

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 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. 2011AP2526

Cir. Ct. No. 2006FA41

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

KURT THEIS,

PETITIONER-APPELLANT,

V.

STEPHENNE THEIS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Oneida County:
PATRICK F. O'MELIA, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Kurt Theis appeals a postdivorce order modifying maintenance. Kurt argues the circuit court erroneously exercised its discretion by

finding a substantial change of circumstances based upon a reduction of child support following a change of physical placement.¹ We agree and reverse.

¶2 Kurt and Stephenne Theis were divorced on February 14, 2008, following a thirteen-year marriage. During the marriage, Stephenne was primarily a homemaker, and worked part-time as a housekeeper. According to her financial disclosure statement, Stephenne had no income from employment at the time of the final hearing. She currently receives disability income. At the time of the divorce, Kurt had an income of \$33,731.64 yearly. He subsequently lost his employment and his current earning capacity is \$25,000 annually.

¶3 The marriage produced two minor children. The parties stipulated to shared placement. The parties also stipulated that Kurt would pay Stephenne \$140 monthly maintenance for an indefinite duration. Child support was established at \$507 monthly.

¶4 On September 10, 2010, Kurt moved to revise the divorce judgment, seeking modification of placement and child support, and termination of maintenance. The circuit court granted Kurt primary placement concerning one child and continued shared placement for the other child. The parties stipulated to a reduction of child support to \$120 monthly. The court denied the motion to

¹ Kurt uses the phrase “abused its discretion.” We have not used that phrase since 1992, when our supreme court replaced the phrase “abuse of discretion” with the phrase “erroneous exercise of discretion.” See *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375. Kurt also improperly refers to “petitioner-appellant” rather than referencing the parties by name. See WIS. STAT. RULE 809.19(1)(i).

References to the Wisconsin Statutes are to the 2009-10 version unless noted.

terminate maintenance. Stephenne indicated she anticipated filing a motion to increase maintenance.

¶5 Stephenne subsequently moved to modify maintenance. After a hearing, the circuit court found a substantial change of circumstances based upon the change of placement and reduction of child support. The court increased maintenance to \$500 monthly. Kurt now appeals.

¶6 Modification of maintenance is committed to the discretion of the circuit court. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We will sustain a discretionary determination if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be upheld unless clearly erroneous. WIS. STAT. § 805.17(2). A circuit court's exercise of discretion is erroneous if it makes factual or legal errors. *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶18, 269 Wis. 2d 598, 676 N.W.2d 452.

¶7 At the outset, we note that Stephenne did not file a brief in this court. We notified her by order dated May 8, 2012, that she was delinquent in filing her brief. We allowed her additional time to either file a brief or request an extension of time. We warned that failure to either file a brief or request an extension for good cause could result in penalties, including a summary reversal pursuant to WIS. STAT. RULE 809.83(2). On that basis alone, we reverse.

¶8 However, even on the merits, we reverse the maintenance modification in this case. The circuit court focused chiefly on Stephenne's need for increased maintenance due to its perception that her income was reduced because of the child support reduction. However, the money Kurt paid for child

support was for the support of the children, not Stephenne. See *Jantzen v. Jantzen*, 2007 WI App 171, ¶15, 304 Wis. 2d 449, 737 N.W.2d 5. Thus, Kurt's child support was never meant for Stephenne's support. The reduction in Kurt's child support obligation was appropriate given the change in primary placement of one child to Kurt.

¶9 The circuit court also failed to appreciate the fact that Stephenne's financial situation had improved since the divorce by virtue of disability payments, whereas Kurt's earning capacity was reduced. Moreover, the court relied upon Kurt's receipt of financial assistance from his father. The court stated, "I presume that's going to continue." An inadequate basis exists in the record to support this finding and it is clearly erroneous. See WIS. STAT. § 805.17(2).

¶10 In addition, a circuit court must not limit its inquiry to the support objective. See *Rohde-Giovanni*, 269 Wis. 2d 598, ¶31. The objective of fairness must also be considered. *Id.* "[T]he focus should be on what is fair to both parties, not just one party." *Id.*, ¶32. The circuit court proceeds under an incorrect standard of law when the fairness objective is not sufficiently considered in relation to both parties. See *Kenyon v. Kenyon*, 2004 WI 147, ¶¶36, 39, 277 Wis. 2d 47, 690 N.W.2d 251.

¶11 Here, the circuit court's determination that a substantial change in circumstances justified a modification of maintenance was unfounded. Moreover, we conclude the court did not adequately consider the fairness objective in relation to both parties. Therefore, we reverse the court's increase in maintenance.

By the Court.—Order reversed.

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

