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DISTRICT II

January 29, 2020

To:

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

2018AP1626

In re the marriage of:
Lisa M. Maliszewski v. Jeffrey J. Maliszewski (L.C. #2014FA531)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Jeffrey Maliszewski appeals and Lisa Maliszewski cross-appeals from an order of the circuit court denying Jeffrey's motion to terminate maintenance and rejecting Lisa's claim that Jeffrey's shirking led to a reduction in his income for maintenance purposes. 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).¹ We affirm in all respects.

The parties were divorced in 2016 after a twenty-two-year marriage. At that time, the circuit court imposed child support and maintenance obligations upon Jeffrey. After child support ended, the circuit court increased maintenance to Lisa. Thereafter, Jeffrey sought to terminate maintenance because Lisa was cohabiting with her romantic partner. The circuit court found that although Lisa was living with her partner, the financial aspects of their living arrangement did not constitute the type of cohabitation that would affect Lisa's maintenance award, i.e., a cohabitation that conferred a financial benefit. *See Woodward v. Woodward*, 2005 WI App 65, ¶¶10, 15, 281 Wis. 2d 217, 696 N.W.2d 221. The court continued maintenance for Lisa. Jeffrey appeals.

A party seeking to modify maintenance must show that there has been a substantial change in the parties' financial circumstances. *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452; *Benn v. Benn*, 230 Wis. 2d 301, 308-09, 602 N.W.2d 65 (Ct. App. 1999). "The court should compare the facts surrounding the previous order with the parties' current financial status to determine whether the moving party has established a substantial change in circumstances." *Jantzen v. Jantzen*, 2007 WI App 171, ¶7, 304 Wis. 2d 449, 737 N.W.2d 5. Whether there has been a substantial change in circumstances warranting maintenance modification is discretionary with the circuit court. *Cashin v. Cashin*, 2004 WI App 92, ¶44, 273 Wis. 2d 754, 681 N.W.2d 255.

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

On appeal, Jeffrey argues that Lisa's cohabitation warranted terminating maintenance. The record does not support Jeffrey's argument. The circuit court was "the ultimate arbiter of the credibility of the witnesses and the weight given to each witness's testimony." *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted). Lisa testified that she and her romantic partner do not have joint accounts or joint assets, each bears his or her own expenses, they share the expenses of joint activities (such as trips), and she repaid her partner for funds he lent to her to meet some of her expenses. The circuit court's findings that Lisa and her partner did not share expenses, assets, or accumulate joint assets are not clearly erroneous based on the record. See *Woodward*, 281 Wis. 2d 217, ¶6. The record supports the circuit court's determination that Lisa's living arrangements did not confer a financial benefit upon her. Because the record does not show a substantial change in Lisa's financial circumstances, the circuit court did not misuse its discretion when it declined to terminate Lisa's maintenance.

We turn to Lisa's cross-appeal. Lisa argues that the circuit court should have increased her maintenance award because (1) Jeffrey's reduced income resulted from shirking and (2) Jeffrey's income for maintenance purposes should have included the income of his spouse, Tina.

Jeffrey's current \$36,000 income from his family business was less than the \$92,000 he was earning at the time of the divorce. The circuit found that the family business was paying Tina \$76,704 in income that would ordinarily have been paid to Jeffrey. Therefore, the circuit court attributed Tina's income to Jeffrey. Attributing Tina's income to Jeffrey placed Jeffrey near \$112,000, an income level the court might have expected to see given the passage of time from the 2016 divorce. In total, the circuit court attributed to Jeffrey \$114,000 in annual income based on

his actual income, benefits and payments on his behalf conferred by the family business, and income paid to Tina by the family business. To achieve an equal division of the parties' postdivorce income, the circuit court awarded Lisa \$2899 in monthly maintenance.

In her reply brief, Lisa clarifies her appellate argument: "Tina's ... income was an intentional income transfer by Jeff to Tina for the purposes of avoiding a support obligation and that income should be imputed to Jeff for purposes of any maintenance calculation." Our review of the record indicates that the circuit court did exactly that, i.e., the court attributed Tina's income to Jeffrey for maintenance purposes. Lisa does not claim that Tina had income from any other source. Jeffrey's household income was accounted for in the maintenance calculation. We address this issue no further.

Lisa next argues that the circuit court should have deemed Jeffrey a shirker. "Shirking" refers to a voluntary and unreasonable employment decision that reduces a party's income. *Chen v. Warner*, 2004 WI App 112, ¶11, 274 Wis. 2d 443, 683 N.W.2d 468, *aff'd*, 2005 WI 55, 280 Wis. 2d 344, 695 N.W.2d 758. When a party has been found to be shirking, courts use earning capacity, rather than actual earnings, to calculate maintenance. *Id.*

We are not persuaded that the circuit court erred when it failed to determine that Jeffrey's reduced income was attributable to shirking. Significantly, Lisa does not propose to this court what Jeffrey's income should have been had the circuit court performed a shirking analysis, and how that income would differ from the \$114,000 income the circuit court attributed to Jeffrey. Lisa is not in a good position to argue that the circuit court erred because she does not point this court to the evidence and arguments she made on this topic. *See Laribee v. Laribee*, 138 Wis. 2d 46, 51, 405 N.W.2d 679 (Ct. App. 1987). We will not search the record to determine how Lisa

may or may not have made this argument to the circuit court. *See Fuller v. Riedel*, 159 Wis. 2d 323, 330 n.3, 464 N.W.2d 97 (Ct. App. 1990).

Because we affirm on the appeal and the cross-appeal, we deny WIS. STAT. RULE 809.25(1) costs to both parties.

Upon the foregoing reasons,

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 WIS. STAT. RULE 809.25(1) costs are denied to both parties.

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

Sheila T. Reiff
Clerk of Court of Appeals