

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 19, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**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.

**No. 99-2788**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE MARRIAGE OF:**

**JAMES R. GRASSMAN,**

**PETITIONER-APPELLANT,**

**v.**

**DEANNA L. GRASSMAN,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
LOUISE TESMER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. James Grassman appeals from the circuit court order terminating his family support payments and ordering \$1,000 per month maintenance payments to his ex-wife, Deanna. He argues that the court should

have terminated his maintenance payments to Deanna because of her continued cohabitation with Ken Davis. We affirm.

## I. BACKGROUND

¶2 James and Deanna were divorced in 1994, following a twenty-six year marriage. In 1997, James moved to modify the family support payments order based, in part, on the change in circumstances resulting from Deanna's cohabitation with Ken. The court commissioner denied his request because, she concluded, "the wife's financial status hasn't been enhanced much more than it was when she in fact had a non-romantic boarder post-divorce."

¶3 Two years later, James filed a second motion to terminate family support payments based on the emancipation of his and Deanna's youngest child, and on the continuing cohabitation of Deanna and Ken. The court commissioner terminated family support and ordered \$750-per-month maintenance payments. Both parties sought circuit court review. The court, following a two-day hearing, modified maintenance to \$1,000 a month. James appeals.

## II. ANALYSIS

¶4 James first argues that "this court should infer from the totality of the circumstances that [Deanna and Ken's] cohabitation is sufficiently marriage-like to constitute a relationship justifying cessation of maintenance." He concedes, however, that under the controlling authorities, termination of maintenance would not be possible. *See Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 327 N.W.2d 674 (1983) (earning capacity and overall economic circumstances, not "cohabitation," are factors critical to maintenance-payment determination). Nevertheless, he contends that this court should "modify" the law.

We cannot do so. *See State v. Clark*, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993) (court of appeals bound by supreme court precedent).

¶5 In the alternative, James argues that the circuit court erred by not considering whether Deanna and Ken fashioned their relationship and finances to prevent the cessation of maintenance. He also argues that the court erred: (1) by setting maintenance at \$1,000 per month, (2) by not properly analyzing the relative economic circumstances of the parties, and (3) by refusing to consider that his maintenance payments subsidized Ken's standard of living. We disagree.

¶6 A circuit court may modify a maintenance award if there has been a substantial change of circumstances. *See* WIS. STAT. § 767.32 (1997-98).<sup>1</sup> The

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<sup>1</sup> WISCONSIN STAT. § 767.32(1)(a) (1997-98) provides:

**Revision of certain judgments:** (1) (a) After a judgment or order providing for child support under this chapter or s. 48.355(2)(b)4., 48.357(5m), 48.363(2), 938.183(4), 938.355(2)(b)4., 938.357(5m), 938.363(2) or 948.22(7), maintenance payments under s. 767.26 or family support payments under this chapter, or for the appointment of trustees under s. 767.31, the court may, from time to time, on the petition, motion or order to show cause of either of the parties, or upon the petition, motion or order to show cause of the department, a county department under s. 46.215, 46.22 or 46.23 or a county child support agency under s. 59.53 (5) if an assignment has been made under s. 46.261, 48.57(3m)(b)2. or (3n)(b)2., 49.19(4)(h) or 49.45(19) or if either party or their minor children receive aid under s. 48.57(3m) or (3n) or ch. 49, and upon notice to the family court commissioner, revise and alter such judgment or order respecting the amount of such maintenance or child support and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment or order respecting any of the matters that such court might have made in the original action, except that a judgment or order that waives maintenance payments for either party shall not thereafter be revised or altered in that respect nor shall the provisions of a judgment or order with respect to final division of property be subject to revision or modification. A revision, under this section, of a judgment or order with respect to an amount of child or family support may be made only upon a finding of a substantial change

(continued)

court's exercise of its authority under this section is discretionary. *See Van Gorder*, 110 Wis. 2d at 195. The question of whether there has been a substantial change of circumstances presents a mixed question of fact and law. *See Harris v. Harris*, 141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987). The circuit court's findings of fact regarding the "before" and "after" circumstances and whether a change has occurred will not be disturbed unless clearly erroneous. *See id.* However, whether the change is substantial is a legal issue which we review *de novo*. *See id.* at 574. A "substantial or material change in the circumstances should be such that it would be unjust or inequitable to strictly hold either party to the judgment." *Fobes v. Fobes*, 124 Wis. 2d 72, 81, 368 N.W.2d 643 (1985) (quoted source omitted). Because the circuit court's legal determination is intertwined with its factual findings, we give weight to its decision. *See Harris*, 141 Wis. 2d at 574-75.

¶7 The cohabitation of the recipient former spouse is a factor to consider only to the extent that it changes the former spouse's economic status. *See Van Gorder*, 110 Wis. 2d at 197. Cohabitation raises two concerns: whether the cohabitation enhances the maintenance recipient's financial condition, and whether the cohabitators have fashioned their financial relationship to prevent reduced maintenance. *See id.*

¶8 Here, the record clearly supports the circuit court's determinations that: (1) a change in circumstances warranted modification of the family support

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in circumstances. In any action under this section to revise a judgment or order with respect to maintenance payments, a substantial change in the cost of living by either party or as measured by the federal bureau of labor statistics may be sufficient to justify a revision of judgment or order with respect to the amount of maintenance, except that a change in an obligor's cost of living is not in itself sufficient if payments are expressed as a percentage of income.

order, and (2) Deanna and Ken had not fashioned their relationship to prevent the cessation of maintenance. First, the court noted that the emancipation of James and Deanna's youngest child required revising the family support order. Second, the court recognized that the family support order had a maintenance component: "It's clear [from] . . . the findings at the time of the original divorce . . . that maintenance had been appropriate . . . this was a 26-year marriage, and during that period of time, [Deanna] worked inside the home . . . ." Consequently, the court heard extensive testimony concerning the parties' economic circumstances and the benefits Deanna received from her cohabitation with Ken.

¶9 Ken testified that he earned \$43,000 a year, that he had a monthly support obligation to his son, and that he contributed minimally to Deanna's household by paying approximately \$200 a month in rent, by paying for their dining out, and by doing household maintenance and yard work. The court also learned that Ken had been married five times, and that he had proposed marriage to Deanna, but that she had not accepted. Based on this information, the court determined that Ken and Deanna had not fashioned their relationship and finances to prevent the cessation of maintenance. Specifically, the court acknowledged that given Ken's marital history, it was understandable that Deanna maintained her legal autonomy. The record supports the court's conclusion.

¶10 James also argues that the court erred in setting maintenance at \$1,000 per month. We disagree. The determination of the amount and duration of maintenance is entrusted to the circuit court's discretion. *See Forester v. Forester*, 174 Wis. 2d 78, 85, 496 N.W.2d 771 (Ct. App. 1993). We will not reverse a discretionary determination absent an erroneous exercise of discretion. *See id.* A circuit court erroneously exercises discretion "if it misapplies or fails to

apply any of the statutory factors set out in sec. 767.26, Stats.<sup>2</sup>, or if it fails to give full play to the dual objectives of maintenance.” *Brabec v. Brabec*, 181 Wis. 2d 270, 277, 510 N.W.2d 762 (Ct. App. 1993) (footnote added).

¶11 The dual objectives of maintenance are support and fairness. *See LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987).

The support objective serves to support the recipient spouse in accordance with the needs and earning capacities of the parties. The fairness objective is meant to ensure a fair and

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<sup>2</sup> WISCONSIN STAT. § 767.26 (1997-98) provides:

**767.26 Maintenance payments.**

Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.
- (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
- (9) The contribution by one party to the education, training or increased earning power of the other.
- (10) Such other factors as the court may in each individual case determine to be relevant.

equitable financial arrangement between the parties in each individual case; to “compensate the recipient spouse for contributions made to the marriage, give effect to the parties’ financial arrangements, or prevent unjust enrichment of either party.”

*Brabec*, 181 Wis. 2d at 277 (quoted source omitted).

¶12 As noted, the circuit court extensively examined the circumstances surrounding Deanna’s cohabitation with Ken. The court also considered the factors enumerated in WIS. STAT. § 767.26, the requisite factors for setting maintenance, and the effect the cohabitation had on those factors. In the end, the court found that Deanna still had a substantial need for maintenance. Specifically, the court recognized that a great discrepancy existed between Deanna’s and James’ incomes, noting that James earned nearly five times more than Deanna. The court observed that this disparity would continue because Deanna had not entered the work force until age forty-five and had limited earning potential. By contrast, James had great earning capacity—by having earned two Masters degrees during the marriage and by having had a long career and solid work experience.

¶13 In reviewing the parties’ financial disclosure forms, the court determined that James had inflated his expenses and, therefore, the court discounted many of his claims. Specifically, the court found that many of James’ expenses were inflated due to his decision to purchase three properties. After comparing James’ and Deanna’s monthly expenses, the court concluded that James had substantially more money at the end of each month, and that based on their relative economic circumstances, the family support order should be converted into a maintenance order which would provide Deanna with \$1,000 per month. Given the discrepancy between the parties’ lifestyles, earning potential, and the duration of their marriage, we conclude that the \$1,000-per-month

maintenance payment order is well within the circuit court's proper exercise of discretion.

*By the Court.*—Order affirmed.

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



