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DISTRICT II

May 3, 2023

To:

Hon. Michael P. Maxwell
Circuit Court Judge
Electronic Notice

Richard E. Reilly
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Peter F. Gustin Jr.
11217 Kinsley St.
Eden Prairie, MN 55344

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

2022AP231

In re the marriage of: Stacey J. Gustin v. Peter F. Gustin, Jr.
(L.C. #2016FA172)

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

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).

Stacey J. Gustin appeals an order suspending her ex-husband's obligation to pay maintenance, arguing that the circuit court erroneously exercised its discretion by failing to perform the required statutory analysis. 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 (2021-22).¹ Because there are insufficient findings on the record to uphold the suspension of maintenance, we reverse and remand for further proceedings.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Peter and Stacey Gustin were divorced after eighteen years of marriage. Their Marital Settlement Agreement, incorporated into their final Judgment of Divorce in early 2017, required Peter to make monthly maintenance payments of \$2,196 (plus a percentage of his bonuses and commissions from his employment) to Stacey until September 1, 2025, or earlier upon either party's death or upon Stacey's remarriage. This amount was based on the fact that at the time of divorce, Peter earned an annual base salary of \$80,000, plus commissions, while Stacey had an agreed imputed earning capacity of \$20,800 per year.

Peter testified that during the marriage the parties lived an "okay" lifestyle, but "nothing extravagant." They lived in a house that was valued at \$230,000 at the time of the divorce. Peter further testified that they "struggled," defaulting on an auto loan once. Stacey also testified that the parties lived "paycheck-to-paycheck," but also said that the parties "did all kinds of stuff and spent all kinds of money" during the marriage. Typical vacations included trips to Florida to stay with Stacey's parents.

In May, 2021, Stacey moved into the house of a man with whom she had had a romantic relationship since 2018. Peter moved to modify maintenance, asserting that Stacey's partner now "provide[d] for all her needs and expenses" and, accordingly, the "marriage-like relationship between [Stacey] and her significant other" resulted in a "substantial change in financial circumstances since the time of the Divorce Judgment." The circuit court conducted an evidentiary hearing on Peter's motion, during which counsel elicited testimony about Stacey's lifestyle. Stacey testified that she paid monthly rent of \$1,000 (including utilities) to her partner to live in his house, although she had only paid him that amount for two months and owed him

past due rent of \$4,000 at the time of the hearing.² At the time of divorce, her monthly rent and utilities totaled \$1,980. Stacey's income from employment decreased since the time of her divorce; she reported earning \$1,300 from January 1, 2021 to May 10, 2021 compared to \$829 per month in 2017. She vacations regularly with her partner, including visiting his home in California for a week or so each month during the winter. Stacey testified that she and her partner have not comingled their finances in any way. Stacey pays her own health insurance, dental insurance, and car payment. The circuit court ordered that maintenance be held open "given this lifestyle change." It determined that "Ms. Gustin's current living arrangement is a substantial change in circumstances" and that "the lifestyle that she enjoys now ... is significantly increasing her standard of living from where it was at the time of the divorce." The court also noted that Stacey "has the ability to earn more income than she's currently earning," and stated "that is a factor that the Court can consider as well." Stacey appeals, arguing that the court failed to set forth a sufficient analysis to support a conclusion that there has been substantial change in her financial circumstances.

We review a circuit court's decision on a request for modification of maintenance under the erroneous exercise of discretion standard. *Wettstaedt v. Wettstaedt*, 2001 WI App 94, ¶6, 242 Wis. 2d 709, 625 N.W.2d 900. We affirm the circuit court's decision unless we find that the court did not examine the relevant facts, apply the proper law, and use a rational process to reach a reasonable conclusion. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

² A court commissioner ruled on Peter's motion in June 2021 holding open maintenance and, according to Stacey, necessitating loans from her partner and her parents to cover her expenses. Stacey sought de novo review by the circuit court of that decision.

Our supreme court has held that a recipient’s cohabitation alone does not justify relief from paying maintenance for the payer. *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 197, 327 N.W.2d 674 (1983). Instead, pursuant to WIS. STAT. § 767.59(1f), a circuit court may revise an order of support “only upon a finding of a substantial change in circumstances.” *See also Taake v. Taake*, 70 Wis. 2d 115, 121, 233 N.W.2d 449 (1975) (“The general rule, often stated, is that a provision for alimony will not be changed except upon a positive showing of a change of circumstances and especially so when originally based upon agreement or stipulation of the parties.”). “This change must be substantial and relate to a change in the financial circumstances of the parties.” *Haeuser v. Haeuser*, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996), *abrogated on other grounds by Kruckenberg v. Harvey*, 2005 WI 43, ¶62, 279 Wis. 2d 520, 694 N.W.2d 879. The burden to show a substantial change in financial circumstances rests with the party seeking the change. *Haeuser*, 200 Wis. 2d at 764. The maintenance recipient’s cohabitation is one factor to be considered but only “to the extent it may change a recipient former spouse’s economic status.” *Van Gorder*, 110 Wis. 2d at 197. Once the court has found a substantial change in the parties’ financial circumstances, the court must then reconsider the factors in WIS. STAT. § 767.56 that govern the original determination of maintenance. *See Kenyon v. Kenyon*, 2004 WI 147, ¶13, 277 Wis. 2d 47, 690 N.W.2d 251; *Rohde-Giovanni v. Baumgart*, 2003 WI App 136, ¶8, 266 Wis. 2d 339, 667 N.W.2d 718, *aff’d*, 2004 WI 27, 269 Wis. 2d 598, 676 N.W.2d 452. While it need not consider all of those factors, the court must consider those that are relevant. *Rohde-Giovanni*, 266 Wis. 2d 339, ¶8.

Here, the circuit court did not identify any particular financial benefit Stacey was receiving from her new living arrangement or discuss her actual economic status on the record. While Stacey submitted financial disclosures, the court did not compare the facts regarding the

parties' current financial status with those surrounding the previous order to determine whether Peter established the requisite substantial change in Stacey's financial circumstances. *See Kenyon*, 277 Wis. 2d 47, ¶27 (stating that when evaluating a substantial change in the parties' financial circumstances during a maintenance modification proceeding, "the appropriate comparison is to the set of facts that existed at the time of the most recent maintenance order"). Nor did the court make a finding that Stacey's cohabitation arrangement was "fashion[ed] ... in a manner that is intended solely to prevent the modification of maintenance payments." *See Van Gorder*, 110 Wis. 2d at 197. It is apparent from its comment about Stacey's "lifestyle change" that the court assumed Stacey benefitted financially from the arrangement, but it did not perform any financial analysis to support a conclusion that there was a substantial change in the parties' financial circumstances. The court must identify on the record its analysis and set forth the factors it has considered and how those factors colored its determinations.

We therefore conclude that the circuit court erroneously exercised its discretion in holding open maintenance and reverse and remand for further proceedings for the court to examine the circumstances surrounding Stacey's financial status, and if it finds a substantial change in financial circumstances, to set forth its consideration of the relevant factors listed in WIS. STAT. § 767.56.

IT IS ORDERED that the order of the circuit court is reversed and remanded for further proceedings. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals