

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 22, 2012

A. John Voelker
Acting 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. 2011AP600

Cir. Ct. No. 2004FA382

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DENISE J. IMIG,

PETITIONER-RESPONDENT,

V.

GARY C. IMIG,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
L. EDWARD STENGEL, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Reilly, J. and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Gary Imig appeals from an order that denied his motion to reduce maintenance and granted Denise Imig's motion to increase

maintenance. Gary argues on appeal that the circuit court erred in finding that Denise's current living expenses did not decrease, despite her cohabitation arrangement with another person, and in concluding that her expenses were consistent with the standard of living she enjoyed during her marriage to Gary. Gary also argues that it was error for the circuit court to conclude that his increase in income was a substantial change of circumstances that warranted an increased maintenance obligation. We reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 Denise and Gary Imig were divorced in January 2006 and stipulated to the terms of maintenance. Pursuant to the judgment of divorce, Gary was required to pay to Denise \$3800 in maintenance monthly, plus 42.5% of his commissions and bonuses. Gary's annual income has increased since the time of divorce by approximately \$31,600.

¶3 In 2007, Denise began cohabitating with her partner, Jeffrey Roberts, and purchased a home with him in 2008. Denise and Jeffrey have an unwritten expense sharing agreement in which Jeffrey pays the mortgage and real estate taxes and Denise pays for household expenses. Drew Imig, the younger of Denise and Gary's two adult sons, lives with Denise and Jeffrey.

¶4 In March 2010, Gary filed a postjudgment motion to modify maintenance, arguing that Denise's cohabitation arrangement constituted a substantial change of circumstances that warranted a reduction of his maintenance obligations. Denise moved for an increase in maintenance.

¶5 After an evidentiary hearing, the circuit court concluded in an oral ruling that both parties had experienced substantial changes in circumstances. The court stated that Gary's substantial change was attributable to his increase in income, and that Denise's was attributable to her cohabitation arrangement. The court determined that Denise's expenses were approximately consistent with the standard of living she enjoyed during her marriage to Gary, but went on to conclude that her cohabitation with Jeffrey, although it was a substantial change of circumstances, did not decrease her living expenses because her expenses had gone up since the divorce. The court therefore entered an order increasing Denise's monthly maintenance award to \$4500, plus 42.5% of Gary's commissions and bonuses. Gary now appeals.

STANDARD OF REVIEW

¶6 We review a circuit court's decision to modify maintenance under the erroneous exercise of discretion standard. *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶17, 269 Wis. 2d 598, 676 N.W.2d 452. A circuit court erroneously exercises its discretion when it fails to consider relevant factors, bases its award on factual errors, makes an error of law, or grants an excessive or inadequate award. *Id.*, ¶18.

¶7 Evaluating whether the parties have experienced a substantial change of circumstances presents a mixed question of fact and law. *Jantzen v. Jantzen*, 2007 WI App 171, ¶7, 304 Wis. 2d 449, 737 N.W.2d 5 (citation omitted). The circuit court's findings of fact regarding the circumstances of the parties before and after the divorce and whether a change has occurred will not be disturbed unless clearly erroneous. *Id.* Whether the change is substantial is a question of law that we review de novo. *Id.*

DISCUSSION

¶8 In order to modify a maintenance award, the moving party must demonstrate that there has been a substantial change of circumstances warranting the proposed modification. *Id.*, ¶7. In deciding whether to modify a maintenance award, the circuit court applies the same factors in WIS. STAT. § 767.56 (2009-10)¹ that govern the original determination of maintenance. *Poindexter v. Poindexter*, 142 Wis. 2d 517, 531, 419 N.W.2d 223 (1988).² When determining whether the parties have experienced a substantial change of circumstances, the circuit court should compare the facts regarding the parties' current financial status with those surrounding the previous order. *Kenyon v. Kenyon*, 2004 WI 147, ¶38, 277 Wis. 2d 47, 690 N.W.2d 251.

¶9 Gary argues that the circuit court erred in finding that Denise's current living expenses did not decrease despite her cohabitation arrangement, and that the court improperly concluded that her expenses were consistent with the standard of living enjoyed during the parties' marriage. Denise responds that an increase in maintenance was warranted because, although certain expenses decreased, other expenses increased, such that her total monthly expenditures increased from \$5226 in 2006 to \$6383.97 in 2010. We conclude that the circuit court's finding that Denise's monthly expenses had not decreased was clearly erroneous because, as discussed below, it took into consideration current expenses

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise referenced.

² WISCONSIN STAT. ch. 767 was substantially renumbered and revised by 2005 Wis. Act 443. *Poindexter v. Poindexter*, 142 Wis. 2d 517, 531, 419 N.W.2d 223 (1988), cites WIS. STAT. § 767.26 (1987-88), which was later replaced by WIS. STAT. § 767.56.

that do not relate to the standard of living enjoyed by the parties during their marriage.

¶10 Gary asserts that a comparison of Denise's 2006 financial disclosure statement with the one submitted in September 2010 reveals that several of her expenses decreased. He points out that Denise's living expenses for rent or mortgage payments, real estate taxes, real estate insurance, home maintenance, food and household supplies, and utilities and telephone decreased from a combined total of approximately \$2240 to \$1,632.50 per month. According to Gary, the overall increase in Denise's monthly expenditures is attributable to types of payments that were not part of the parties' standard of living during their marriage. Specifically, he points to Denise's monthly installment payments of \$933.54 on accumulated credit card debt and her payment of \$458 per month in educational expenses for their adult son, Drew. Gary also argues that Denise's 2010 financial disclosure statement included unfounded medical and dental expenses.

¶11 Gary contends that, by including her credit card installment payments in her monthly expense budget, Denise engaged in impermissible "double counting." He asserts that Denise's credit cards were more than likely used to pay for items that were already listed elsewhere in her budget. He points out that her financial disclosure statements show that the amount of her monthly installment payments increased from approximately \$450 in 2006 to \$933.54 in 2010. Gary also notes that he testified at the motion hearing that, during the marriage, he usually paid off credit card balances in full each month.

¶12 Gary does not cite any legal authority or evidence in the record to support his assertion that Denise's credit card payments are a form of double

counting. He merely states that \$400 to \$500 of Denise's monthly payments are attributable to interest, but fails to elaborate as to what the initial charges were for and why they should not have been considered by the court. The double counting argument is not sufficiently developed for us to resolve it on appeal, but we recognize that competing inferences could be made as to the credit card payments, such that the circuit court may decide to revisit the issue on remand. A comparison of Denise's 2010 and 2006 financial statements shows that the amount of her monthly credit card payments has more than doubled. An inference could be made that these payments are inconsistent with the standard of living enjoyed during the marriage. Or, as Denise argues, an inference could be made that the increase in credit card debt was a result of her having to bridge the gap between her monthly budget and her monthly income, which consists of social security and maintenance payments. Without further information about the underlying charges, we decline to decide the issue of which inference is more reasonable, and leave any additional fact-finding regarding the credit card payments to the sound discretion of the circuit court.

¶13 Regarding Drew's educational expenses, Gary argues that it was improper for the court to consider the educational expenses of an adult child for purposes of modifying maintenance. He notes that Denise's 2006 financial disclosure statement listed school expenditures of only \$25 per month, as opposed to the \$458 she now pays. He also notes that the 2006 judgment of divorce held child support open in acknowledgement of the fact that Drew would soon graduate from high school. Finally, Gary argues that he has given Drew assistance with his college tuition, and testified to that fact at the motion hearing. Gary asserts that he did not claim his tuition assistance to Drew as an expense on his financial

disclosure statement to be considered in the court's determination of maintenance, like Denise did.

¶14 Turning to the educational expenses, we agree with Gary that Drew's college expenses should not have been considered by the circuit court for purposes of modifying maintenance. The Wisconsin Supreme Court has emphasized that educational expenses of an adult child, worthwhile as they may be, should rarely be considered by the modifying court when examining a party's budget for maintenance purposes, and that such expenses can be justified only in unusual or extraordinary circumstances. *Rohde-Giovanni*, 269 Wis. 2d 598, ¶¶2, 38.

¶15 The circuit court stated that this case involved unique circumstances that made it difficult to balance the interests of the parties. However, we do not view the circumstances of this case as unusual or extraordinary, and conclude that the circuit court erroneously exercised its discretion when it took the college expenses of an adult child into consideration for maintenance purposes.

¶16 Gary also argues that the circuit court lacked any foundation for its finding that Denise's expenditures for medical issues had increased. Gary points to Denise's testimony that she had not yet received the dental work that she listed on her 2006 and 2010 financial disclosure statements. He also asserts that Denise's medical and health insurance expenses are unsupported estimates.

¶17 In addressing the medical and dental issues, it is significant to note that Denise had health and dental insurance through Gary during their marriage. Denise testified at the motion hearing that she is missing teeth, has a broken crown, and is in need of a root canal. She testified that, in the past five years, she has not had enough money to have her dental work completed, but that she made

an appointment and negotiated a payment plan with her dentist, on which she based the dental expense in her 2010 disclosure statement. Regarding her medical and health insurance expenses, Denise testified that she does not have health insurance. She currently pays for doctor visits, lab tests, and prescriptions on her own. She testified that she needs to obtain health insurance, and has received quotes to do so, but that it has been difficult to obtain insurance because she has a disability. Based upon the evidence in the record, we cannot conclude that the circuit court had no foundation for its finding that Denise's expenses related to her medical issues had increased. Implicit in the circuit court's finding that Denise's medical expenses had increased is a credibility determination as to Denise's testimony, which we decline to disturb on appeal. *See* WIS. STAT. § 805.17(2).

¶18 Gary further argues that the circuit court erroneously concluded that his increase in income was a substantial change of circumstances that automatically justified an increase in maintenance. The record supports the circuit court's finding that Gary's income increased.

¶19 Having concluded that the circuit court erred in the determination that Denise's expenses had not decreased, we remand to the circuit court to address whether modification is appropriate. In doing so, we note that the court's oral ruling makes clear that Gary's increased income was not the only factor it relied upon in increasing maintenance. The court also took other factors into consideration, such as Denise's needs and expenses. Because the circuit court did not order an automatic increase due to Gary's change in income, we need not decide whether such an automatic increase would have been warranted. We leave to the circuit court's discretion the question of whether Gary's increase in income, when considered along with the proper factors under WIS. STAT. § 767.56, warrants modification of maintenance on remand. We reverse and remand the

cause to the circuit court to modify its findings of fact consistent with this opinion, and to determine, in the sound exercise of its discretion, whether the parties' competing changes in circumstances warrant modification of maintenance.

By the Court.—Order reversed and cause remanded.

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

