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DISTRICT II

January 21, 2015

To:

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

2014AP938-FT

In re the marriage of: Stephen A. Waite v. Shirley A. Waite
(L.C. #2011FA1098)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Shirley A. Waite appeals from a postjudgment order declining to find Stephen A. Waite in contempt and award related attorney fees, and granting Stephen's motion to modify maintenance. Pursuant to a presubmission conference and this court's order of June 3, 2014, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).¹ Upon review of those memoranda and the record, we affirm.

The parties were divorced on December 14, 2012. As part of the original divorce judgment, the trial court approved a partial marital settlement agreement awarding the homestead

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

to Stephen and ordering that he “refinance the homestead within ninety (90) days from the granting of the Judgment of Divorce removing Shirley’s name from the mortgage and note.” It was undisputed that the property had a “negative equity.” In setting maintenance, the trial court determined that Stephen had no ability to work or earn a living, but received \$54,400 annually in disability benefits and an additional \$19,500 per year in interest income from a recent inheritance.² The trial court found that Shirley was capable of earning at least \$45,000 per year in the dental field, but that “it may take some time to achieve this.” The court therefore imputed to Shirley an annual income of \$25,000, which equated “to \$12.00 per hour, substantially less than what she earned before.” Employing an income equalization formula, the court awarded Shirley \$1900 per month in maintenance effective December 1, 2012, through January 31, 2015, at which time the amount would reduce to \$920 per month.

In April 2013, Shirley filed a motion seeking to have Stephen found in contempt for failing to timely remove her name from the mortgage and line of credit secured by the homestead and requesting related attorney fees. Due to circuit court rotation, a new judge was assigned. The postjudgment court provided Stephen additional time to refinance the homestead debt. When it became clear that Stephen would be unable to obtain the requisite financing, the court ordered Stephen to sell the home or pay off the debt in order to clear Shirley’s name. Stephen used his inheritance to pay off the \$225,000 debt secured by the property. He also filed a motion

² Stephen’s income was comprised of social security disability in the amount of \$2237 per month, plus proceeds from a life insurance disability policy in the amount of \$2300 per month, with the latter benefit terminating on January 31, 2015. Additionally, during the pendency of the divorce, Stephen’s father died, leaving him a substantial inheritance. The divorce court found that Shirley had failed to establish a hardship sufficient to permit the court to divest Stephen of his inheritance and declined to award a portion to Shirley. *See* WIS. STAT. § 767.61(2)(b). However, the divorce court imputed annual income to Stephen based on a three-percent return on his \$650,000 inheritance investment.

seeking a reduction or termination of his maintenance obligation and a finding of contempt against Shirley for failing to return personal property awarded him in the divorce.

In January 2014, the parties appeared for a final hearing. Stephen's accountant testified that after paying off the homestead debt his interest income had reduced to a projected amount of \$6000 per year. Stephen testified that he consulted with eight banks, all of which declined his refinancing application based on his debt-to-income ratio, including his maintenance obligation. He testified that pursuant to professional advice, he attempted to lower his debt-income ratio by using some of his inheritance to pay down the homestead debt, to no avail. Shirley testified that she was working nine hours per week through a contract with Marquette University and was earning less than the \$25,000 imputed to her in the original divorce. From the bench, the trial court denied both parties' contempt motions, declined to award attorney fees to either party, and reduced Stephen's maintenance obligation to \$600 per month effective February 1, 2014, with a termination date of January 31, 2015.

Shirley first argues that the trial court erred by denying her contempt motion and request for attorney fees.³ We disagree. Contempt of court refers to the intentional “[d]isobedience, resistance or obstruction of the ... order of a court.” WIS. STAT. § 785.01(1)(b). Here, the trial court expressly found that there was “no showing of any willful disregard of the Court Order.” Rather, Stephen had “problems refinancing” and eventually “had to pay the entire mortgage to get [Shirley's] name off the mortgage and note.” The court's findings are not clearly erroneous.

³ We review the trial court's use of its contempt powers for an erroneous exercise of discretion. *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995).

See WIS. STAT. § 805.17(2).⁴ Given the trial court’s determination that Stephen was not in contempt, it properly denied Shirley’s motion for attorney fees. Cf. *Town of Seymour v. City of Eau Claire*, 112 Wis. 2d 313, 320, 332 N.W.2d 821 (Ct. App. 1983) (under WIS. STAT. § 785.04(1)(a), a trial court has the power to order attorney fees as a sanction upon a contemptuous party as part of the losses and damages caused by the contempt); see also *Rand v. Rand*, 2010 WI App 98, 327 Wis. 2d 778, 787 N.W.2d 445 (applying this analysis in the family-law setting). The court properly found that there was “no contempt, no actual damages[,]” particularly where Shirley failed to demonstrate that she suffered any harm from having her name on the financial documents for more than ninety days.

Next, Shirley challenges the trial court’s decision to modify and then terminate maintenance. A family court may modify a maintenance award upon a demonstration by the movant of “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. Typically, the focus of the inquiry will “be on any financial changes the parties have experienced.” *Id.* Because the trial court has broad discretion to determine the amount and duration of maintenance, our review is limited to considering “whether there was sufficient evidence from which the circuit court could reasonably find a substantial change in the parties’ circumstances that would justify” the modification. *Id.*, ¶17.

⁴ We reject Shirley’s argument that the court was obliged to find Stephen in contempt for failing to immediately use his inheritance to pay off the debt. The marital settlement agreement required Stephen to seek refinancing. As the postjudgment court noted, this was Stephen’s original plan, he made significant efforts to achieve this goal, and the postjudgment court specifically allowed him additional time to pursue refinancing.

The trial court properly found that there was a substantial change in circumstances based on the significant decrease in Stephen's interest income from \$19,500 to \$6000 per year.⁵ Additionally, the court properly exercised its discretion in determining that this change justified modification of the original maintenance award. The postjudgment court considered the statutory maintenance factors in light of the divorce court's original findings and order.⁶ Reasoning that the divorce court sought to equalize the parties' disposable income and that Stephen was disabled, the postjudgment court found that Shirley had been given time to realize her earning capacity and needed "an incentive to diligently pursue her capacity," noting that as of January 31, 2015:

[Shirley's] capacity, according to [the divorce court], is twice what [Stephen will] be making at that point. So she needs to realize that she can't really expect more from her 65 year old disabled ex-husband. That she needs to do what she can between now and her retirement to maximize her income.

⁵ In finding that the decreased interest income constituted a substantial change in circumstances, the court considered the nature of the underlying expenditures "in light of [Stephen's] obligation to pay maintenance in this case" and determined that they were reasonable. With regard to Stephen's decision to use his inheritance to pay off the homestead debt, the court noted that because he was obligated to remove Shirley's name from the mortgage and could not refinance the debt, he had to either sell or pay for the property. Given all the circumstances, the court found that it was less expensive and more reasonable to pay off the debt.

⁶ Contrary to Shirley's assertions, the trial court expressly referenced and relied upon the divorce court's factual findings and legal conclusions. See *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶33, 269 Wis. 2d 598, 676 N.W.2d 452 (in determining a motion to modify maintenance, the court "should adhere to the findings of fact made by the circuit court that handled the parties' divorce proceedings"). The postjudgment court considered factors including the parties' ages, health status and the modest standard of living enjoyed during their long-term marriage. As to their earning capacities, it relied on the divorce court's express findings that Shirley was employable, had an earning capacity of \$45,000 per year, and "was not devoted to finding appropriate employment consistent with her prior education, training and experience" which included a college degree in dental hygiene, a master's degree in public health and "substantial experience in the dental practice field."

Because the postjudgment court's decision had a reasonable basis in the record and was not based on legal or factual errors, it constituted a proper exercise of discretion which we may not second guess.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals