

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 3, 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. 03-0268
STATE OF WISCONSIN**

Cir. Ct. No. 95FA000394

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

JAMES DAILEY,

PETITIONER-APPELLANT,

v.

RITA DAILEY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
MARIANNE E. BECKER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. James Dailey appeals from the order denying his postjudgment motion to modify maintenance based on a substantial change in

circumstances. Because we conclude that the circuit court properly determined that James did not establish a substantial change in circumstances, we affirm.

¶2 James Dailey and Rita Dailey were divorced in 1996 after twenty-seven years of marriage. At the time of the divorce, the parties entered into a marital settlement agreement which was approved by the court. The agreement provided that James would pay child support until June 15, 1996. After that date, James would pay Rita \$275 per month in maintenance unless Rita married, died, or lived in a marriage-like relationship. James remarried in 2000. Rita has not remarried.

¶3 In 2002, James moved for termination of maintenance or a reduction of maintenance based on a substantial change in circumstances. The basis for his motion was that Rita's income had increased since the time of the divorce. A hearing was held, and the court denied the motion. The court found that James had not demonstrated a substantial change in circumstances. Specifically, the court found that while Rita is "doing much better" than she was at the time of the divorce, maintenance had been set at a very low amount because neither party had significant income. The court further found that paying maintenance did not affect James's financial situation.

¶4 The amount and duration of maintenance awards rests within the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of that discretion. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). A request for a change in a maintenance award also rests within the circuit court's discretion. *Haeuser v. Haeuser*, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996). The modification can be made "only upon a positive showing of a change in circumstances." *Id.* This change must be

substantial and involve a change in the financial circumstances of the parties. *Id.* The burden of proving the change in circumstances rests with the party seeking the change. *Id.*

¶5 We conclude that the family court properly denied the motion. First, the court noted that the maintenance award involved a “very reduced” amount because of the limited income of the parties. This was a long marriage of twenty-seven years. Even though Rita’s income had increased from what it was at the time of the divorce, she was still having difficulty paying all of her expenses. Rita’s testimony established that she had some health problems and as a result of her limited income and without the maintenance award, she was not able to pay for all of her medications. Further, James testified that paying the monthly maintenance amount did not significantly affect his ability to meet his budget.

¶6 James argues that the family court improperly considered the income of his second wife. While the court mentioned that James was remarried and he had taken on “other obligations,” when the court addressed whether James had demonstrated a substantial change in circumstances it did not rely on his current wife’s income.

¶7 James also seems to suggest in his brief that the court which entered the initial order intended to equalize the award of income.¹ The record, however, does not contain a transcript of the divorce proceedings. The court’s findings of fact and conclusions of law in the judgment of divorce are part of the record. There is nothing in that document’s discussion of maintenance which mentions

¹ In his brief, James states that “[a]lthough Judge Kieffer did not exactly equalize their incomes, he made their incomes approximately equal with the award of maintenance.”

equalizing income. Without some support in the record, we cannot consider James's assertion that the family court granting the divorce intended to equalize income.

¶8 Finally, Rita asks this court to award her attorney's fees based on her financial circumstances. She previously asked for a contribution to her expenses associated with the appeal under WIS. STAT. § 767.39(2) (2001-02). But the request was denied by the circuit court. She now asks this court to award fees, arguing that she does not have the ability to pay and James does. *See Balaam v. Balaam*, 52 Wis. 2d 20, 31, 187 N.W.2d 867 (1971). This determination, however, requires that the court make findings of fact, something which this court does not do. *See Lange v. LIRC*, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997) (the court of appeals is primarily an error-correcting court). Rita, therefore, should bring the request again before the circuit court. 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.

