

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 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. 2006AP2899-FT

Cir. Ct. No. 2002FA295

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

LOTIS LISONDRA BAILEY N/K/A LOTIS U. LISONDRA,

PETITIONER-RESPONDENT,

V.

KENT WALTER BAILEY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County:

DALE T. PASELL, Judge. *Affirmed.*

Before Dykman, Higginbotham, and Bridge, JJ.

¶1 PER CURIAM. Kent Bailey appeals from a postdivorce order that increased the amount and extended the term of maintenance he must pay to his ex-wife Lotis Lisondra. We affirm for the reasons discussed below.

BACKGROUND

¶2 The parties met through a service connecting women from the Philippines with American men. They were divorced in 2004 following a ten-year marriage during which their daughter was born. At the time of the divorce, Bailey was fifty-four years old and receiving \$3,987 a month from Veterans disability, Postal Service disability, and Social Security disability benefits. Lisondra was thirty years old and earning \$1,075.53 a month as a telemarketer, plus receiving \$736 in Social Security benefits for their daughter stemming from Bailey's disability.

¶3 The court observed that the parties' combined budgets exceeded their joint income, so that it could not award each all that they needed. The court concluded that it would be appropriate to award maintenance to Lisondra for her education with the goal of gaining better employment and obtaining a standard of living more comparable to that enjoyed during the marriage. However, the court also stated that Lisondra's stated intention of pursuing a four- or five-year college degree while raising a minor child "would be very difficult"; that it would be "difficult [for the court] to say" that Bailey should pay something in the neighborhood of \$60,000 for Lisondra's education given the lack of assets she had brought into the marriage; that a four-year degree might actually result in Lisondra having a better standard of living than that enjoyed during the marriage; and that the court did not consider it appropriate to require five years of maintenance "where the parties were only together eight and a half years." The court awarded

Lisondra maintenance in the amount of \$750 a month for thirty months, which would allow her to pursue a two-year degree without working, or working on a limited part-time basis. It further noted that the award “could be extended if there’s a real need for it,” or reduced or eliminated if it turned out that Lisondra simply continued working rather than going back to school.

¶4 Lisondra moved to modify and extend the maintenance award shortly before it expired. Following an evidentiary hearing, the trial court found that Bailey’s monthly income had increased to \$6,371 due to a large increase in his military benefits which the court had not anticipated.¹ The court deemed the increase in income to be a substantial change in the financial circumstances of the parties. The court further found that Lisondra was taking approximately twelve credits a semester toward a four-year degree and working about thirty hours a week, in addition to bearing the full burden of caring for the parties’ child. The court pointed out that there had been some question at the time of the divorce whether Lisondra would actually follow through on her expressed desire to go to college, and indicated that it was impressed with how diligently Lisondra had been pursuing her education—especially since English was a second language for her and she was not receiving any help with child care duties from Bailey, as the court would have anticipated, or from family members since Lisondra had immigrated alone. The court was still of the opinion that the relatively modest length of the marriage weighed against having Bailey pay for five years of college, but noted that Lisondra was also incurring her own educational loans, and that even with an

¹ At the time of the divorce, Bailey’s military disability benefits were being reduced based on his Social Security benefits, but a change in the law allowed him to collect both without a reduction.

increase in maintenance, Bailey’s income would be greater than it had been at the time of the divorce. It concluded that it was unfair to have Lisondra working thirty hours a week while attending school full time and supporting both herself and the parties’ child. The court increased the maintenance award to \$1,000 a month and extended it for three years. Bailey appeals.

STANDARD OF REVIEW

¶5 “In order to modify a maintenance award, the party seeking modification must demonstrate that there has been a substantial change in circumstances warranting the proposed modification.” *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452; *see also* WIS. STAT. § 767.59(1f)(a) (2005-06).² In the typical case, the focus of the substantial change inquiry will “be on any financial changes the parties have experienced.” *See, e.g., Rohde-Giovanni*, 269 Wis. 2d 598, ¶30. In addition to any changed financial circumstances and the recipient’s need for support, “[f]airness must be considered with respect to the situations of both parties in determining whether maintenance should be continued indefinitely, continued for a limited amount of time, reduced, or terminated.” *Id.*, ¶31. Because circuit courts have broad discretion to determine the amount and duration of maintenance, our standard of review is “whether there was sufficient evidence from which the circuit court could reasonably find a substantial change in the parties’ circumstances that would justify” the modification—although we may independently determine any issue of law that arose during the court’s exercise of discretion. *Id.*, ¶¶17 and 19.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

DISCUSSION

¶6 Bailey first argues that the trial court erroneously exercised its discretion by finding a substantial change in circumstances based solely on his increased income. He relies on our statement in *Murray v. Murray*, 231 Wis. 2d 71, 83, 604 N.W.2d 912 (Ct. App. 1999), that “just because the payor has achieved a position that enables him or her to live a richer lifestyle than that enjoyed during the marriage does not mean that the payee may share this lifestyle as well through maintenance.” His argument is flawed in two respects.

¶7 First, the record does not show that the increased maintenance amount would allow Lisondra to “share” in a “richer lifestyle than that enjoyed during the marriage.” To the contrary, the court pointed out several times at the initial hearing that there was insufficient combined income at the time of the divorce to meet both of the parties’ budgets. Thus, under the original divorce judgment, both parties were left at a standard of living below that enjoyed during the marriage. We are not persuaded that the extra \$250 a month ordered by the court in the modified maintenance order would bring Lisondra above the standard enjoyed during the marriage.

¶8 In addition, we are not persuaded that Bailey’s increased income was the only change in the parties’ circumstances, though it was admittedly a major focus of the court’s discussion. *Murray* also points out that, when a limited-term maintenance award “seeks to place the recipient spouse in a self-supporting economic situation by the end of the maintenance period,” the inability of the spouse to become self-supporting despite not malingering and accepting as much employment as possible, may in and of itself constitute a substantial change in

circumstances. *Id.* at 78-79 (citing *Fobes v. Fobes*, 124 Wis. 2d 72, 81-82, 368 N.W.2d 643 (1985)). We are satisfied that this was the situation here.

¶9 The court discussed how Lisondra’s living situation had changed since the time of the divorce—namely, that she was attending a four-year college full time while working thirty hours a week and assuming 100% of the child care responsibilities, when at the time of the divorce the court had anticipated that she would either significantly cut her work hours or stop working altogether in order to pursue a two-year associate or technical degree to become self-supporting. The court had also assumed at the time of the divorce that Lisondra would receive at least some assistance from Bailey in raising their daughter, since the divorce judgment allowed him reasonable periods of physical placement as agreed upon by the parties, but Bailey explained at the modification hearing that his disabilities prevented him from exercising his right to physical placement. In sum, the trial court’s expectation that Lisondra would be able to become self-supporting within thirty months had not been met, despite diligent effort on her part. In addition, the original maintenance award had not been sufficient to allow her to significantly reduce her work hours in order to pursue her education. We conclude that it was reasonable for the trial court to determine that this situation, in conjunction with Bailey’s significantly increased income, constituted a substantial change in circumstances.

¶10 Bailey next argues that the trial court erroneously exercised its discretion by “retrying the entire issue of maintenance.” In particular, he complains that the trial court changed its position on whether it was appropriate for Bailey to support Lisondra’s pursuit of a four- to five-year college degree after being together for eight-and-one-half years, instead of considering how the change in the parties’ circumstances affected Lisondra’s ability to obtain a two-year

degree. We disagree both with Bailey's understanding of the law and his characterization of the trial court's decision.

¶11 Contrary to Bailey's contention, once a substantial change in circumstances has been established, a court may reconsider all of the relevant statutory factors for determining an initial maintenance award, in accordance with the fairness and support objectives "in light of" the parties' changed circumstances. *See Woodard v. Woodard*, 2005 WI App 65, ¶¶6-10, 281 Wis. 2d 217, 696 N.W.2d 221; *see also* WIS. STAT. § 767.59(1c)(a)1. In any event, we are not persuaded that the trial court did change its position that the length of the marriage weighed against a longer maintenance award. Rather, it decided that the increase in Bailey's income and the fact that Lisondra was still working while attending college full time outweighed that factor. The court had originally deemed it unfair to have Bailey live below the marital standard of living for five years following a mid-length marriage to allow Lisondra to stop working while pursuing a college degree. But it did not consider it unfair to have Bailey provide continued support when he was no longer below the marital standard of living and Lisondra was working and pursuing her degree. We see no misuse of discretion here.

By the Court.—Order affirmed.

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

