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DISTRICT II

August 14, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP70-FT In re the marriage of: Ronald A. Neumuth v. Sheryl A. Neumuth (L.C. # 2001FA929)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Ronald A. Neumuth appeals from an order increasing the amount and extending the term of his maintenance payments to Sheryl A. Neumuth. Pursuant to a presubmission conference and this court's order of January 24, 2013, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).[1] Upon review of those memoranda and the record, we reverse.

The parties were married in 1975 and their 2002 divorce judgment set maintenance from Ronald to Sheryl at $1167 per month. Ronald was laid off from his job in 2008 and filed a motion to either terminate maintenance or to hold it open until he could secure employment. By

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[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the time of the January 2009 hearing, Ronald had obtained employment with a $63,000 annual salary, and Sheryl was earning about $37,000 per year. Ronald's posthearing brief asserted that he needed time to prepare for retirement:

> Respondent [sic] believes the Court should terminate his maintenance obligation now but most certainly on his 62nd birthday when he reaches eligibility for social security retirement. He needs some time to prepare for his own retirement should he continue to work beyond that date. Respondent will have three more income producing years.[2]

The court commissioner modified Ronald's monthly obligation to $800 and ordered that maintenance would terminate on October 31, 2012. The court's original order simply provided that "based on the parties' financials and their written arguments … [maintenance] hereafter is set at $800.00 per month and shall terminate on October 31, 2012." Sheryl, by counsel, wrote a letter asking that the court clarify its reasons for the chosen termination date, and the court commissioner confirmed Sheryl's assumption that the date represented Ronald's "62nd birthday when he reaches eligibility for social security retirement." Sheryl then drafted a more specific order providing that maintenance would terminate on "October 31, 2012, which is the petitioner Ronald Neumuth's 62nd birthday and the date upon which he reaches eligibility for social security retirement." The court commissioner signed the amended order on March 17, 2009, and neither party requested de novo review.

In January 2010, Ronald lost his job. By order entered March 26, 2010, pursuant to Ronald's motion, the court commissioner held maintenance open and required Ronald to engage in an active work search. The court scheduled a review hearing and provided that it could be

[2] Sheryl is three years younger than Ronald.

cancelled "if Respondent [sic] has employment prior to that time and the parties have an agreement." The parties later agreed to adjourn the review hearing "with either party able to bring it on by letter request when Mr. Neumuth secures employment."

On October 4, 2010, Ronald wrote a letter to the court stating that he had obtained a temporary job which could potentially become permanent and that the parties had agreed to reinstate the $800 monthly maintenance order for as long as Ronald maintained this job, "which should be a minimum of six months." On October 26, 2010,[3] the court commissioner entered an order reinstating maintenance. The order provided that Ronald's new job paid a biweekly salary of $3000 and had the potential to "ripen into permanent employment."

Sixteen months later, Sheryl filed a motion to extend and increase Ronald's maintenance payments, which the court commissioner denied. On de novo review, the trial court entered an order indefinitely extending Ronald's maintenance payments beyond the termination date and increasing the monthly amount to $1167, effective November 1, 2012. The trial court found that there had been a substantial change of circumstances since the October 26, 2010 order in that: (1) Ronald's then-temporary job had since ripened into "fulltime employment, which includes benefits and bonuses, in particular, a $16,000 bonus in 2012"; (2) Ronald has no plans to retire in the immediate future; and (3) "Ronald is earning over $97,101 annually plus bonus, and the respondent is earning $40,691 annually with no bonus." The trial court added that at the time of

[3] The order was executed on October 20, 2010, and is not thereafter file-stamped. Based on the court record and the parties' representations, it appears the order was filed on October 26, 2010.

the original divorce hearing, "the support obligation was set so the parties would have approximately a 57/43 split of net disposable income." Ronald appeals.

"In order to modify a maintenance award, the party seeking modification must demonstrate that there has been a substantial change in circumstances warranting the proposed modification." ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. The appropriate comparison is to the circumstances in existence at the time of the most recent maintenance order. ***Kenyon v. Kenyon***, 2004 WI 147, ¶38, 277 Wis. 2d 47, 690 N.W.2d 251. Where a party seeks to extend or prematurely terminate a limited-term maintenance award, the trial court determines whether the changed circumstances warrant modification in light of the predicate for the term order. *See* ***Fobes v. Fobes***, 124 Wis. 2d 72, 81-82, 368 N.W.2d 643 (1985); ***Murray v. Murray***, 231 Wis. 2d 71, 79-80, 81, 604 N.W.2d 912 (Ct. App. 1999). A substantial change in circumstances exists when due to unforeseen events and in light of the "goals of the limited-term maintenance," "it would be unjust or inequitable to hold either party to the strict terms of the limited-term maintenance agreement." ***Murray***, 231 Wis. 2d at 81.

Maintenance determinations lie within the sound discretion of the trial court, and we will affirm absent an erroneous exercise of discretion. ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶17. A trial court erroneously exercises its discretion when it fails to consider relevant factors or bases its award on errors of fact or law. ***Id.***, ¶18. This court independently reviews any issues of law. ***Id.***, ¶19.

We conclude that the trial court erroneously exercised its discretion in extending Ronald's term maintenance order. The March 17, 2009 limited-term order was based on Ronald's asserted need to build a nest egg before his actual retirement and contemplated that he

would "continue to work beyond [his eligibility] date."[4] The order was never predicated on his actual retirement, and its language, drafted by Sheryl's attorney, specifies that the termination date represents Ronald's eligibility for social security retirement. Sheryl chose not to request de novo review of the order, and the award of limited-term maintenance is the law of the case. The term order served the purpose of "limiting the responsibility of the payor-spouse to a time certain and avoiding future litigation." ***Murray***, 231 Wis. 2d at 81. Fairness dictates that Ronald had a right to "structure[] his finances based on his belief that maintenance would end." ***Jantzen v. Jantzen***, 2007 WI App 171, ¶19, 304 Wis. 2d 449, 737 N.W.2d 5.

We also conclude that Ronald's job having become "permanent" is not a substantial change in circumstance. The October 26, 2010 order contemplated that Ronald might become a permanent employee, but allowed for the possibility that he would lose his "temporary" job and therefore be unable to pay maintenance. Fortunately, that never happened. We fail to see how Ronald's change in status to a permanent employee is relevant to Sheryl's request to extend maintenance.

Similarly, Ronald's increased income does not warrant an extension of maintenance. At the time of the de novo hearing, Ronald grossed about $83,000 annually, with an additional allowance for his automobile and cell phone costs, bringing his gross salary to about $93,000.[5]

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[4] This language was included in Ronald's trial brief and the court's order was based on the parties' "written arguments."

[5] The trial court found that Ronald's annual salary was $97,000, an amount neither supported by the record nor asserted by either party. This finding is clearly erroneous.

Sheryl's annual salary was $41,995, not including any income from her jewelry business. Ronald's salary increase from $78,000 in October 2010 to between $83,000 and $93,000 is not a substantial change in circumstances.[6] Both parties now earn more than in the past, and it was always anticipated that Ronald would earn more than Sheryl. *See* ***id.***, ¶17 (the fact that a recipient-spouse has less disposable income than the payor is not a substantial change in circumstances where it was known at the time maintenance was originally set that the payor would always command a higher salary). To the extent that the trial court looked to the "57/43 split" in the original divorce judgment to determine whether there was a substantial change of circumstances, this was an error of law. *See* ***Kenyon***, 277 Wis. 2d 47, ¶16 (where there has been a prior modification, the trial court should not use the facts surrounding the original divorce judgment as a baseline for evaluating the asserted change in circumstances). Neither Ronald's salary nor his bonus represents the sort of unforeseen event that would "frustrate or impede the goals of the limited-term maintenance." ***Murray***, 231 Wis. 2d at 81.

The trial court also increased Ronald's maintenance payments to $1167 effective November 1, 2012. Because we conclude that maintenance should have terminated on October 31, 2012, we need not address the propriety of the increased amount.

Upon the foregoing reasons,

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[6] It is unclear precisely which numbers the trial court used in calculating Ronald's gross income. Ronald testified that his job requires travel and that, in the past, he was provided with a company car. Ronald testified that for tax purposes, the company decided to replace the vehicle with a $640 monthly automobile allowance to cover vehicle payments, insurance, and maintenance. Ronald argued that the auto allowance, which he received in addition to his $83,000 salary, should not be included when calculating his gross income because it replaces a prior benefit and does not represent a true salary increase. The trial court did not make any specific findings concerning whether and to what extent the automobile allowance was or should be considered in calculating Ronald's income.

IT IS ORDERED that the order of the circuit court is reversed and remanded for further proceedings consistent with this opinion.

Diane M. Fremgen
Clerk of Court of Appeals