**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

August 20, 1997

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**No. 96-3150**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**DOROTHY A. WESSEL,**

**PETITIONER-RESPONDENT,**

**V.**

**EMMETT D. WESSEL,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Emmett D. Wessel appeals from an order modifying family support payable to his former wife, Dorothy A. Wessel. He argues that in reducing rather than terminating support, the circuit court

erroneously exercised its discretion and that the reduction granted should have been made effective on the day the parties' minor child reached majority. We affirm the modification of support but reverse the trial court's determination that the reduction was not retroactive to the date the child reached majority.

The parties were divorced in September 1991 after twenty-three years of marriage. Emmett was ordered to pay family support in the sum of $1916 monthly. On June 7, 1996, Emmett moved to terminate family support because the parties' minor child was reaching the age of majority on July 29, 1996, and because Dorothy's financial circumstances had improved by a shared living arrangement. Family support was reduced to $1000 monthly commencing September 11, 1996.

The modification of maintenance involves the exercise of the circuit court's discretion. *See* ***Poindexter v. Poindexter***, 142 Wis.2d 517, 531, 419 N.W.2d 223, 229 (1988). We will affirm the circuit court's exercise of discretion when the determination is based on the facts appearing in the record and the appropriate and applicable law. *See* ***id.*** The determination must be the product of a rational mental process. *See* ***id.***

We first address Emmett's contention that it was error for the circuit court to consider the predivorce standard of living when modifying family support. He suggests that because of Dorothy's cohabitation, financial need for support is the only basis on which to continue maintenance. However, when modifying maintenance awards, the circuit court must consider the same factors governing the original determination of maintenance set forth in § 767.26, STATS. *See* ***Poindexter***, 142 Wis.2d at 531, 419 N.W.2d at 229. "Cohabitation is only a factor to consider to the extent it may change a recipient former spouse's economic status." ***Van***

***Gorder v. Van Gorder III***, 110 Wis.2d 188, 197, 327 N.W.2d 674, 678 (1983). Even when the recipient spouse cohabitates with another, the predivorce standard of living remains one of the many factors the circuit court should consider in determining maintenance. "Section 767.26 and its objectives realistically require that the party seeking maintenance have a standard of living *reasonably* comparable to that enjoyed during the marriage." ***Bisone v. Bisone***, 165 Wis.2d 114, 120, 477 N.W.2d 59, 61 (Ct. App. 1991).

The circuit court's decision reflects a proper consideration of all the relevant factors under § 767.26, STATS. It noted that the parties had terminated a long-term marriage and that there was still a disparity in their earnings. It found that Emmett had the ability to pay maintenance. Continued maintenance was found necessary in order to help Dorothy obtain her predivorce economic status because her ability to become self-supporting at the predivorce standard of living was unlikely. Contrary to Emmett's contention, the court considered the benefits Dorothy derives from her cohabitation arrangement and in fact reduced her budget based on Dorothy's ability to share expenses with her housemate. It recognized the reduction in her expenses as a result of the child's majority. It also considered the tax consequences of the maintenance order. After considering these factors, the circuit court set maintenance at a level necessary to meet Dorothy's revised budget needs.

Emmett faults the circuit court for not making a precise determination of Dorothy's income, including rental income she receives and income which could be imputed for services Dorothy provides without compensation in her cohabitator's business. The circuit court's finding that Dorothy makes only slightly more in 1996 than in 1991 is not clearly erroneous. *See* ***DeLaMatter v. DeLaMatter***, 151 Wis.2d 576, 588, 445 N.W.2d 676, 681 (Ct.

App. 1989) (the circuit court's determination of income is a finding of fact which we will not set aside unless clearly erroneous). Dorothy's financial statement revealed that she earned only $36 more in 1996 than in 1991. It would be conjecture to impute income to Dorothy for hours spent at her cohabitator's business. Moreover, Dorothy testified that her efforts in the business were calculated into the division of living expenses. The circuit court's failure to impute additional income to Dorothy was not error. Dorothy's rental income was included on her financial statement. There is nothing to suggest that the circuit court ignored this income source in calculating the amount of modified maintenance.

Finally, we address whether the reduction of support should have been made retroactive to the date the parties' child reached majority. The circuit court did not retroactively apply the reduction, reasoning that because Dorothy had continued to support the parties' child even after the child reached majority, she should have the benefit of the child support component of the original amount set for family support.

The circuit court exercises its discretion in determining the date the order vacating support should be effective. *See* ***Hansen v. Hansen***, 176 Wis.2d 327, 336, 500 N.W.2d 357, 361 (Ct. App. 1993). The court should determine a modification date equitable for both parties. *See* ***id.*** at 338, 500 N.W.2d at 362. Among the factors which the court may consider in making its determination are the diligence of the payor in making the application for modification and expressions by the payor that support payments would continue even after the date on which the obligation is terminable. *See* ***id.*** at 336, 500 N.W.2d at 361.

Emmett's legal obligation to support his minor child terminates when the child reaches age nineteen or graduates from high school. *See* ***Resong v.***

***Vier***, 157 Wis.2d 382, 389, 459 N.W.2d 591, 594 (Ct. App. 1990). In anticipation of his child's eighteenth birthday on July 29, 1996, Emmett moved to terminate family support in a timely fashion. The hearing on Emmett's motion was postponed upon Dorothy's request. The motion was not heard until August 21, 1996, and decided on September 11, 1996.

Emmett was diligent in seeking a termination of child support. By his motion, Emmett expressed his intention not to support the child beyond majority. It was Dorothy's choice to continue to support the child past majority. Although it is laudable for a parent to continue support beyond majority, no court can dictate that a parent do so. *See* ***id.*** at 391, 459 N.W.2d at 594. Expenses incurred by an adult child may not be considered in setting child support. *See* ***id.*** at 389, 459 N.W.2d at 593-94. Therefore, we conclude that the circuit court erroneously exercised its discretion in not making the order eliminating the child support component of family support effective on July 29, 1996, the date the parties' child reached majority. On remand the circuit court shall enter an order reducing support effective July 29, 1996, and reimbursing Emmett for any overpayment made.

No costs to either party.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions.

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