

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2012

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. 2010AP3006

Cir. Ct. No. 2006FA923

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DONNA M. UMNUS,

PETITIONER-RESPONDENT,

V.

GERALD T. UMNUS,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Gerald Umnus appeals from a circuit court order denying his motion to modify maintenance. He also appeals from an order

denying his motion to reconsider and declining to grant WIS. STAT. § 806.07 (2009-10) relief from the parties' November 2009 maintenance stipulation.¹ We conclude that Gerald did not establish either a substantial change in circumstances warranting maintenance modification or that relief from the stipulation was required. We affirm.

¶2 At the time of the parties' 2007 divorce, Gerald was ordered to pay \$272 per week in child support for their two children and \$195 per week in maintenance.

¶3 In July 2009, Gerald moved to modify maintenance due to a substantial change in circumstances: he had been laid off from his employment. At that time, Gerald was paying \$185 per week in child support and \$195 per week in maintenance. His unemployment compensation benefit was \$388 per week.

¶4 In November 2009, the parties entered into a stipulation modifying Gerald's child support obligation to the appropriate percentage of his unemployment compensation, or \$66 per week. The court also modified Gerald's maintenance payment to \$115 per week. The stipulation anticipated that the parties' remaining minor child would no longer be subject to support as of January 2010, and child support would terminate at the end of January. The stipulation

¹ All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. We construe the notice of appeal as encompassing the August 20, 2010 order denying maintenance modification and the September 28, 2010 order denying reconsideration and WIS. STAT. § 806.07 relief. The time for filing a notice of appeal from the August 20 order was extended by Gerald's WIS. STAT. § 805.17(3) motion for reconsideration. See *Schessler v. Schessler*, 179 Wis. 2d 781,783, 508 N.W.2d 65 (Ct. App. 1993). The hearing which resulted in the August 20 order amounted to a bench trial to which § 805.17(3) applies. See *Schessler*, 179 Wis. 2d at 784-85.

further stated: “This order shall continue until such time as [Gerald] obtains employment.” The circuit court approved the parties’ stipulation.

¶5 On June 1, 2010, Gerald moved the circuit court to suspend or terminate his maintenance obligation because he remained unemployed. At the hearing on Gerald’s motion, Gerald testified that he remained unemployed and was receiving \$366 in weekly unemployment compensation benefits. The court zeroed in on the nature of the substantial change since the parties’ November 2009 stipulation. Gerald described the change as follows: at the time he entered the stipulation, he believed he would be rehired. Now, his employer was slated for sale.

¶6 The court ruled that Gerald could not show a substantial change in circumstances because he received \$388 per week in unemployment compensation at the time of the November 2009 stipulation and now received \$366 per week in unemployment compensation, a de minimis change of \$22. The court found that the \$22 reduction in weekly income was not a substantial change in circumstances and denied Gerald’s motion to suspend or terminate maintenance. The court saw no reason to have Donna testify because Gerald had not met his burden to show a substantial change in circumstances.

¶7 Gerald moved the circuit court to reconsider because Donna did not testify about her current financial circumstances, including her current need for maintenance. Gerald argued that when the court approved the November 2009 stipulation, the court did not make any findings about the parties’ income. Gerald also sought relief from the November 2009 stipulation under WIS. STAT. § 806.07.

¶8 In a September 15, 2010 letter to the circuit court, Donna objected to reconsideration and argued that Gerald's financial circumstances continued to far exceed hers.

¶9 At the hearing on Gerald's reconsideration motion, Gerald and Donna testified.² Gerald testified that when he stipulated to reduced maintenance, he believed he would be rehired shortly. He testified that had he known at the time of the November 2009 stipulation that he would not return to work at his previous employer, he would not have agreed to continue paying maintenance. He claimed that he could no longer pay maintenance because he was not meeting his expenses. The court asked Gerald what he was receiving in unemployment compensation at the time he moved the court to modify his maintenance. Gerald responded that he was receiving approximately the same amount he received in July 2009 when he first sought to reduce maintenance, and the parties then stipulated to a reduction.

¶10 The court made the following findings. Once Gerald was laid off, the court reduced maintenance. Gerald stipulated to maintenance based on his then-current unemployment compensation, and he continued to receive approximately that amount. The stipulation did not set out Gerald's belief that his layoff would be temporary, and the court clearly did not believe that this is what motivated Gerald to enter the stipulation. The court noted that news reports at the

² Only Gerald's testimony is relevant to our resolution of this appeal.

time of the layoff and in the months preceding the stipulation included the employer's warning that the layoffs could become permanent.³

¶11 The court found that the record was devoid of information about Gerald's efforts, if any, to locate employment either in his field (crew foreman in precast concrete) or outside of it. He appears to merely collect unemployment compensation. The court determined that the fact that Gerald continues to receive unemployment benefits and may not be called back to work does not constitute a substantial change in circumstances warranting modification of maintenance. The court also declined to grant WIS. STAT. § 806.07 relief from the stipulation.

¶12 On appeal, Gerald complains that the circuit court refused to take evidence from Donna at the hearing on his motion to suspend or terminate maintenance. While Gerald is correct that the circuit court did not take evidence about Donna's financial circumstances at the hearing on his modification motion, the court held an evidentiary hearing on Gerald's reconsideration motion which included testimony and other evidence about the parties' financial circumstances.

¶13 Gerald sought relief from the stipulation under WIS. STAT. § 806.07(1)(a) (mistake, inadvertence or surprise), (1)(g) (no longer equitable for the judgment to have prospective application) and 1(h) (any other reason justifying relief from the judgment). He argues that he intended to return to work when he entered the November 2009 stipulation. However, the circuit court's finding that the stipulation sets out no such intention is supported in the record. The

³ Gerald complains that the circuit court considered these news reports. However, Gerald did not object at the time. Any complaint that the circuit court considered this information is waived.

stipulation states: “This order shall continue until such time as [Gerald] obtains employment.” The court clearly did not find Gerald’s claim about his intention to be credible. Credibility determinations are for the circuit court. *Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. In addition, despite Gerald’s claimed intention, the undisputed facts were that at the time of the last hearing in this case, Gerald was receiving approximately the same amount of unemployment benefits he received at the time he entered into the November 2009 stipulation. The court correctly denied Gerald § 806.07 relief from the stipulation because there was no mistake, inadvertence or surprise, no reason to terminate the stipulation prospectively, and no other basis for relief.

¶14 We turn to the circuit court’s determination that Gerald did not establish a substantial change in circumstances to warrant modifying maintenance. When evaluating a substantial change in 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, ¶2, 277 Wis. 2d 47, 690 N.W.2d 251. The court uses the findings made in the previous proceeding and cannot retry the issues decided at that proceeding. *Id.* The court compares the facts about the parties’ current financial circumstances with those surrounding the previous order to determine whether the party seeking modification has established the requisite substantial change in circumstances. *Id.* Only after a substantial change in circumstances has been shown must the court consider the dual maintenance objectives of support and fairness. *Id.*, ¶3. We review the circuit court’s decision for a misuse of discretion. *Id.*, ¶10.

¶15 In this case, the previous modification order was the order approving the parties' November 2009 stipulation. There is no evidence in the record regarding Donna's financial condition in June-November 2009 before the parties stipulated to \$115 per week maintenance in November 2009.⁴ The stipulation recognized that Gerald's child support and maintenance obligations were modified based on his unemployment compensation. When Gerald sought to modify maintenance in June 2010, he was receiving approximately the same amount of unemployment compensation as when he stipulated to \$115 in weekly maintenance. This was the comparison the circuit court had to make under *Kenyon* to resolve Gerald's claim of a substantial change in circumstances.⁵ Because Gerald could not surmount the substantial change threshold, the court did not need to consider the support and fairness objectives of maintenance.

¶16 Gerald alleges that the circuit court was biased against him. We have upheld the circuit court's findings of fact and conclusion of law that there was no substantial change in circumstances or a basis to grant relief from the stipulation. There was no bias.⁶

⁴ Both parties testified at the 2010 reconsideration hearing about their 2009 income. We do not to treat this evidence as the record upon which the circuit court entered the order approving the parties' stipulation. Under *Kenyon v. Kenyon*, 2004 WI 147, ¶2, 277 Wis. 2d 47, 690 N.W.2d 251, we are bound by the record created at the time of the stipulation.

⁵ The record does not establish how the \$115 maintenance award was calculated. That the previous modification order is unaccompanied by evidence of the parties' financial circumstances arises from the parties' choice to stipulate rather than litigate. Parties stipulating to reduced maintenance could create a contemporaneous record that would be useful for a subsequent modification under the *Kenyon* analysis. The parties did not do so here.

⁶ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.")

By the Court.—Orders affirmed.

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

