

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2002

Cornelia G. Clark
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. 01-3146
STATE OF WISCONSIN**

Cir. Ct. No. 97-FA-66

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

JEFFREY D. BERLIN,

PETITIONER-APPELLANT,

V.

LORI S. BERLIN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County:
DAVID C. RESHESKE, Judge. *Affirmed.*

Before Nettlesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jeffrey D. Berlin appeals from a post-judgment order which denied his motion for a reduction in his family support payments, found him in contempt for failing to make family support payments, and ordered

him to contribute to his former wife's attorney's fees. We agree with the circuit court that Jeffrey did not establish he was entitled to have the support payments reduced. We also conclude that the court properly found him to be in contempt. We affirm.

¶2 Jeffrey Berlin and Lori S. Berlin were divorced in 1998 after eighteen years of marriage. At the time of the divorce, Jeffrey's monthly income as an attorney was \$8600 while Lori's monthly income was \$744. They had two children. They stipulated pursuant to a marital settlement agreement that Jeffrey would pay Lori \$4000 per month in family support. Jeffrey remarried a year later. Shortly after his remarriage, Jeffrey filed a motion to modify the support payments. Lori filed her own motion to find Jeffrey in contempt for failure to pay the support. The court commissioner found Jeffrey in contempt for failure to pay support. Jeffrey was given the chance to purge the contempt by remaining current on his \$4000 per month obligation and by paying \$2000 per month towards arrearages.

¶3 In January 2000, Lori filed a motion to enforce the contempt finding previously made. The court commissioner found Jeffrey to be in continuing contempt for failing to purge, and recommended that he spend sixty days in the county jail. The circuit court approved these findings and recommendations, finding that Jeffrey had not shown any change in circumstances which warranted a reduction in the amount of support payments to which he had stipulated at the time of the divorce. The court further noted that the depression Jeffrey claimed affected his work was in existence at the time of the divorce. In May 2000, the court issued a remedial contempt order which directed Jeffrey to pay the money or go to jail for ninety days. Jeffrey was allowed to avoid jail and purge the contempt by making scheduled payments.

¶4 In January 2001, Lori again asked the court to find Jeffrey in continuing contempt. Once again, Jeffrey moved to modify the amount of support. And in February 2001, the court once again found Jeffrey in contempt and found that he had not had a change in circumstances. Another remedial contempt order was issued in March 2001. Jeffrey apparently made some substantial payments in response to this order. A review hearing was held in September 2001, and yet another remedial contempt order was issued. It is from this order that Jeffrey now appeals.

¶5 Throughout the proceedings, Jeffrey argued that his circumstances had changed since the time of the divorce. He argued that his income had been reduced dramatically through no fault of his own, and that the expenses of his law practice exceeded his income, with a net income of zero. He testified that he suffered from depression which affected his ability to work. He further argued that he had attempted to find other employment, but had little success. He testified that the one position he was offered paid less than was necessary to pay the family support award, and therefore, he did not accept it.

¶6 The circuit court found, however, that while Jeffrey's income from his law practice was less than at the time of the divorce, his lifestyle was the same or better. The court noted that he was living in a house which cost more than \$300,000, and which he and his wife had remodeled. While the house was titled in his new wife's name, it had been bought with money she received from Jeffrey's father. The court also noted testimony concerning Jeffrey's access to certain revocable trusts from which substantial withdrawals had been made. The court found that there was no reduction in Jeffrey's standard of living. The court also noted that the field of law in which Jeffrey practiced, while not as profitable

as it previously had been, nonetheless was still a reasonable way to earn a living.

The court stated:

The only conclusion that I can draw from the facts that have been elicited here is quite simply that Mr. Berlin has gotten married and has the ability, through other resources, to support himself in a life-style very similar to the lifestyle he enjoyed before; and, in fact, in a position to be a hobby lawyer because he doesn't need the money for himself. That's the only conclusion that I can reach from the record that I see here. And that therefore, the incentive to generate the same kind of, or close to the same kind of income is simply not there from his perspective.

¶7 The court also found that while Jeffrey had shown that the income from his law practice had been reduced, he had not shown what his income actually was. The court concluded that Jeffrey was not “fairly or diligently working at the occupation for which he is best suited, which is the practice of law” and that he was “willfully accepting lower compensation for the purpose of avoiding or reducing his ability to pay.” In other words, the court concluded, he was shirking. The court ordered him to continue to pay \$4000 a month as support and further ordered him to pay \$5000 towards Lori's attorney's fees on the contempt proceedings.

¶8 Jeffrey argues on appeal that he demonstrated a substantial change in circumstances which warranted a reduction in the amount of family support payments he makes, and that the circuit court erred when it found that there was no change. The standard of review applicable to this type of case involves a multi-step process. See *Murray v. Murray*, 231 Wis. 2d 71, 77-78, 604 N.W.2d 912 (Ct. App. 1999). In this case, however, we need only reach the first step. “A trial court may modify a maintenance award only upon a positive showing of a substantial change in the financial circumstances of the parties. A substantial change in circumstances should be such that it would be unjust or inequitable to

strictly hold either party to the original maintenance award. The burden of proof lies with the party seeking modification.” *Id.* at 77 (citations omitted). We review the trial court’s finding of no change in circumstances to determine whether it was clearly erroneous. *Id.*¹

¶9 Further, a party may be held in contempt if he or she has the ability to pay but the refusal to pay is willful and with intent to avoid payment. *Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999). We also review the circuit court’s use of its contempt power for a proper exercise of discretion. *Id.* at 308. The type of sanctions, including the award of attorney fees, are also within the circuit court’s discretion. *Id.*

¶10 The primary basis for the circuit court’s determination in this case was its assessment of Jeffrey’s credibility. The court repeatedly rejected Jeffrey’s claims. The court noted that the depression Jeffrey claimed affected his ability to

¹ The standard of review is:

We will uphold a trial court’s findings regarding a change in circumstances unless they are clearly erroneous. However, whether the change is substantial is a question of law which we review de novo. But because this legal determination is intertwined with the trial court’s factual findings, we nevertheless give weight to the court’s decision, despite our de novo standard of review.

Even where there has been a substantial change in circumstances, the ultimate decision whether to grant a modification of maintenance lies within the trial court’s discretion. We will uphold a trial court’s exercise of discretion when the record shows that the court employed a process of reasoning in which the facts and applicable law are considered in arriving at a conclusion based on logic and founded on proper legal standards.

Murray v. Murray, 231 Wis. 2d 71, 77-78, 604 N.W.2d 912 (Ct. App. 1999) (citations omitted).

work existed at the time Jeffrey entered into the settlement agreement. The court also noted that the reduction in income Jeffrey claimed did not account for the lifestyle he led. The court stated that Jeffrey was not hiding income from his law practice, but rather that he was not pursuing the occupation to which he was best suited in an effort to avoid making the support payments.

¶11 Jeffrey argues that his testimony was unrefuted, but that does not mean that the court was bound to accept it. The court explained why it did not accept Jeffrey's testimony. Specifically, the court noted that despite having no income from his law practice, Jeffrey was able to live with his wife and many pets in a house valued at more than \$300,000, and make improvements to that house. The court noted that Jeffrey had not presented any evidence of what his income actually was. The court also noted that Jeffrey had not established that he was unable to earn enough money in his law practice. The court found that Jeffrey was, in essence, a "hobby lawyer," who lacked the motivation to generate the income he was capable of generating.

¶12 We will not second-guess the trial court's assessment of Jeffrey's credibility. The record fully supports the conclusions the court drew. Further, despite claiming no income, Jeffrey was able to make substantial payments for arrearages and support when he was faced with jail time. We agree with the circuit court's findings that the record did not establish a substantial change in circumstances which warranted a modification of the marital settlement agreement. The record further establishes that Jeffrey was in contempt for failing to make those payments. The court found that Jeffrey had the ability to pay, but was refusing to do so.

¶13 Jeffrey also argues that the circuit court erred when it ordered him to pay a portion of Lori's attorney's fees. Jeffrey, however, applies the wrong standard to this situation. The attorney fees incurred in pursuing a contempt of court order are recoverable under WIS. STAT. § 785.04(1)(a) (1999-2000) as a remedial sanction. *Benn*, 230 Wis. 2d at 315. The circuit court properly awarded Lori a portion of her attorney's fees for having to repeatedly seek judicial assistance to enforce the judgment. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

