

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 19, 2009

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. 2008AP2119

Cir. Ct. No. 2006FA700

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

KAREN LYNN MCCAULEY N/K/A KAREN LYNN KITELINGER,

PETITIONER-RESPONDENT,

v.

ALAN JAMES MCCAULEY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
DANIEL DILLON, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Alan McCauley appeals an order which required him to pay maintenance to his ex-wife Karen Kitelinger as a purported sanction

for contempt. We agree with McCauley that the circuit court erroneously awarded maintenance without notice, an evidentiary hearing devoted to maintenance issues, or consideration of the relevant maintenance factors. We therefore reverse the order and remand the matter for further proceedings.

BACKGROUND

¶2 McCauley and Kitelinger were divorced in 2007. The divorce judgment noted that Kitelinger waived maintenance in exchange for other considerations in the parties' marital settlement agreement. Specifically, McCauley agreed to pay the parties' COBRA premiums and to contribute \$800 per month toward Kitelinger's health insurance for a period of 24 months. The judgment further provided that if McCauley "fails to comply with the provision on Health Insurance or fails to hold [Kitelinger] harmless on claims by creditors; maintenance will be evaluated upon [Kitelinger's] motion."

¶3 In April of 2008, Kitelinger moved to have McCauley held in contempt for failing to sign quit claim deeds and real estate transfer returns and failing to make payment to Kitelinger for her health insurance. At the contempt hearing, McCauley admitted that he had not signed the deeds and real estate returns in a timely manner (although he did so before the hearing) and had not yet made a payment for Kitelinger's health insurance.

¶4 The trial court found that Kitelinger's failure to comply with the provisions of the divorce judgment was a willful contempt of court and not based on inability to pay. It then referred to the provision in the divorce judgment allowing reevaluation of maintenance if the health insurance payments were not made and stated:

I am taking this opportunity to review the maintenance waiver, and at this time I am ordering Mr. McCauley to pay maintenance. That maintenance will be unlimited in duration, and it will be in the sum of \$1,000 per month. That payment will be instead of the \$800 payment for health insurance.

The court explained that the additional amount was to compensate for the fact that the maintenance would be taxable income to Kitelinger.

¶5 McCauley appeals the imposition of maintenance without notice or an opportunity to present evidence and without any consideration of the statutory maintenance factors.

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.” *Rhode-Giovanni v. Baumgart*, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452; *see also* WIS. STAT. § 767.59(1f) (2007-08).¹ Because circuit courts have broad discretion to determine the amount and duration of maintenance, our review is limited to considering “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. *Baumgart*, 269 Wis.2d 598, ¶¶17, 19.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

DISCUSSION

¶7 The trial court relied upon *Eckert v. Eckert*, 144 Wis. 2d 770, 424 N.W.2d 759 (Ct. App. 1988), for the proposition that it had authority to impose maintenance based on a party's failure to comply with the terms of the property division. We agree that a party's failure to comply with the property division may provide grounds to revisit the issue of maintenance — particularly where the divorce judgment itself conditioned the maintenance waiver upon compliance with the property division. That does not mean, however, that a court may disregard the standard procedures and, sua sponte, award maintenance in the context of a contempt hearing. Indeed, the divorce judgment here provided only that Kitelinger could bring a motion to have the maintenance issue reexamined if McCauley failed to comply with the health care provisions.

¶8 In short, we conclude that the trial court erred by entering a maintenance order without notice that the divorce judgment was to be reopened, without providing the parties an opportunity to present evidence of their current financial positions, and without consideration of the relevant statutory factors under WIS. STAT. § 767.56. We therefore reverse the maintenance award. The practical effect of this reversal is to reinstate McCauley's obligation to make 24 monthly payments of \$800 toward Kitelinger's health care insurance, and any payments made under the reversed order should be applied toward that obligation. Upon remand, Kitelinger may bring a motion to reopen the divorce judgment to reconsider maintenance.

By the Court.—Order reversed and cause remanded with directions.

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

