that owned the real estate housing Cheers Bar & Grill, Rande presumably controlled the amount of rent to charge. Furthermore, as the court noted, rent is income to Rande and there was no evidence presented about the rent, the debt, and the expenses of the LLC. Therefore, as the court emphasized, there was no testimony or evidence as to the amount of rental income Rande’s LLC earned from the bar. To the extent Rande contends he received no “income” from the LLC, rent received by Cheers Bar & Grill is considered income to the landlord, even if the rent was used only to make payments on the land contract. In the absence of evidence regarding Rande’s “true income,” the court properly concluded Rande failed to establish a substantial change in his financial circumstances.

¶10 Rande alternatively argues he established a substantial change in Lisa’s financial circumstances, highlighting the approximately \$10,000 increase in Lisa’s yearly income since the divorce. As noted above, however, Lisa’s hourly income actually decreased. The fact that Lisa earned additional income by

working more hours—necessitated by the decrease in her hourly wage—does not establish a substantial change in her financial circumstances warranting a modification to maintenance.

¶11 Ultimately, the circuit court reasonably concluded that Rande failed to make a positive showing that there was a substantial change in the parties' financial situation to justify either terminating or reducing the maintenance award.

By the Court.—Order affirmed.

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

