

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-2828
STATE OF WISCONSIN**

Cir. Ct. No. 94FA000156

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JAMES M. ESSELMAN,

PETITIONER-RESPONDENT,

V.

ROSEMARIE C. ESSELMAN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Juneau County:
VIRGINIA WOLFE, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Rosemarie Esselman appeals from an order denying two postjudgment motions for modification of the family support provision of her divorce judgment. She contends that the trial court erroneously

exercised its discretion by determining that there was not a significant change in circumstances warranting a modification in the amount of family support she receives from her ex-husband, James Esselman. Because the record supports the trial court's determination, we affirm.

¶2 Rosemarie and James were divorced in 1995. At that time they had three minor children. Each parent was to have equal physical placement. All children are now adults.¹ The divorce judgment awarded Rosemarie a portion of the marital property, as well as family support of \$4,000 per month. The parties twice amended the judgment by stipulations that were incorporated into the judgment.

¶3 Family support was originally slated to end August 1, 2004, but because James agreed to advance several payments, a stipulation adjusted the date to May 1, 2004. Rosemarie then brought a motion to increase and extend the family support. Since the child support portion of the family support would continue only until the last child reached the age of majority, the trial court determined that Rosemarie was seeking a modification of the maintenance component of family support. The trial court determined that she did not meet her burden of proof regarding the change in circumstances.

¶4 Rosemarie contends that there was a sufficient change in circumstances to justify a modification of the child support and maintenance portions of the family support payment award. Recently, we described the approach to motions for modification of maintenance awards that the supreme

¹ At the time of the hearing which is the subject of this appeal, only two children were adults.

court set forth in *Rohde-Giovanni v. Baumgart*, 2004 WI 27, 269 Wis. 2d 598, 676 N.W.2d 492:

In order to seek a modification of a maintenance award, the party seeking the modification must demonstrate that there has been 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. As the supreme court explained in this recent decision, the correct test on a motion to modify maintenance “should consider fairness to both of the parties under all the circumstances.” *Id.* at ¶32. The court is to begin with a consideration of facts as found at the time the judgment was entered and then consider changes in the parties' circumstances since that time. *Id.* at ¶¶33-34. In the context of a motion for modification of a limited-term maintenance agreement, the court should also consider the purposes of awarding maintenance for that limited term. *See Fobes v. Fobes*, 124 Wis. 2d 72, 81, 368 N.W.2d 643 (1985) (affirming modification of limited-term maintenance to permanent maintenance because the payee was unable to achieve the goal contemplated).

Cashin v. Cashin, 2004 WI App 92, ¶ 41, ___ Wis. 2d ___, 681 N.W.2d 255.

¶5 We

review a trial court's decision to deny an extension of maintenance as a discretionary decision, including the decision whether there is a substantial change in circumstances. Under this standard of review, we affirm the trial court's decision on whether there is a substantial change in circumstances if there is a reasonable basis in the record for the trial court's decision.

Cashin, 681 N.W.2d 255, ¶44.

¶6 Rosemarie argues that circumstances have changed greatly since her divorce judgment. Specifically, she argues that James' income has increased and hers has decreased. But James testified that his income actually decreased. The trial court found that Rosemarie failed to show her expenses at the time of her

divorce, and that her statement of expenses at the present time included business expenses as well as expenses for two adult children.

¶7 Rosemarie testified about her present expense, but agreed that some were overstated, and some were for her business. She refused to answer other questions, including whether she spent \$75 per month on clothing. She testified: “I’m not going to answer these questions. I’m under oath here, and I’m not giving you accurate numbers, sir.” The trial court concluded: “As best as the Court can determine, [Rosemarie’s] expenses for herself and one child are less than the \$4,000 payment of family support she currently receives.” While the trial court did not find that Rosemarie had failed to show a substantial change of circumstances, it is apparent that with the limited evidence the trial court had before it, it was not possible to find that there had been a substantial change of circumstances.

¶8 Rosemarie is apparently of the view that the court found no substantial change in circumstances. She argues: “[T]he finding of the trial court that there had not been a substantial change of circumstances since the trial of this action is clearly erroneous. It is obviously against the great weight and clear preponderance of the evidence.” To begin with, this standard of review is incorrect. In addition, a review of the evidence Rosemarie produced at the hearing on her motion reveals that she was attempting to increase the amount and duration of her family support. Rosemarie’s failure to show what her expenses really were resulted in the failure to show that a substantial change of circumstances had occurred. The trial court’s finding that all that Rosemarie had proven was that she was receiving family support in excess of her needs is, under the circumstances, a finding that she failed to show that a substantial change of circumstances had occurred since her divorce judgment.

¶9 Rosemarie contends that her daughter, Ann, has had many problems that required extra attention, ultimately leading to the failure of Rosemarie's business, a change in circumstance which, in her view, is significant. Ann had not yet been diagnosed as a schizophrenic at the time of the divorce. The diagnosis of the disease might be considered a change in circumstance if Ann were still a minor, but she is not. She is no longer the legal responsibility of either parent.

¶10 Rosemarie also contends that her failed day spa constitutes a change in circumstance. She blames the failure of this business on her belief that the children are very "needy" and on her belief that James did not adhere to the equal placement provisions of the judgment of divorce. The trial court found that, while Rosemarie "is free to pursue business plans and investments," James "does not become an insurer of her business success." "The law of change of circumstances should not require the payor-spouse to finance the unwise or imprudent financial decisions of the recipient spouse." *Murray v. Murray*, 231 Wis. 2d 71, 82, 604 N.W.2d 912. The trial court was not required to consider Rosemarie's failed day spa when determining child support.

¶11 Next, Rosemarie argues that there was a significant change in circumstances requiring that the maintenance portion of her family support payment be increased. We see this issue as no different from Rosemarie's assertion that there was a significant change in circumstances justifying an increase in the child support portion of the family support order. The trial court found that Rosemarie's expenses for her and one minor child were less than the \$4,000 per month family support that she was receiving. The court also determined that Rosemarie had chosen to operate a hair salon where she works two days a week, but receives no income. It noted that Rosemarie had presented no reason why she cannot earn a full-time salary. We conclude that a failure to

show a substantial change of circumstances permits a trial court to deny a request for increased family support, child support or maintenance. Accordingly, we affirm the trial court's refusal to modify Rosemarie's family support.

¶12 Rosemarie argues that stipulations that she and James signed are invalid and do not bar her from receiving an increase in family support. But the trial court refused to modify Rosemarie's family support because she had not shown a substantial change in circumstances, not because the stipulations prevented a modification. We need not address Rosemarie's contentions regarding the stipulations.

By the Court.—Order affirmed.

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