COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2845 **Cir. Ct. No. 99-FA-218**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE MARRIAGE OF:

CHARLES BRITTON,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

BONNY BRITTON,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed*.

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

¶1 PER CURIAM. Bonny Britton appeals and Charles Britton cross-appeals an order awarding Bonny $250 per month maintenance and refusing to

hold Bonny in contempt of court for violating a visitation order. Bonny argues that the trial court should not have imputed income to her or reduced her expenses because her cohabiting boyfriend, William Mason, and adult children live in her home. Charles argues that the court should have awarded Bonny no maintenance because she suborned Mason's perjury on the cohabitation issue. Charles also argues that the court should have imposed sanctions against Bonny for violating the visitation order. We reject these arguments and affirm the order.

¶2 At the time of the initial divorce judgment, the parties stipulated that Charles could not afford to pay and Bonny did not need maintenance because Charles paid 29% of his income as child support. The court held open maintenance to be revisited on Bonny's motion when the child support decreased. Bonny requested maintenance of $837.50 per month when Charles' child support decreased from 29% to 17% of his income. The trial court, imputing some income or reduced expense capacity to Bonny from Mason and her adult children living in her home, granted her $250 per month indefinite maintenance.

¶3 Bonny's appeal is substantially premised on several mischaracterizations of the posture of this case and the trial court's rulings. First, Bonny incorrectly describes this as a reduction in her maintenance. Rather, it is an increase from zero to $250 per month. Second, she misallocates the burden of proof. The burden is on the party seeking a modification. *See* ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996). In ***Van Gorder v. Van Gorder***, 110 Wis. 2d 188, 327 N.W.2d 674 (1983), the burden was on the husband to establish the financial consequences arising from his wife's cohabitation because he was the party seeking to modify maintenance. Third, the trial court did not conclude that ***Van Gorder*** did not apply. Rather, it ruled that it lacked sufficient evidence to make precise calculations regarding Mason's

contributions to Bonny's household. Therefore, the court was required to impute reasonable contributions to household expenses from Mason and the adult children living with Bonny.

¶4 The trial court properly exercised its discretion when it set maintenance at $250 per month. WISCONSIN STAT. § 767.26(10) (1999-2000) allows the court to utilize factors it determines to be relevant when assessing a party's total economic circumstances. Bonny requested maintenance even though she had not taken reasonable steps to reduce her expenses or create income from the assets awarded her in the divorce. The trial court faulted her for not attempting to refinance her high mortgages and reasonably found that other adults living in her home should help defray household expenses. Bonny notes that the mortgage expenses would have been the same regardless of how many guests lived in her house. She does not, however, adequately account for other expenses that increase when more individuals live in a home, such as food and utilities. In addition, as the children become adults and leave home, Bonny's need for a large home with a substantial mortgage is reduced. As in ***Kronforst v. Kronforst***, 21 Wis. 2d 54, 65, 123 N.W.2d 528 (1963), the trial court could reasonably find that Bonny must, in effect, take in boarders if she wishes to continue living in the family homestead. By imputing some income to Bonny from her emancipated children and Mason defraying household expenses, the court has merely compelled Bonny to effectively utilize the assets awarded her in the divorce rather than expecting her former husband to financially support her generosity.

¶5 Charles's argument that the trial court should have awarded Bonny no maintenance because she suborned Mason's perjury at trial is also premised on mischaracterizations of the trial court's ruling. The court specifically stated that it was not making a finding of perjury, but only that Mason's testimony was not

credible. Not every finding that testimony lacks credibility justifies a perjury finding. Reasonable people might disagree about the precise meaning of describing where one "lives." In addition, there is no evidence that Bonny suborned any perjury and ***Lorscheter v. Lorscheter***, 52 Wis. 2d 804, 811, 191 N.W.2d 200 (1971), does not compel sanctions for perjury committed by a nonparty when there is no evidence of subornation. Mason may have had his own reasons for mischaracterizing his relationship with Bonny.

¶6 Finally, the trial court properly exercised its discretion when it refused to impose contempt penalties against Bonny for violating the visitation order. Bonny allowed her minor daughter to travel elsewhere when she was supposed to be with her father in California. The trial court required that the time be made up over the next Christmas holiday, but imposed no other penalties against Bonny. Requiring makeup time the following Christmas holiday constitutes a reasonable exercise of the trial court's discretion.

By the Court.—Order affirmed. No costs on appeal.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).