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DISTRICT IV

February 21, 2014

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

2013AP677

In re the marriage of: Matthew Warren Freng v. Keri Rachel Freng
(L.C. # 2007FA30)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Matthew Freng and Keri Freng filed cross-appeals from a post-divorce order dealing with their cross-motions for modifications to child support and maintenance. Keri has since died of cancer, and her cross-appeal has been dismissed. However, Matthew has notified this court that he wishes his appeal to proceed because he still challenges amounts accrued. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the circuit court order in all respects.

We begin by noting the importance of the standards of review applicable to post-divorce orders modifying child support and maintenance. Child support and maintenance awards both lie within the discretion of the circuit court. *Ladwig v. Ladwig*, 2010 WI App 78, ¶15, 325 Wis. 2d 497, 785 N.W.2d 664. We will not disturb discretionary determinations so long as the circuit court “‘examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.’” *Id.* (quoted source omitted).

Under this standard, it is often necessary for this court to review disputed factual findings or legal propositions upon which the circuit court relied before determining whether the circuit court’s application of the law to the facts was reasonable. This court will independently decide any questions of law underlying a discretionary determination. *See Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶19, 269 Wis. 2d 598, 676 N.W.2d 452. However, we will accept a circuit court’s factual findings unless those findings are clearly erroneous—meaning that the great weight and clear preponderance of the evidence support a contrary determination. *See* WIS. STAT. § 805.17(2); *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

Furthermore, because the circuit court is in the best position to observe witness demeanor and gauge the persuasiveness of testimony, it is the “ultimate arbiter” for credibility

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

determinations when acting as a fact finder, and we will defer to the circuit court's resolution of discrepancies or disputes in the testimony and the court's determinations of what weight to give to particular testimony. See *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); see also WIS. STAT. § 805.17(2) (“[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”). This means that we will not overturn credibility determinations on appeal unless the testimony on which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

Matthew contends that the circuit court erroneously exercised its discretion when it extended his maintenance obligation and refused to reduce his child support obligation, but he fails to recognize or acknowledge that the actual claims of error he advances on this appeal rest squarely upon factual findings and credibility determinations. Specifically, Matthew challenges the circuit court's factual findings that Keri's need for support had greatly increased and that Matthew's earning capacity had remained the same since the last support order had been entered.

The circuit court's finding that Keri's need for support had greatly increased was based on uncontroverted evidence that Matthew had discharged in bankruptcy a \$475,000 business loan that had been assigned to him in the property division. That discharge in bankruptcy resulted in the bank obtaining a personal judgment of approximately \$475,000 against Keri in her capacity as a personal guarantor and attaching that judgment to property that Keri had been

awarded in the property division.² That finding was not clearly erroneous. Also, the change plainly constituted a substantial change with respect to the property division, which in turn amply supported the circuit court's exercise of discretion to extend the term of maintenance to compensate Keri for her decreased ability to rely on the assets she had been awarded to support herself.

The circuit court's consideration of Matthew's earning capacity was entwined with the court's determinations that the testimony of Keri's vocational expert was more credible than that of Matthew's vocational expert, and that Matthew's own testimony was not credible with respect to how he was supporting himself. Based on those credibility determinations, the circuit court's factual finding that Matthew's earning capacity was not "much different" than it had been when the last order had been entered was not clearly erroneous, and that finding precluded the circuit court from entering a modification order.

² Matthew also argues that the circuit court erred, as a matter of law, in treating the possibility that he might seek to discharge his remaining property division obligations in a future bankruptcy as a substantial change in circumstances. That argument, however, is an obvious misconstruction of the circuit court's actual ruling, which the court explicitly stated was based on "the results thus far in the bankruptcy."

IT IS ORDERED that the circuit court's order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals