

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 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. 99-3240

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JEROME C. RUESCH,

PETITIONER-APPELLANT,

v.

SU CHENG RUESCH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Wood County:
EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Jerome Ruesch appeals from an order denying his motion to reduce a maintenance award to his ex-wife, Su Cheng Ruesch. The

issue is whether the trial court properly exercised its discretion when it determined that the award should remain as ordered in the divorce judgment. We affirm.

¶2 The parties divorced in 1996 after almost twenty-one years of marriage. At that time, Jerome earned about \$58,000 annually (including overtime), and Su was unemployed. By stipulation, he agreed to pay maintenance of \$1,250 per month for an indefinite period. The parties further stipulated that Su's earning capacity was approximately \$13,000 per year if she were to work full-time.

¶3 In March 1999, Jerome moved for reduced maintenance, alleging a substantial change of circumstances. At the hearing, Su testified that she is now earning close to her expected \$13,000 per year as a part-time waitress. She also testified that she shares her home with Herbert Schack and his son. Schack testified that he pays Su \$50 per week, pays his own food and personal expenses, maintains and repairs Su's house, and has expended several thousand dollars in work and materials toward remodeling it.

¶4 Jerome testified that he anticipated that a recent job transfer would substantially reduce his opportunity to earn the \$15,000 to \$20,000 he received annually in overtime compensation. He added that he had voluntarily requested the transfer to a job that would place less stress on an injured knee and provide a cleaner work environment.

¶5 The trial court concluded that the parties' changed circumstances were not substantial enough to warrant the reduction or elimination of maintenance. On appeal, Jerome contends that this ruling amounts to an erroneous exercise of discretion.

¶6 The trial court may modify a maintenance award if there is a substantial change of circumstances. *See* WIS. STAT. § 767.32 (1997-98)¹. The court's exercise of its authority under this section is discretionary. *See Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 195, 327 N.W.2d 674 (1983). The cohabitation of the recipient former spouse is a factor to consider only to the extent it changes the former spouse's economic status. *See id.* 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.* The burden of proving changed circumstances is higher when the original maintenance payments were established by stipulation. *See id.* at 195. When payments are made by stipulation, the substantial change in circumstances should be such that it would be unjust or inequitable to hold either party to the stipulation. *See id.*

¶7 The trial court reasonably exercised its discretion when it denied Jerome's request for reduced maintenance. Jerome's salary reduction had not yet occurred, nor was the extent of it clear from the testimony. Additionally, the reduction was voluntary. Jerome testified that he was motivated by a physical injury, but he presented no evidence beyond his own testimony that the injury made the job transfer necessary. Under these circumstances, the trial court could reasonably conclude that the stipulated maintenance payments were not unjust or inequitable.

¶8 The same may be said for Su's financial status. The trial court could have reasonably determined that Su and Schack were not fashioning a relationship

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

solely to preserve her maintenance. The court also could have reasonably determined that Su's status was not so substantially enhanced by Schack's contributions that the continued level of maintenance was unjust. At best, Schack's contributions allowed her to live in a somewhat larger residence than she would otherwise have, although one that was very modest under any reasonable view of the testimony.

¶9 Jerome further contends that the trial court erroneously used the equal division of income standard, set forth in *LaRocque v. LaRocque*, 139 Wis. 2d 23, 39, 406 N.W.2d 736 (1987), to deny the motion. However, Jerome misconstrues the court's comments. It is evident to us that the trial court was merely offering a general comment on the fairness of the parties' arrangement. As the trial court noted, if the parties' combined income were equally divided, Jerome would retain the greater portion of it even if his income were reduced by twenty-five percent because overtime was no longer available to him. The trial court did not rely on that factor in rendering its decision.

By the Court.—Order affirmed.

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

