COURT OF APPEALS DECISION DATED AND RELEASED

JUNE 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3433-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CHARLOTTE GADZINSKI,

Petitioner-Respondent,

v.

GERALD GADZINSKI,

Respondent-Appellant.

APPEAL from orders of the circuit court for Trempealeau County: ALAN S. ROBERTSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Gerald Gadzinski appeals the denial of his post-divorce motion seeking modification of maintenance payments and denial of his motion for reconsideration.[1] This court affirms the decisions of the trial court.

[1] This is an expedited appeal under RULE 809.17, STATS.

In February 1993, Charlotte and Gerald Gadzinski were divorced after an eighteen-year marriage. They were awarded joint legal custody of their teenaged daughter, who resided primarily with Gerald. At the time of the divorce, Gerald earned approximately $80,000 annually as a sales manager and also owned and operated a tavern. The trial court ordered Gerald, fifty years of age at the time, to pay $1,200 per month spousal maintenance, to be reviewed when Charlotte obtained employment and terminated when Gerald retired. Maintenance payments were deducted from Gerald's wages until he resigned his sales position effective January 14, 1994. No maintenance payments were made after January 15, 1994.

In December 1993, Gerald brought a motion based on his impending "retirement" from his sales job and requesting revision or termination of maintenance. At the hearing in March 1994, Gerald testified that he had resigned, but also asserted that his "retirement" constituted a significant change in circumstances and that Charlotte, by failing to obtain employment, was shirking her duty to contribute to the support of their daughter. The court refused to modify the maintenance award, finding that Gerald had not retired but had resigned from his job, thereby voluntarily reducing his ability to pay. The court ruled that maintenance would continue until Gerald's retirement or earliest retirement eligibility. The court also found that Charlotte had not sought work after the divorce and had not worked "for some time prior to the divorce." The court ruled that she was not required by the divorce judgment to obtain employment. Gerald did not appeal the court's decision.

In September 1994, Charlotte filed a motion for contempt for failure to pay maintenance, and Gerald brought a second motion requesting the reduction or elimination of maintenance and requesting that Charlotte be ordered to pay child support. The motions were heard in October 1994. Gerald again raised the issue of "retirement," which was the subject of his first motion, and raised for the first time the issue that Charlotte had been employed since the March hearing. Charlotte testified that since March she had worked at a casino for eight weeks, earning $2,121, but quit because of physical problems exacerbated by prolonged standing. She also testified that she worked in home health care for six weeks, earning $1,600, but quit when she could not afford to renew the lease on her apartment and had to move in with her mother. The court reiterated that Charlotte was not required to obtain employment under the divorce decree and that she sought employment to help support herself. The court refused to modify the maintenance award, ordered sanctions against

Gerald to compel him to pay all court-ordered maintenance, and ordered Charlotte to pay child support at the rate of 17% of gross earnings.

Gerald brought a motion for reconsideration, arguing that the court's decision was unfair and failed to consider Charlotte's lack of diligence in seeking employment. The trial court heard and denied Gerald's motion for reconsideration in December 1994. Gerald appeals the denial of his second motion for revision of maintenance and his motion for reconsideration. This court affirms the decisions of the trial court.

Maintenance payments may be modified only upon a showing of a substantial change in the financial circumstances of the parties. ***Licary v. Licary***, 168 Wis.2d 686, 692, 484 N.W.2d 371, 374 (Ct. App. 1992); § 767.32(1)(a), STATS. A decision made on a certain state of facts is given the effect of res judicata so long as that factual situation has not materially changed. ***Thies v. MacDonald***, 51 Wis.2d 296, 301-02, 187 N.W.2d 186, 189 (1971). The court has no power to retry issues determined by an earlier hearing. *See* ***id***. at 302, 187 N.W.2d at 189. The party seeking to alter the provisions of the judgment must demonstrate that the circumstances have materially changed. ***Id***. at 301, 187 N.W.2d at 189. The decision whether to modify maintenance is made in light of the support objective of maintenance, which is that the payee spouse should live at a standard reasonably comparable to that enjoyed during the marriage if the payor spouse does. *See* ***Dowd v. Dowd***, 167 Wis.2d 409, 417, 481 N.W.2d 504, 507 (Ct. App. 1992).

When a determination whether to modify a maintenance award is based on findings of fact, this court will not upset those findings unless they are clearly erroneous. *See* ***Thies***, 51 Wis.2d at 303, 187 N.W.2d at 190. Where the decision rests primarily on an exercise of discretion, the court examines whether the trial court erroneously exercised its discretion. ***Id***. at 303-04, 187 N.W.2d at 190. This court will sustain a trial court's discretionary decision if it was based upon facts appearing in the record, in reliance on appropriate law and is the product of a rational mental process achieving a reasonable determination. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

The trial court found that, pertaining to his resignation from employment, Gerald raised the same issues in his second motion for revision of

maintenance that were the subject of his first.[2] A review of the record supports the court's findings. Gerald's change in income was the subject of the March hearing and cannot be considered as the basis of a substantial change in circumstances in a subsequent hearing. In the absence of a substantial change of circumstances, there is no authority to modify the maintenance award and the court correctly refused to do so. Gerald's recourse after the March 1994 decision was to bring an appeal, not to file a second motion on the same grounds.

The trial court also found that Charlotte's employment after the March 1994 hearing did not constitute a significant change in circumstances. A review of the record reveals that the court, echoing its earlier decisions, implicitly found that Charlotte, given her lack of employment background or training, is unlikely to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Charlotte was generally not employed during the marriage, has few employment skills and modest earning power. Further, the court had already decided at the March 1994 hearing that Charlotte need not seek employment. The court's October 1994 finding, therefore, is not clearly erroneous.

Moreover, in reaching its decision, the court applied the standard stated in ***Dowd***, 167 Wis.2d at 417, 481 N.W.2d at 507, that the support objective of maintenance is not satisfied when the payee spouse is not living at the standard of living reasonably comparable to that enjoyed during the marriage. This constitutes a reasonable application of a correct rule of law and is not an erroneous exercise of discretion.

The court also denied Gerald's motion for reconsideration raising no new issues, a decision within the discretion of the court. A review of the record indicates no erroneous exercise of discretion.

By the Court.—Orders affirmed.

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[2] The court stated that the March 1994 ruling denying Gerald's first motion for reduction or elimination of maintenance was properly decided and that there was no evidence presented in the second hearing that would lead to a contrary finding.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.