

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2002

Cornelia G. Clark
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. 02-0385-FT
STATE OF WISCONSIN**

Cir. Ct. No. 95-FA-1959

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

WILLIAM M. JACOBY,

PETITIONER-APPELLANT,

V.

JO ELLEN JACOBY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MORIA KRUEGER, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM.¹ William Jacoby appeals from a post-divorce order that replaced his limited term family support obligation with a maintenance award of indefinite duration. He claims that the trial court erred by failing to find that a substantial change of circumstances had occurred, and erroneously exercised its discretion by relying solely on the length of the marriage and the disparity in the parties' income as a basis for making the award. We affirm because we conclude that the record does demonstrate a substantial change of circumstances and shows that the trial court properly considered all of the relevant factors.

BACKGROUND

¶2 When William and Jo Ellen (Jody) Jacoby divorced in 1997, they stipulated in relevant part:

FAMILY SUPPORT IN LIEU OF CHILD SUPPORT
AND MAINTENANCE (WITH NO MAINTENANCE
WAIVER)

- A. The petitioner shall pay the amount of \$1,622.00 per month toward family support of the respondent and the minor children.
- B. The family support payments shall continue until the death or remarriage of the payee spouse. If the family support is terminated while the payee spouse still has minor children in his/her custody, then the court shall make a determination of the award of child support and/or maintenance. The payments shall be limited term and they shall end on the 60th [month²] following the date of final trial herein.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000). In addition, all references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² The parties agreed on the record that the stipulation was supposed to be for sixty months, rather than sixty payments, as initially written.

William testified at the divorce hearing that he had agreed to a five-year term of family support because his vocational expert had concluded that Jody could reach a level of competence for a better job by that time. William also acknowledged on cross-examination his understanding that, under the agreement, Jody would be able to come back to court before the expiration of the sixty months to ask for an extension of maintenance.

¶3 In 1999, William successfully moved to reduce the amount of the family support payment after the parties' oldest child reached the age of majority.

¶4 In 2001, Jody moved to modify the divorce judgment on the grounds that the family support was scheduled to end and she would not be able to meet her household needs without continued support. The trial court concluded that the issue of maintenance should be determined de novo because the court had not specifically considered maintenance at the time of the divorce due to the parties' stipulation on family support. After a hearing, the trial court set maintenance at \$750 per month for an indefinite period.

STANDARD OF REVIEW

¶5 We will uphold factual findings regarding a postdivorce 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 a particular change of circumstances is "substantial" enough to warrant modification of the divorce judgment is a question of law that we review de novo, although we may give weight to the trial court's determination since it may be intertwined with factual findings. *Id.* Once a threshold substantial change of circumstances has been established, we will not disturb the trial court's ultimate exercise of discretion to modify the amount or duration of maintenance so long as the record shows the

trial court rationally applied the applicable legal standards to the facts of record. *Id.* at 77-78.

ANALYSIS

Substantial Change of Circumstances.

¶6 The trial court has the authority to modify a limited-term maintenance provision in a divorce judgment, even if it was based upon a stipulation, so long as the motion to modify is filed prior to the scheduled termination of the maintenance award and the moving party demonstrates a “substantial or material change in circumstances” which would render it unjust or inequitable to hold the party to the original terms of the judgment. *Fobes v. Fobes*, 124 Wis. 2d 72, 80-81, 368 N.W.2d 643 (1985). We agree with William that the same test should apply to the modification of a family support order. Therefore, the trial court should have required a showing of a substantial change in circumstances prior to replacing the family support with a maintenance award.

¶7 Even if the trial court has relied upon the wrong rationale, however, we may affirm its decision if we can determine independently that the facts of record provide a basis for it. *State v. Gray*, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999). Here, the trial court specifically commented that “I think we were all expecting [at the time of the initial divorce judgment] ... that there would be some advancement, some title change in Ms. Jacoby’s work in the next five years.” The trial court went on to note that, in retrospect, the presumption that Jody could become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage was “a flawed premise” that should be corrected. It found that she was already at her earning capacity and “doing her best.”

¶8 In *Fobes*, 124 Wis. 2d at 81-82, we held that a party's failure, despite diligent effort, to become self-supporting as anticipated at the time of the divorce constituted a substantial change of circumstances. We see no material distinction from *Fobes* here, and conclude that the trial court's factual findings regarding the non-occurrence of an event upon which the trial court had premised its approval of the original stipulation constituted a substantial change of circumstances sufficient to allow it to modify the support award.

Amount and Duration of Maintenance.

¶9 When modifying maintenance, the trial court should consider the same factors applicable to the initial determination, including the length of the marriage, the age and health of the parties, the property division, the parties' respective educational levels and earning capacities, the contributions of one party to the education or earning power of the other, tax consequences, and the standard of living enjoyed during the marriage. See *Dowd v. Dowd*, 167 Wis. 2d 409, 416, 481 N.W.2d 504 (Ct. App. 1992); WIS. STAT. § 767.26. These factors

are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective).

LaRocque v. LaRocque, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736, 740 (1987).

¶10 William argues that the trial court improperly awarded indefinite maintenance when the only factors favoring such an award were the length of the marriage and the disparity of the parties' incomes. He goes on to explain why he believes the fairness objective does not require a maintenance award since the trial

court acknowledged that Jody's income was probably the same as it would have been without the marriage.

¶11 We are not persuaded by William's arguments. First, our review of the record shows that the trial court discussed each of the relevant factors. It took into account the fact that Jody's earning capacity did not appear to have been substantially affected by her absence from the job market during the marriage when deciding *not* to equalize the party's incomes, despite the length of the marriage. However, it concluded that, in addition to the disparity of the parties' incomes, Jody's health problems and her inability to be self-supporting at a standard reasonably comparable to that enjoyed during the marriage warranted an indefinite maintenance award. The award was justified by fairness considerations, and was appropriate to achieve the support objective. In sum, the weight given to the various maintenance factors was properly within the trial court's discretion. *Metz v. Keener*, 215 Wis.2d 626, 640, 573 N.W.2d 865 (Ct. App. 1997).

By the Court.—Order affirmed.

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

