

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 15, 2007**

David R. Schanker  
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. 2006AP2839-FT**

**Cir. Ct. No. 2002FA150**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**SUSAN MCINTOSH LAWSON, N/K/A SUSAN MCINTOSH,**

**PETITIONER-RESPONDENT-CROSS-APPELLANT,**

**v.**

**RALPH LAWSON,**

**RESPONDENT-APPELLANT-CROSS-RESPONDENT.**

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APPEAL and CROSS-APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM.<sup>1</sup> Ralph Lawson appeals an order modifying his maintenance obligation. He argues the trial court erroneously calculated the earning capacity of his ex-wife, Susan McIntosh. He also argues the trial court erred by not considering McIntosh's income as a water aerobics instructor in determining her earning capacity. McIntosh cross-appeals, arguing the trial court erred by setting Lawson's earning capacity at \$123,300 and by accordingly reducing his maintenance obligation retroactive to the date of filing. We disagree with both parties and affirm the order.<sup>2</sup>

### BACKGROUND

¶2 Lawson and McIntosh were divorced in 2003. Lawson was ordered to pay \$24,000 per year in maintenance. Commencing on June 1, 2006, the maintenance amount would increase to \$72,000 per year due to the termination of child support. At the time of the divorce, Lawson earned approximately \$187,134 per year as a pilot for Northwest Airlines, and the trial court determined McIntosh had an earning capacity of \$30,000 per year as a part-time dental hygienist. After a hearing on March 22, 2005, the order was modified to require Lawson to pay maintenance of \$60,000 per year beginning June 1, 2006.

¶3 On December 27, 2005, Lawson filed a motion requesting modification of his maintenance obligation due to a reduction in his income.

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<sup>1</sup> This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

<sup>2</sup> We note that both parties failed to provide proper citation to the record for many factual assertions. All factual references must be supported by citations to the record. *See* WIS. STAT. RULE 809.19(1)(d).

McIntosh filed a cross-motion asking for an increase in maintenance due to the increased severity of her arthritic condition and her decreased ability to work.

¶4 The court held a hearing on June 9, 2006. At the hearing, Lawson testified he earned \$136.94 per hour and worked an average of seventy-five hours per month for a projected yearly income of \$123,300.

¶5 McIntosh testified that she had averaged about \$3,000 per month through the end of April, but that the amount was inflated due to her working one hundred hours in January. She stated that the high number of hours worked in January caused her to become disabled requiring her to take a six-week leave of absence. McIntosh submitted her 2005 W-2 showing she earned \$29,718 and stated she expected to earn about the same, approximately \$30,000, in 2006. McIntosh also submitted a Social Security statement showing she earned \$29,656 in 2004.

¶6 McIntosh stated she had arthritis which limited her ability to work as a dental hygienist. She submitted a letter from her rheumatologist stating that due to her disability she was restricted to twenty hours of work per week. McIntosh further stated that the last time she worked more than twenty hours per week was in January. McIntosh also worked part-time as a water aerobics instructor.

¶7 On cross-examination, McIntosh admitted that if she worked twenty hours per week for the entire year at her pay rate of \$34 an hour, she had the potential to earn \$35,360. Lawson then asked McIntosh if she had ever threatened that if he asked for a reduction in maintenance, her disability would get worse. McIntosh replied, "I don't believe so." Lawson then submitted a letter to the court which he characterized as threatening. McIntosh stated her letter was a response to a letter sent to her by Lawson which she characterized as "equally threatening."

The court allowed Lawson to submit that letter but stated, “To me they are both irrelevant. So you can put them in the file. That’s fine. We’ll note this is fairly typical back and forth between ex-spouses, you know.”

¶8 After hearing testimony and reviewing position statements submitted by both parties, the court reduced the maintenance to \$42,000 per year, stating:

Based upon Susan’s testimony, she is able to work only part-time as a dental hygienist earning \$34.00 per hour. I agree that she is partially disabled due to an arthritic condition.... I am satisfied that she cannot work more hours per week due to her present medical condition. She therefore now has an earning capacity of \$30,000.00 per year. I am not considering Susan’s part-time earnings as a Water Aerobics Instructor, since I feel that this situation is not permanent, and I believe that this is therapeutic for her arthritic condition. Also, Susan has yet to earn as much as \$30,000 per year in her chosen career; thus, she may have to eliminate part-time work altogether....

Ralph’s earnings have been re-negotiated by Northwest Airlines. Ralph testified, and exhibits submitted verified, that his new earnings are \$123,300.00 per year, which I find to be his new earning capacity.

## DISCUSSION

¶9 The party seeking to modify maintenance has the burden of proof to show there has been a substantial change in circumstances to warrant the proposed modification. *Cashin v. Cashin*, 2004 WI App 92, ¶41, 273 Wis. 2d 754, 681 N.W.2d 255. We review a decision to modify maintenance under the erroneous exercise of discretion standard. *Id.*, ¶43. “[W]e affirm the trial court’s decision on whether there is a substantial change in circumstances if there is a reasonable basis in the record for the trial court’s decision.” *Id.*, ¶44. The exercise of discretion is essential to the trial court’s functioning; we therefore look for reasons to sustain discretionary decisions, not for evidence to support findings the court could have

reached but did not. *Gerrits v. Gerrits*, 167 Wis. 2d 429, 441, 482 N.W.2d 134 (Ct. App. 1992).

¶10 In this case, the trial court found a substantial change in circumstances due to Lawson's decreased earning capacity and reduced the maintenance award accordingly. However, Lawson argues the amount should be reduced even further because McIntosh's earning capacity has increased from the \$30,000 earning capacity set by the trial court at the time of their divorce. Lawson first argues the trial court erred when it determined McIntosh's earning capacity remained at \$30,000 a year. Lawson argues this amount is incorrect because McIntosh admitted that if she worked twenty hours a week she could earn \$35,360 per year. He also argues the court erred by not considering the \$7,800 McIntosh made in January.

¶11 While McIntosh had the potential to make \$35,360 per year, the trial court noted that she had yet to earn even \$30,000 in a year and was partially disabled due to arthritis. Considering McIntosh's past earning history at the same job and her deteriorating physical condition, the trial court had a reasonable basis to set McIntosh's earning capacity at \$30,000. Further, the record shows the trial court considered McIntosh's January earnings and accepted her testimony that the additional hours worked in January had caused her disability to worsen and she would be unable to work as many hours in the future. The circuit court is the ultimate arbiter of the credibility of witnesses. WIS. STAT. § 805.17(2); *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶12 Lawson also argues the trial court erred by not considering a letter McIntosh sent him, which he characterized as threatening, and claims shows McIntosh's intention to minimize her earning capacity. However, McIntosh

testified the letter was merely “a reply to [Lawson’s] letter which is equally threatening.” The trial court believed McIntosh’s testimony and classified the letter as “fairly typical back and forth between ex-spouses....” It is the trial court’s responsibility to weigh the credibility of witnesses and evidence, not this court’s. WIS. STAT. § 805.17(2). We see no error.

¶13 Finally, Lawson argues the trial court erred by not considering McIntosh’s income as a water aerobics instructor when determining her earning capacity. McIntosh worked eight hours a month as a water aerobics instructor and earned eighteen dollars an hour. Lawson argues the court did not include this income in McIntosh’s earning capacity because it considered the position temporary and therapeutic despite the fact McIntosh never testified the position was either therapeutic or temporary. While McIntosh may not have testified that the position was temporary the court reasoned, “Susan has yet to earn as much as \$30,000 per year in her chosen career; thus, she may have to eliminate part-time work altogether....” Thus, the court came to a reasoned conclusion after considering McIntosh’s earning history and her deteriorating physical condition.<sup>3</sup>

¶14 In her cross-appeal, McIntosh argues the trial court erred by determining Lawson’s earning capacity was \$123,300. McIntosh states that by looking at his earnings for the first three months of 2006, he earned \$2,706 more per month than the average salary the court utilized in determining the maintenance award. However, at trial, Lawson testified that his hours fluctuated each month and that based on the average number of hours he expected to work his income would be \$123,300. Therefore, there is a reasonable basis in the record

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<sup>3</sup> In the exercise of equitable discretion, the trial court similarly did not attribute any income to Lawson from his part-time business venture.

for the court's decision. In essence, McIntosh is asking this court to accept her testimony regarding what she expected to make for the year as a whole despite her higher earnings at the beginning of the year and reject Lawson's similar testimony.

¶15 Finally, McIntosh argues the court erred in making the reduction of maintenance retroactive to the date Lawson filed the motion, December 27, 2005. WISCONSIN STAT. § 767.32(1m) (2003-04) permits a reduction in maintenance to be made retroactive, to the date the motion was filed. In making the award retroactive, the court noted:

This figure approximates an equal share of monthly disposable incomes, as reflected in Exhibit A. The court is satisfied that, in consideration of the factors mentioned in the maintenance award statute, as compared with the court's findings listed above, and further considering all other factors earlier found by the court, that this is a fair and reasonable award.

McIntosh again points to Lawson's higher earnings for the beginning of 2006 as evidence that the court erroneously exercised its discretion by making the award retroactive. However, as noted above, the court accepted Lawson's testimony that based on his fluctuating hours he expected to make \$123,300 in 2006. Therefore, while he may have paid a smaller percentage of his income for the first three months of 2006, he may have paid a large percentage of his income in later months. Additionally, the pay cuts at Northwest began about the time Lawson filed his motion. We see no error in making the award retroactive.

*By the Court.*—Order affirmed.

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



