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DISTRICT IV

August 9, 2016

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

2015AP2117

In re the marriage of: Michele D. Rhodes v. Benjamin T. Rhodes
(L.C. # 2009FA276)

Before Lundsten, Sherman, and Blanchard, JJ.

Benjamin Rhodes appeals a post-divorce order modifying the monthly maintenance he is required to pay his former wife, Michele Rhodes. Benjamin argues that the circuit court improperly exercised its discretion in reducing his maintenance order by \$100 per month, and not more than that. After reviewing the record and briefs, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ For the reasons discussed below, we summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Benjamin and Michele Rhodes divorced in 2012. Benjamin brought a motion to reduce maintenance, alleging that there was a substantial change in circumstance, namely, that his income was reduced as a result of new employment. Following a hearing, the circuit court concluded that the reduction in Benjamin's income constituted a substantial change in circumstance, and ordered that monthly maintenance paid to Michele be reduced from \$1700 per month to \$1600 per month. Benjamin now appeals.

Modification of maintenance falls within the circuit court's discretionary authority. *Gerth v. Gerth*, 159 Wis. 2d 678, 681, 465 N.W.2d 507 (Ct. App. 1990). When the circuit court has determined that the requisite substantial change of circumstance threshold has been met, the circuit court will then consider the twin objectives of support and fairness in setting the new award. *Kenyon v. Kenyon*, 2004 WI 147, ¶3, 277 Wis. 2d 47, 690 N.W.2d 251. *See also* WIS. STAT. § 767.59(1c)-(1f). It is important to note that “[t]he court’s power to modify the provisions of the judgment of divorce is not the power to grant a new trial or to retry the issues determined by the original hearing, but only to adapt the decree to some distinct and definite change in the financial circumstances of the parties” *Thies v. MacDonald*, 51 Wis. 2d 296, 302, 187 N.W.2d 186 (1971). Benjamin’s brief invites this court on appeal to do what *Thies* explicitly prohibits, namely, revisit issues determined at the original hearing. We decline. Our focus is on the fact-finding and exercise of discretion the circuit court undertook in resolving Benjamin’s motion for modification of maintenance only.

We affirm the circuit court’s findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993). The only new finding of fact the circuit court made that Benjamin seemingly challenges is that related to the circuit court’s determination of Benjamin’s income. *See DeLaMatter v.*

DeLaMatter, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989) (a circuit court's income determinations are findings of fact that the appellate court will not set aside unless clearly erroneous). We do not deem a finding of fact clearly erroneous unless there is no credible evidence in the record to support it. See *Insurance Co. of N. Am. v. DEC Int'l, Inc.*, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

When determining Benjamin's income, the circuit court noted that Benjamin had in past years received the benefit of the circuit court having under-calculated his income due to the court not having considered the overtime pay Benjamin consistently received in prior years. The court also noted that throughout the course of the litigation, Benjamin consistently testified that he is not guaranteed 40 hours per week of work. In an effort to accurately assess Benjamin's income, the court reviewed his income history, including the most recent paystubs that indicated Benjamin was receiving overtime pay, and concluded:

[I]t appears that overtime is something that he's getting in his new employment. It's something that he's consistently got over the years.... I think a fair amount to calculate for overtime would be around four point five hours of overtime that [Benjamin] has consistently been getting through looking at the averages of the last three years, looking at his new employment as well.

So I [do now take] this into consideration when calculating what the maintenance award should be.

The court observed that Benjamin was consistently working 40 or more hours each week and that he seemingly had some ability to control the amount of overtime he accepted, and calculated Benjamin's income using the 40 hour work week plus the 4.5 hours of overtime per week it imputed to arrive at a yearly income figure of \$82,313.92. The court added: "So that's what I used for [Benjamin's] yearly income based upon his new employment, based upon his hours that he has been able to obtain, as well as overtime hours." Benjamin offers no argument explaining

how the circuit court's assessment of his income earning ability is clearly erroneous. Because credible evidence in the record supports the court's finding of fact as to Benjamin's income, we uphold it.

We conclude that the court appropriately exercised its discretion in reducing Benjamin's maintenance order by \$100.00 per month. Reviewing the statutory factors, the court noted that Benjamin's health had actually improved since the entry of the original maintenance order, but that other statutory considerations such as the length of the marriage, the property division, education level, and earning capacity all remained the same. The court remained convinced that indefinite maintenance to Michele was appropriate and emphasized that its goal was "to ensure some fair and equitable financial arrangements between the parties." Benjamin raised no issues at the hearing disputing these findings and raised no additional statutory factors that might potentially affect the court's analysis. The court is required to consider only those statutory factors that are relevant to a particular circumstance. *Trattles v. Trattles*, 126 Wis. 2d 219, 228, 376 N.W.2d 379 (Ct. App. 1985).

In addition to calculating the parties' income, the court reduced Michele's submitted monthly budget based on its conclusion that a couple of the entries were "inflated," and set the new maintenance order at \$1600 per month. The court noted that its modification would result in Benjamin having some \$400 more in disposable monthly income than Michele. In considering the relevant statutory factors, as well the fairness and support objectives, the court reached a decision that a reasonable court could reach under the facts of the case, and properly exercised its discretion in modifying maintenance.

Upon the foregoing reasons,

IT IS ORDERED that the order modifying maintenance is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals