

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 1, 2010

A. John Voelker
Acting 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. 2009AP3014

Cir. Ct. No. 2001FA89

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ROSA E. GONZALEZ,

PETITIONER-RESPONDENT,

V.

JOSE ESTEBAN TREVINO A/K/A GILBERTO ROSALES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Jose Esteban Trevino appeals from an order by which the court terminated family support and ordered indefinite-term

maintenance to his former wife, Rosa E. Gonzalez, at the same amount Trevino had been paying, \$7000 a month. The court's well-reasoned decision demonstrates a proper exercise of discretion. We affirm.

¶2 The basic facts are undisputed. The parties divorced in May 2002 after a twenty-two-year marriage that produced two sons, Steven and Mark. Mark was a minor at the time of the divorce. Trevino's gross annual salary was \$170,000; he also received discretionary bonuses from time to time. Gonzalez was a homemaker throughout the marriage with no income. Pursuant to the marital settlement agreement incorporated into the divorce judgment, Trevino paid family support of \$7000 a month, plus fifty-five percent of any bonuses. Child support and maintenance were left open.

¶3 Trevino remarried in December 2002 and had three more children. Divorce proceedings in that marriage were commenced in 2007. In May 2009, after Mark turned eighteen and graduated from high school, Trevino moved to revise the judgment. He alleged that Mark's emancipation and pending support obligations in his second divorce constituted a substantial change in circumstances. *See* WIS. STAT. § 767.59(1f) (2007-08).¹

¶4 At the August 2009 motion hearing, the court found that Trevino's gross income had increased to \$220,000, but with an altered salary structure that no longer included bonuses, and that Gonzalez is totally disabled with no income and no ability to earn one. Steven and Mark reside with Gonzalez and assist her with her care, transportation, yard work and snow shoveling. They do not pay

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

room, board or expenses. The court also found that Trevino's pending child support obligation in his subsequent divorce was irrelevant to this case. The court terminated family support but ordered Trevino to continue to pay \$7000 per month, all as maintenance to Gonzalez.

¶5 On appeal, Trevino argues that leaving the \$7000 amount intact constitutes an erroneous exercise of discretion because it in fact is child support disguised as maintenance. With no agreement or court order obligating him to support his sons beyond the age of majority, he contends, the circuit court should have reduced the family support by approximately \$2400 a month, the amount of the child support component he paid before Mark's emancipation.

¶6 A circuit court exercises its discretion when determining the amount and duration of maintenance. *King v. King*, 224 Wis. 2d 235, 247, 590 N.W.2d 480 (1999). We will not disturb its maintenance decision unless the award represents an erroneous exercise of discretion. *Id.* at 248. Its exercise of discretion is erroneous if it fails to consider proper factors, bases the award upon factual errors, or the award itself is either excessive or inadequate. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (Ct. App. 1989).

¶7 A party seeking to modify a support award must show a substantial change in circumstances warranting the proposed modification. See *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. To determine a change in circumstances, the appropriate comparison is between the parties' current financial status and the facts existing when maintenance was last set. See *Kenyon v. Kenyon*, 2004 WI 147, ¶38, 277 Wis. 2d 47, 690 N.W.2d 251. A circuit court also exercises its discretion when determining whether there has been a substantial change in circumstances justifying a modification. See *Rohde-*

Giovanni, 269 Wis. 2d 598, ¶17. The court’s focus is fairness to both of the parties under all of the circumstances. *See id.*, ¶32.

¶8 The court’s decision showed that it considered proper factors and made an award that is neither excessive nor inadequate based upon facts in the record. *See LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). The court properly recognized that, given the parties’ long-term marriage, a reasonable starting point was an equal division of their total income. *See id.* at 39. To further the dual objectives of fairness and support, the court noted that it could depart from the equal-division starting point upon a reasoned consideration of the factors in WIS. STAT. § 767.56. *See LaRocque*, 139 Wis. 2d at 39.

¶9 The circuit court specifically found that Trevino’s earning ability had increased and that he has a substantial earning capacity from skills honed largely during the marriage. It found that Gonzalez’s income and earning capacity remain at zero; that having Steven and Mark live with her causes only a minor cost increase and does not affect overall household expenses like mortgage payments, upkeep and utilities; and that she in fact derives a substantial benefit from having them live there because she otherwise would have to hire someone, likely at a greater cost, to provide the services and assistance they provide. While the court did eliminate from Gonzalez’s budget a \$714 monthly expense for Mark’s books and tuition—deeming it laudable, but not a legally enforceable obligation—it found her budget on the whole to be reasonable, “[p]erhaps even understated.”

¶10 The court rejected Trevino’s request that it simply deduct the child support element from the family support award. It reasoned that doing so would both disregard the fairness and support factors and yield an absurd result because it would leave Trevino with \$166,000 a year and Gonzalez only \$54,000.

¶11 Trevino complains that the court effectively increased Gonzalez's maintenance award from \$4592 to \$7000 despite not finding a substantial change in circumstances. As the party seeking to modify maintenance, it was his burden to show there has been a substantial change in circumstances to warrant the modification he proposed. *See Rohde-Giovanni*, 269 Wis. 2d 598, ¶30.

¶12 Trevino has not done so. Granted, he no longer has minor children from his first marriage and will owe child support in his second. His income undeniably has increased, however, compared to at the time of the divorce and his earning capacity remains strong. He does not dispute that Gonzalez is totally disabled with virtually no chance that her income or health outlook will improve. We affirm the circuit court's determination.

By the Court.—Order affirmed.

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

