

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 10, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1098

Cir. Ct. No. 2001FA22

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

JUDITH MANCEL HANSEN,

PETITIONER-APPELLANT,

V.

PETER MICHAEL HANSEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County:
DARRYL W. DEETS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Judith Hansen appeals an order amending a divorce judgment. The order converted Judith's family support award to

maintenance, and replaced a percentage award with a fixed amount. She contends that the award is an erroneous exercise of discretion because it is inadequate under the circumstances. We affirm.

¶2 Judith and Peter Hansen divorced in 2002 after 21 years of marriage. Judith's earning capacity was \$42,000 per year at the time of the divorce, and the court found that Peter's average income over the prior three years was approximately \$140,000 per year. The parties had two minor children. The court ordered Peter to pay Judith indeterminate length family support of \$2000 per month plus 25% of his income above \$104,000.

¶3 In February 2007, Peter moved to reduce family support, and Judith subsequently filed a motion to convert family support to maintenance and to increase the award. By 2007 the children were adults and no longer lived with Judith. Judith's earnings from work had increased to \$56,000 per year, and Peter's income had increased to \$218,000 in 2005 and decreased to \$214,000 in 2006. In both those years he paid over \$56,000 in family support. After primarily considering the increases in both parties' income, Judith's budget, and anticipated reductions in Peter's income due to health, age and business factors, the circuit court converted the family support award to maintenance, and set it at \$2500 per month. By the court's undisputed calculations, the award gave Judith a total income which approximately equaled her monthly budget of \$5166. It gave her approximately 33% of the combined total of her then-current income, and Peter's 2006 income.

¶4 Judith contends that the circuit court erroneously exercised its discretion by inadequately considering the fairness of the maintenance decision, failing to use an equal division of income as its starting point, finding a substantial

change in financial circumstances that justified a reduced award, failing to consider all of Peter's income, and basing its decision at least in part on anticipated reductions in Peter's income.

¶5 A party seeking to modify maintenance must show 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. The appropriate comparison for changed circumstances is to the set of facts that existed at the time of the most recent maintenance order. *Kenyon v. Kenyon*, 2004 WI 147, ¶38, 277 Wis. 2d 47, 690 N.W.2d 251. The court should compare the facts surrounding the previous order with the parties' current financial status to determine whether the moving party has established a substantial change in circumstances. *Id.*

¶6 Circuit courts exercise their discretion when determining whether there has been a substantial change in circumstances, and whether it justifies a modified award. See *Rohde-Giovanni*, 269 Wis. 2d 598, ¶17. A circuit court erroneously exercises its discretion when it fails to consider relevant factors, bases its award on factual errors, makes an error of law, or grants an excessive or inadequate award. *Id.*, ¶18. In determining whether to modify an award the court should "consider fairness to both of the parties under all of the circumstances, not whether it is unjust or inequitable to alter the original maintenance award." *Id.*, ¶32.

¶7 Consideration of fairness. Judith contends that the court inadequately considered the fairness of reducing maintenance to a level that, while allowing her to meet her monthly budget, gave substantially more disposable income to Peter. We disagree. The court examined Judith's budget and found that

a substantial component of it was discretionary spending on such things as her adult children, donations to her church and repaying a discretionary loan. Nevertheless, the court concluded that in the interests of fairness Judith should be allowed sufficient maintenance to continue that discretionary spending. By so doing, the court went beyond considerations of support only, which would have justified a substantially lower maintenance award, and adequately and reasonably considered the fairness of the award to Judith.

¶8 Starting with an equal division. Judith contends that the court erroneously applied the law in Wisconsin for awarding maintenance after long-term marriages, when it failed to consider a fifty-fifty division of income as its starting point. However, when the court made its original award it did, in fact, consider the fifty-fifty split as its starting point, and then deviated from it by awarding family support to Judith that left her with substantially less than fifty per cent of the parties' income. Judith cites no authority for the proposition that having already considered and rejected an equal division in its original decision, the court must begin again from the same point on a postjudgment motion to modify maintenance. On a postjudgment motion to modify a divorce judgment the court should adhere to the findings made at the time of the divorce, and not retry issues determined at the original hearing. *Id.*, 269 Wis. 2d 598, ¶33.

¶9 A change of circumstances. The trial court properly determined that there was a substantial change of circumstances justifying the fixed amount \$2,500 per month award. Since the original award, the parties' two minor children had become adults and left Judith's home, her budget for necessities had substantially decreased, her earnings from work had increased to well beyond her pre-divorce earning capacity. The court also found that Peter's income would decrease from his 2005-06 level of earnings due to age, arthritis and business changes. The court

reasonably determined from these circumstances that the parties' financial situations had substantially changed, justifying a restructured maintenance award tailored to the circumstances of both parties.

¶10 Peter's income calculation. Judith argues that the court erred because it failed to add rental income to its calculation of Peter's gross income. Peter testified that he reported rental income, paid to him from his LLC, of approximately \$20,000 in 2005 and \$17,000 in 2006. He essentially testified that it was classified as income for tax purposes, but was not really income that he considered paid to him, as it went directly to the LLC's lender. A reasonable fact finder could have found the testimony equivocal as to whether the rental amount qualified as income for maintenance purposes. However, because Judith did not pursue the issue in the circuit court, nor argue that the court should add the rental amounts to his gross income for maintenance calculation, we deem the issue waived.

¶11 Peter's prospective reduction in income. In Judith's view, the court erred by finding that Peter was near the end of his high income years because of his age, arthritis, and the addition of a partner to his practice. Peter testified that his earnings were unusually high in 2005-06 because of a partner's illness, he had already begun to cut back his hours and patients due to age and arthritis, and he was adding a new partner, which meant dividing the partnership proceeds four ways rather than three, and that he simply could not work as hard as he once did. There is no dispute that the court may consider anticipated future events in determining maintenance. *See Enders v. Enders*, 147 Wis.2d 138, 146, 432 N.W.2d 638 (Ct. App. 1988). Here, Peter's testimony provided a reasonable basis for the court's determination that Peter could anticipate reduced earnings, and it was the court's prerogative to believe that testimony. *See Dejmal v. Merta*, 95

Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (the determination of witness credibility is left to the trial court).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

