

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2008

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. 2007AP2797

Cir. Ct. No. 2000FA71

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

GLEN C. HONG,

PETITIONER-APPELLANT,

V.

ANNETTE R. HONG N/K/A ANNETTE R. CHRISTOPHER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Jackson County:
GERALD W. LAABS, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Glen Hong appeals from an order that denied his motion to terminate maintenance payments to his ex-wife, Annette Christopher,

and found him in contempt for failing to make any payments to her for the preceding two years. We affirm for the reasons discussed below.

BACKGROUND

¶2 Hong and Christopher were divorced in 2001, pursuant to a marital settlement agreement. Hong was to pay Christopher \$25,000 to equalize a property division in which Hong received the bulk of the parties' assets and debts, including an ongoing construction and excavation business. The divorce judgment also reserved the issue of maintenance as to Christopher "until such time as her name is removed from all outstanding indebtedness, and the outstanding marital obligations assigned to Glenn Hong have no adverse affect on her ability to secure credit."

¶3 Hong discharged the \$25,000 equalization payment in bankruptcy in 2002, without having made any payment to Christopher. In addition, a number of creditors pursued Christopher following the bankruptcy for debts that had been solely assigned to Hong in the divorce, and she discovered that her credit report listed those debts as hers. As a result, Christopher made some payments on the outstanding debts to maintain her own accounts, and was unable to obtain credit to start her own business. She finally moved for maintenance in 2005.

¶4 The court decided that it was appropriate to award maintenance due to Hong's failure to comply with the relevant provisions of the marital settlement agreement, which in turn led to an inequitable property division. The court noted that the marriage had lasted fifteen years; that Hong was forty-six while Christopher was thirty-eight, and that both parties had high school diplomas. The court found that Hong was unemployed and not actively seeking employment, but that he was employable as a heavy-duty-equipment operator, and should be able to

earn something in the range of the \$4,166 per month that he was earning at the time of the divorce. It also found that Christopher was earning about \$13,000 per year and had some disabilities that limited her employment opportunities, but was pursuing additional education which could allow her to become self-supporting within ten years. The court then ordered Hong to pay Christopher maintenance in the amount of \$1,000 per month for ten years.

¶5 The following year, Christopher sought contempt sanctions to compel compliance with the maintenance order. Hong responded with a motion to terminate maintenance. Following a joint motion hearing held in 2007, the court refused to terminate maintenance and found Hong in contempt. It sentenced him to sixty days in jail unless he made a payment of \$4,000 within thirty days. Hong appeals.

STANDARD OF REVIEW

¶6 “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 (2005-06).¹ We will uphold the trial court’s discretionary determination as to whether there has been a substantial change in circumstances “if there is a reasonable basis in the record for the trial court’s decision.” *Cashin v. Cashin*, 2004 WI App 92, ¶44, 273 Wis. 2d 754, 681 N.W.2d 255.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶7 We also review the trial court’s use of its contempt powers under the erroneous exercise of discretion standard. *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995).

DISCUSSION

Modification of Maintenance

¶8 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. However, the court also “should consider fairness to both of the parties under all of the circumstances.” *Id.*, ¶32. “In the context of a motion for modification of a limited-term maintenance agreement, the court should also consider the purposes of awarding maintenance for that limited term” and whether the intended goal has been accomplished. *Cashin*, 273 Wis. 2d 754, ¶41.

¶9 Here, the purpose of the maintenance award was to compensate Christopher for what turned out to be a vastly unequal property division and to allow Christopher an opportunity to obtain the education and training she would need to become self-supporting. Neither goal had been accomplished since entry of the prior maintenance order. Not only did Hong fail to make a single maintenance payment, but Christopher testified that she had been unable to continue her education without proof of her maintenance income. Christopher also testified that she had to pay 24% interest on a car loan due to her ongoing credit problems following Hong’s bankruptcy, and had been unable to get a favorable percentage rate to buy property or get a school loan.

¶10 Turning to the other financial circumstances of the parties, Hong first contends that the trial court erroneously failed to consider that Christopher's 2006 tax return showed her income had increased by about \$6,000 from the \$13,000 she was making at the time of the last order. Christopher testified, however, that she had just started a new job where she was working thirty-two hours a week at \$9.57 per hour, which would amount to just under \$16,000 per year. We are satisfied that testimony showing a \$3,000 increase in Christopher's income supports the trial court's finding that "her financial situation isn't really any different substantially than it was at the time of the divorce."

¶11 Meanwhile, Hong's actual income had increased from a negative \$26,000 per year to a positive \$12,000 per year, meaning that the gap between the parties' actual income had narrowed by \$35,000 in Hong's favor since the last order. The court did not base its view of the parties' relative financial positions on Hong's actual income, however, but rather on his imputed income. In 2005, the court had found that Hong was not looking for work, but was capable of earning nearly \$50,000 per year as a heavy equipment operator, which was the amount he was actually earning at the time of the divorce. Although Hong was again doing some excavating work as a self-employed contractor in 2007, the court found that Hong was still not diligently seeking work up to the level of his earning capacity.

¶12 Hong contends that the evidence at the modification hearing was insufficient to show that he could earn nearly \$50,000 per year. Hong's earning capacity was a factual determination made at the time of the initial maintenance award, however. He could not merely relitigate whether the trial court had set his earning capacity too high. *See Rohde-Giovanni*, 269 Wis. 2d 598, ¶30. Rather, in order to show a substantial change in circumstances, he would need to show that

something had changed with respect to his earning capacity, such as a disability or a downturn in the excavation market. He offered no such evidence.

¶13 Furthermore, the court's finding of shirking was supported by Hong's testimony that he had not applied for any jobs in his field outside of his own self-employment; had not sought any additional vocational training; had not sought any jobs outside his field (and actually laughed in court at the question); and had not applied at the Jobs Center or had any technical evaluation of his skills performed. The court was entitled to make its own credibility assessment about the diligence of Hong's job search and his claims about the lack of available work. In particular, the court noted that Hong "considers payment to his ex-wife as secondary." That finding was supported by testimony that Hong had been able to secure more than \$50,000 in bank loans secured by his property, plus loans from his father and sister, over the preceding two years, but had used none of that money to satisfy his maintenance obligations.

¶14 Hong next contends that the trial court erroneously failed to consider the financial impact of Christopher's cohabitation with a "domestic partner."² Christopher testified at the 2007 hearing that she was living with an ex-fiancé and paying him \$200 a month in rent, plus sharing some household expenses. Christopher also testified, however, that she had already tried to make arrangements to move to Hawaii by herself, which fell through. Therefore, we are not persuaded the court was required to view Christopher's shared living situation as likely to continue in the future. Furthermore, in order for Christopher's shared

² Hong also contends that the trial court erroneously excluded testimony about the financial impact of cohabitation as irrelevant. The only testimony stricken as irrelevant, however, was a question about whether the place Christopher was staying was a home or apartment.

living arrangement to have constituted a substantial change in circumstances, Hong would also have needed to show that Christopher was *not* living with anyone or sharing expenses at the time of the 2005 hearing. Hong has pointed to no evidence at either the 2005 or 2007 hearing which would support that contention.

¶15 In contrast, Hong testified at the 2007 hearing that he himself was married with a “new” family, and that his wife was “basically supporting the family” with her job. Again, therefore, any comparative change in the parties’ domestic living arrangements would appear to favor the continuation, rather than the termination, of maintenance.

¶16 In sum, we are satisfied that the court could reasonably conclude that any changes in the parties’ circumstances was not substantial enough to warrant termination of the 2005 maintenance award. While Christopher had experienced a slight increase in income, she had still received no payments to offset the disproportionate property division and was still suffering negative credit consequences from Hong’s bankruptcy—including a setback to her educational goals. Meanwhile, Hong had a wife who was financially supporting his family, while he failed to diligently seek work anywhere near his earning capacity, yet was able to obtain \$50,000 in bank loans using his property as collateral.

Contempt

¶17 Intentional disobedience of a court order constitutes contempt of court. *See* WIS. STAT. § 785.01(1)(b). A contempt finding may result in a punitive sanction designed to punish the offending person in order to uphold the authority of the court or a remedial sanction imposed for the purpose of terminating a continuing contempt. WIS. STAT. §§ 785.01(2) and (3). A court

may impose a remedial contempt order based on a failure to pay support so long as the failure is willful and not the result of an inability to pay. *Benn v. Benn*, 230 Wis. 2d 301, 309-10, 602 N.W.2d 65 (Ct. App. 1999). In addition, when the court sets a purge condition, it “should serve remedial aims, the contemnor should be able to fulfill the proposed purge, and the condition should be reasonably related to the cause or nature of the contempt.” *Christensen v. Sullivan*, 2008 WI App 18, ¶17, 307 Wis. 2d 754, 746 N.W.2d 553 (citation omitted).

¶18 As we have already explained above, the court’s findings that Hong had the ability to make his maintenance payments but was choosing not to do so were supported by its prior assessment of Hong’s earning ability as an equipment operator and its credibility determination that Hong was not diligently seeking work, as well as the fact that Hong had obtained \$50,000 in loans using his property as collateral. This was not a situation where Hong was making a good faith effort to make payments and had fallen behind. He had not made a single payment of any amount in the entire two years since the order had been entered. The court could reasonably expect Hong to attempt to obtain an additional loan to cover the \$4,000 purge condition, and it set a hearing to review the matter after thirty days, which would have provided Hong an opportunity to present evidence of his inability to satisfy the purge condition.³ Hong has not persuaded us that the trial court erroneously exercised its discretion by finding him in contempt or setting the purge conditions.

³ It appears from court minutes and docket entries that Hong left the state rather than comply with the contempt order, attend the next scheduled hearing, or report for jail, and that there may still be an outstanding warrant for him in effect.

By the Court.—Order affirmed.

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

