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**DISTRICT II**

April 24, 2019

To:

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Circuit Court Judge  
Sheboygan County Courthouse  
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Sheboygan, WI 53081

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

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2018AP1221

In re the marriage of: Ronald Lee Batdorf  
v. Elizabeth Anne Batdorf (L.C. #2011FA321)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Ronald Batdorf appeals from a circuit court order increasing his maintenance payments to his former spouse, Elizabeth Batdorf. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT.

RULE 809.21 (2017-18).<sup>1</sup> We affirm because the circuit court properly exercised its discretion in increasing maintenance.

Each party filed a motion to modify maintenance on the grounds of a substantial change in circumstances. In May 2017, Ronald sought to terminate maintenance; in April 2018, Elizabeth sought to increase maintenance. At the time the motions were filed and heard, Elizabeth was receiving \$500 per month as maintenance. After an evidentiary hearing, the circuit court increased Elizabeth's maintenance to \$1228 per month. Ronald appeals.

We first address an issue relating to what was before the circuit court. Elizabeth complains that, on appeal, Ronald relies on facts that were not in evidence in the circuit court. Ronald responds that he informed the circuit court during argument about his health and financial circumstances and, as a *pro se* litigant, he should have been afforded leniency in presenting his case. The record shows that the circuit court specifically warned Ronald that he could not argue matters not in evidence. Thereafter, Ronald offered a limited amount of evidence. During argument, Ronald mentioned additional health and financial matters (e.g., he has significant health issues requiring multiple medications, he pays rent, and he plans to support an adult child through college).

Argument is not evidence. *Horak v. Building Servs. Indus. Sales Co.*, 2012 WI App 54, ¶3 n.2, 341 Wis. 2d 403, 815 N.W.2d 400. The circuit court clearly informed Ronald that if he had evidence to present, he had to do so before the parties began argument. We conclude that the evidence before the circuit court is limited to that admitted by the circuit court prior to

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

argument, and we do not address any appellate arguments relying upon material that was not in evidence. We also reject Ronald's suggestion that the circuit court had a duty to scour the record to locate information supporting Ronald's position. To the contrary, it was Ronald's obligation to draw the circuit court's attention to the material in the record supporting his position. *See Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (party must direct family court's attention to issues being submitted for determination).

A party seeking to modify maintenance "must demonstrate that there has been a substantial change in circumstances warranting the proposed modification." *Cashin v. Cashin*, 2004 WI App 92, ¶41, 273 Wis. 2d 754, 681 N.W.2d 255. Whether a substantial change in circumstances has occurred is a discretionary determination for the circuit court. *Id.*, ¶44. Once a circuit court finds a substantial change in the parties' circumstances, the decision to modify the amount or duration of maintenance is within the court's discretion. *Id.* We will not reverse a discretionary determination if the record shows a reasonable basis for the court's decision. *Id.* We will uphold the circuit court's findings of fact unless they are clearly erroneous. *Klinefelter v. Dutch*, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991). The weight of the evidence was for the circuit court to determine. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

At the May 2018 evidentiary hearing on the parties' maintenance modification motions, Elizabeth testified that she started teaching sixteen years ago, but she left her tenured Racine teaching position to move to Sheboygan County for Ronald's employment. At the time of the hearing, Elizabeth was commuting to Milwaukee to teach, but she did not expect to have a teaching contract for a full-time position for the following year due to budget cuts. Elizabeth testified about her financial disclosure statement and her financial circumstances, including that

she had exceptional vehicle expenses due to her 130-mile commute to work, and her current \$50,126 annual income left her with a shortfall of approximately \$1000 per month. Elizabeth submitted a proposed budget that was consistent with the marital standard of living, and she asked the circuit court to impose maintenance in an amount that would enable her to reach that standard of living.

Ronald testified that he had stable employment, and he confirmed his income for 2015 (\$74,112, when maintenance was last adjusted), 2016 (\$84,389), 2017 (\$83,143) and part of 2018. Ronald recalled that at the time of the last maintenance hearing in 2015, Elizabeth's income was \$18,000. Elizabeth's counsel highlighted that Ronald had increased earnings since maintenance was last adjusted. Ronald did not testify about or draw the circuit court's attention to any financial documents he filed.

Citing the WIS. STAT. § 767.56 maintenance factors, the parties' substantial disparity in earnings, their respective financial circumstances, and her attempts to obtain employment, Elizabeth argued that a \$1228 monthly maintenance award would equalize the parties' income. Ronald argued that, at the time of the hearing, Elizabeth remained employed as a teacher earning \$50,000 per year, and her maintenance request was excessive (amounting to one-half of the difference in their incomes). He also referred to matters not in evidence.

The circuit court considered the WIS. STAT. § 767.56 factors. The parties had a twenty-one-year marriage. Elizabeth was employed during the marriage and cared for the children. Before the family moved for Ronald's employment, Elizabeth was a tenured teacher and had an expectation that she would have a very good income and the benefits of seniority. The move had a negative impact on Elizabeth's earnings history, she put her teaching career on hold for a

period of time, and rather than being currently tenured, she was experiencing employment instability. The circuit court found that even though Elizabeth would likely lose her current job, her maintenance request was still premised upon supplementing her current income. The court found that Elizabeth had reasonable living expenses, but she was not living at a standard comparable to the marital standard of living. The court found that \$1228 in monthly maintenance would leave Ronald with a fair income while taking into account that Elizabeth would continue to earn her current income.

On appeal, Ronald faults the circuit court for not explicitly stating that there had been a “substantial change in circumstances.” The parties’ maintenance modification motions both alleged a substantial change in circumstances. *See Keller v. Keller*, 2002 WI App 161, ¶9, 256 Wis. 2d 401, 647 N.W.2d 426 (parties seeking relief on the same grounds effectively concede the existence of the grounds for relief). As the existence of a substantial change in circumstances was effectively conceded, the circuit court did not need to use “magic words.” *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993).

The record created on the maintenance modification motions supports the circuit court’s discretionary determination of a substantial change in circumstances. *Cashin*, 273 Wis. 2d 754, ¶44. The parties’ financial circumstances substantially changed since maintenance was last modified in 2015: Ronald had increased earnings, but Elizabeth was not meeting her reasonable monthly budget, she was not living at the marital standard of living, she was experiencing the career and income effects of moving for Ronald’s employment, and she faced the likely loss of her current employment. These considerations were proper under WIS. STAT. § 767.56(1c)(i) (contribution by one party to the increased earning power of the other party), § 767.56(1c)(j) (any factor deemed relevant by the circuit court), and § 767.56(1c)(f) (consideration of the

marital standard of living). See *Kenyon v. Kenyon*, 2004 WI 147, ¶13, 277 Wis. 2d 47, 690 N.W.2d 251 (circuit court properly considered the § 767.56 maintenance factors).

Ronald argues that the circuit court did not consider whether the maintenance award was fair to him. As previously noted, the evidence Ronald presented to the circuit court was limited and did not include anything relating to his health needs or housing issues or inability to pay increased maintenance. Ronald did not draw the circuit court’s attention to his budget and his own financial needs during the evidentiary portion of the hearing. Ronald did not show that he was unable to pay additional maintenance.<sup>2</sup>

Increasing maintenance to Elizabeth was a proper exercise of discretion based on the record before this court. The maintenance award meets the goals of maintenance “to support the recipient spouse in accordance with the needs and earning capacities of both the recipient spouse and the payor spouse” and create “a fair and equitable financial arrangement between the parties.” *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶29, 269 Wis. 2d 598, 676 N.W.2d 452. The court determined that support and fairness required that Elizabeth receive additional maintenance.

Upon the foregoing reasons,

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<sup>2</sup> We do not consider any of Ronald’s arguments relating to the prior maintenance modification in 2015. The record includes neither a transcript of that 2015 proceeding nor an order setting out the circuit court’s findings of fact and conclusions of law. “When an appeal is brought upon an incomplete record, this court will assume that every fact essential to sustain the trial court’s decision is supported by the record.” *Suburban State Bank v. Squires*, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988).

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*