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DISTRICT II

May 8, 2024

To:

Hon. David P. Wilk
Circuit Court Judge
Electronic Notice

Thomas W. Anderson Jr.
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Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1307

In re the marriage of: Holly A. Hansen v. Peter E. Hansen, Jr.
(L.C. #2016FA180)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Peter E. Hansen, Jr. appeals an order denying his motion for a reduction in his maintenance obligations due to a substantial change in circumstances. He also appeals an order denying his motion for reconsideration. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We conclude Peter adequately demonstrated a substantial change in circumstances. Accordingly, we reverse and remand to the circuit court for further proceedings.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The parties were married for more than two decades and divorced in 2017. At the time of divorce, the circuit court imputed income to Holly in the amount of \$35,000 and found that Peter had income of \$54,452. Based on those amounts, the court ordered Peter to pay Holly \$810.50 in monthly maintenance for a period of six years. In 2021, Peter sought to modify his maintenance obligation, claiming Holly’s income had increased and his income had decreased.² Following evidentiary proceedings, the court denied the motion. Peter filed a motion for reconsideration, which resulted in modifications to the court’s written decision but not a change in the outcome. Peter now appeals.

Peter’s sole argument is that the circuit court erred by concluding that no substantial change in circumstances had occurred. To modify a maintenance award, the party seeking modification must demonstrate that there has been a substantial change in circumstances. *In re Marriage of Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. In general, the focus is on any financial changes the parties have experienced. *Id.*

Whether there has been a substantial change in circumstances presents a mixed question of fact and law.³ *Brin v. Brin*, 2014 WI App 68, ¶8, 354 Wis. 2d 510, 849 N.W.2d 900. We will

² The 2021 motion followed a similar motion in 2020, in which Peter received a temporary reduction in his maintenance obligation based on the effects of COVID-19 on his commission-based work in advertising sales for a newspaper.

³ The case law appears to be somewhat inconsistent in selecting the standard of review to apply to this issue. Some cases apply the erroneous-exercise-of-discretion standard. *See Lemke v. Lemke*, 2012 WI App 96, ¶17, 343 Wis. 2d 748, 820 N.W.2d 470. For the reasons explained herein, our conclusion is the same under the “de novo” or “erroneous exercise of discretion” standards.

On this point, we note Peter’s brief switches between references to the “de novo” standard of review, the “clearly erroneous” standard, and the “erroneous exercise of discretion” standard—though he and Holly refer to the latter standard as “abuse of discretion,” a phrase our supreme court abandoned in 1992. *See Hefty v. Hefty*, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992).

uphold the circuit court’s findings of fact regarding the parties’ circumstances “before” and “after” the divorce and whether a change has occurred unless those findings are clearly erroneous. *Jantzen v. Jantzen*, 2007 WI App 171, ¶7, 304 Wis. 2d 449, 737 N.W.2d 5 (citing *Dahlke v. Dahlke*, 2002 WI App 282, ¶8, 258 Wis. 2d 764, 654 N.W.2d 73). Whether the change is substantial is a question of law that we review de novo. *Id.*

Here, we conclude Peter has demonstrated a substantial change in circumstances. The circuit court initially denied Peter’s motion based on its finding that Holly earned very close to the \$35,000 income imputed to her at the time of divorce. Peter’s motion for reconsideration observed that Holly’s *regular* income for 2021 was approximately \$35,000; however, her actual income, including overtime wages, was just over \$44,000. Conversely, the court found that Peter’s income had dropped since the time of divorce to about \$48,000.

The circuit court’s decision on reconsideration modified its findings as to the parties’ wages in accordance with Peter’s motion, placing the parties on much more equal financial footing than they were at the time of divorce. However, the court continued to find that there had been no substantial change in circumstances, observing that: (1) Peter was capable of earning about \$2,000 per year more based upon his failure to find part-time work similar to a job he had been terminated from; (2) Peter’s income was “trending in a favorable direction” relative to 2020, when he earned only \$44,000; (3) there was a lack of evidence that the current overtime opportunities Holly was being afforded would continue; and (4) it would unduly penalize Holly to consider her overtime work for maintenance purpose.

In our view, none of these matters overcome the clear evidence—as found by the circuit court—that the parties’ financial picture had changed considerably. Peter’s income, even if

“trending” upward from the 2020 low of \$44,000, was still approximately \$6,000 lower than his income at the time of divorce. Conversely, Holly’s income had increased by about \$9,000 post-divorce. Contrary to the circuit court’s view, neither the fairness concepts discussed in *LaRocque v. LaRocque*, 139 Wis. 2d 23, 406 N.W.2d 736 (1987), nor the incentive and productivity doctrines espoused in *Schmitt v. Schmitt*, 2001 WI App 78, ¶20, 242 Wis. 2d 565, 626 N.W.2d 14, and in *Bahr v. Bahr*, 107 Wis. 2d 72, 82-84, 318 N.W.2d 391 (1982), appear to require the circuit court to ignore income a party has actually earned when determining whether there has been a substantial change in circumstances.

Peter also argues that “[f]airness and equity” dictate that we terminate his maintenance obligations altogether. This decision is not ours to make in the first instance. See *Murray v. Murray*, 231 Wis. 2d 71, 77-78, 604 N.W.2d 912 (Ct. App. 1999) (“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.”). Our sole conclusion is that Peter has demonstrated a substantial change in circumstances necessitating that we reverse the orders and remand the matter to the circuit court. That court must now determine whether continuing maintenance is appropriate and, if so, the amount.

IT IS ORDERED that the orders of the circuit court are summarily reversed pursuant to WIS. STAT. RULE 809.21. The cause is remanded for further proceedings consistent with this opinion and order.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals