

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 2003

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. 02-2797
STATE OF WISCONSIN

Cir. Ct. No. 97-FA-150

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MARY ANN WENDT,

PETITIONER-APPELLANT,

v.

CLIFFORD WENDT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County:
ROBERT H. RASMUSSEN, Judge. *Reversed.*

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

¶1 PER CURIAM. Mary Ann Wendt, pro se, appeals an order modifying the maintenance awarded her in her divorce. She argues that the trial court erroneously determined that a substantial change in economic circumstances occurred when she sold her home and realized proceeds greater than those

anticipated at the time of the divorce. Her former husband, Clifford Wendt, has not filed a response brief. *See* WIS. STAT. RULE 809.19(3).¹ We may reverse on that ground alone. WIS. STAT. RULE 809.83(2). Nonetheless, we have reviewed the record to determine whether it supports the court's determination. We conclude the record does not support the determination that a substantial change in circumstances occurred and we reverse the order.

¶2 Mary Ann was granted a divorce from Clifford in January 1999. The parties were married in 1953 and were retired at the time of their divorce. The divorce judgment divided equally the parties' personal property and real estate.² To reach an equalized property division, the court ordered that Mary Ann pay Clifford \$48,105 at the time the real estate was sold, or within seven years, whichever first occurs. The sum was secured by a mortgage against real estate Mary Ann had been awarded and bore no interest.

¶3 The divorce judgment provided Clifford was to pay \$612 per month maintenance, subject to later increases. Clifford moved for a modification of his maintenance obligation based upon a substantial change of circumstances. He argued that Mary Ann sold real estate awarded to her in the divorce that netted her more than what was anticipated at the time of the divorce.

¶4 It is undisputed that the real estate awarded to Mary Ann was valued at \$149,500 at the time of the January 1999 divorce and sold for \$234,000 in May 2001. It is also undisputed that Mary Ann disposed of the sale proceeds as

¹ All statutory references are to the 2000-2001 version unless otherwise noted.

² The appellant's brief and the record are unclear regarding the amount each received as a net award.

follows: \$48,000 to Clifford pursuant to the divorce judgment, \$128,000 for a replacement home, \$12,300 state and federal taxes and \$29,000 for an investment that had a value of \$17,000 at the time of the hearing.³ In addition, the court rejected Mary Ann's \$15,787 claim for attorney fees and other sale expenses.

¶5 The court ruled from the bench as follows:

[T]he issue before the Court, first of all, is whether or not a substantial change of circumstances has been shown. The Court finds that yes, it has.

The substantial change is the fact that Mrs. Wendt took an asset which was not liquid and liquidated it. She's not to be faulted for that, but it certainly goes to the issue of whether or not she has the ongoing need that she had when she had a nonincome-producing and nonliquid asset as she did at the time of the divorce. This asset sold for approximately \$85,000 more than it was valued at the time of the divorce. The costs of sale, no matter what they were, there's been no showing that the costs of sale were higher because of the increased sale price.

¶6 The court disregarded the costs of sale. The court found that the taxes were greater due to the higher than anticipated price, and found that of the \$12,300 state and federal taxes, approximately \$5,000 resulted from the increased sale price. Therefore, the court found that "reduces the \$85,000 down to \$80,000."

¶7 The court found that Mary Ann "could have chosen to have used that additional \$80,000 for purposes of putting into a bond or into an account at a bank, a CD, or some other safe, risk-free investment, and to have generated income from

³ The record contains no evidence contradicting these figures. In any event, because Clifford chose not to file a response brief, these numbers are unrefuted. See *Charolais Breeding v. FPC Secs.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

that to meet her needs. She did not do so.” The court further determined that a five- to ten-year bond of that size would have resulted in an income stream of approximately 4.5%, which would have been \$3,600 per year interest, equaling \$300 per month.

¶8 The court found that allegations that Clifford received additional unanticipated income at an auction have not been sufficiently substantiated. The court ordered:

The imputed income which Mrs. Wendt chose to forego by spending in excess of \$80,000 in other ways, thereby not being available to invest as would have been prudent. The previous order with regard to maintenance is reduced by \$300 per month

¶9 Under WIS. STAT. § 767.32, the trial court has the authority to modify maintenance upon a substantial change of circumstances. The amount of the modification is addressed to trial court discretion. *Abitz v. Abitz*, 155 Wis. 2d 161, 174, 455 N.W.2d 609 (1990). However, whether there has been a substantial change of circumstances sufficient to warrant the modification of maintenance presents a mixed question of fact and law. *Rosplock v. Rosplock*, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). The trial court’s fact findings regarding what, if any, changes have occurred will not be disturbed unless clearly erroneous, while the question of whether the change is substantial is a question of law we review independently. *Id.*

¶10 Although there is no dispute that there has been a change in circumstances since the time of the parties’ 1999 divorce, “the critical question is whether those changes were ‘substantial’ within the meaning of the law.” *Murray v. Murray*, 231 Wis. 2d 71, 81, 604 N.W.2d 912 (Ct. App. 1999). “Fairness and equitable principles underpin the law of substantial change in circumstances.” *Id.*

at 82. A substantial change of circumstances should be such that it would be unjust or inequitable to strictly hold either party to the original maintenance award. *Id.* at 81. The burden of proof for modification of maintenance lies with the party seeking modification. *Haeuser v. Haeuser*, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996). Modification may be based only upon facts of record. *Johnson v. Johnson*, 217 Wis. 2d 124, 127, 576 N.W.2d 585 (Ct. App. 1998).

¶11 We conclude the record fails to demonstrate a substantial change in circumstances within the meaning of the law. First, Mary Ann retained \$17,000 from the sale of the land, not \$80,000. Even if the costs of sale were not excluded, her net proceeds would have been \$33,000. The record fails to show that it was not reasonable for Mary Ann to purchase a replacement house for \$128,000. Also, there is nothing in the record to show that the sum Mary Ann invested lost value due to imprudence rather than market factors. The record fails to contain any proof of the rate of return on bonds.

¶12 Additionally, although Mary Ann's real estate sale brought proceeds greater than the 1999 appraisal suggested, there is no showing that at the time of the divorce it was unanticipated that real estate would appreciate. Both Clifford and Mary Ann were awarded parcels of land across the street from one another. There is no showing that Clifford would not realize substantial income from appreciation if he were to sell his real estate. It is not reasonable to consider only Mary Ann's economic circumstances and not Clifford's.

¶13 It was Clifford's burden to show not only that the changes in economic circumstances were material, but also that they were substantial. We

conclude that Clifford failed to meet his burden and, therefore, we reverse the order.

By the Court.—Order reversed.

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

