

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2007

David R. Schanker
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. 2006AP2717-FT

Cir. Ct. No. 1993FA865

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

DIANE V. BRODBECK,

PETITIONER-RESPONDENT,

V.

FRANK A. BRODBECK,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Frank Brodbeck appeals an order denying his motion to modify maintenance. Frank additionally appeals an order finding him in contempt of court for failing to pay previously ordered maintenance.

¶2 Frank and Diane Brodbeck were married in May 1965 and legally separated in May 1994. A marital settlement agreement was not reduced to writing but, rather, orally stated on the record at the time of the final hearing. Frank waived maintenance; however, Diane was awarded maintenance in the amount of \$745 per month, commencing May 9, 1994, and terminating June 1, 1995. Thereafter, maintenance was to be paid for an “indefinite period” in the amount of \$1,071 per month.

¶3 The legal separation was converted to a judgment of divorce in May 1995. On May 31, 2005, Frank’s employment as an automotive sales manager was terminated and, on June 13, 2005, he stopped making maintenance payments. Frank ultimately moved the circuit court to suspend maintenance on September 8, 2005. Later that month, he filed an addendum to the motion, seeking to terminate maintenance altogether. Frank argued that he had made several unsuccessful attempts to find employment and was, therefore, opting for early retirement. In November 2005, Diane filed an order to show cause for contempt. After a hearing, the circuit court denied the motion to modify maintenance and found Frank in contempt of court for his failure to make payments. This appeal follows.

¶4 Frank argues that the circuit court erred by denying his motion for maintenance modification. Generally, maintenance obligations may be modified based upon a substantial change in either party’s cost of living. *See* WIS. STAT. § 767.59(1k) (2005-06). Here, the circuit court never reached the issue whether

there was a substantial change in the cost of living but, rather, applied the doctrine of equitable estoppel to bar Frank's claim for modification of maintenance.

¶5 In certain cases, a party may be estopped from seeking a modification of maintenance. See *Rintelman v. Rintelman*, 118 Wis. 2d 587, 348 N.W.2d 498 (1984). In *Rintelman*, our supreme court concluded that a party may be equitably estopped from seeking modification of the terms of a maintenance stipulation incorporated into a divorce judgment if:

both parties entered into the stipulation freely and knowingly, ... the overall settlement is fair and equitable and not illegal or against public policy, and ... one party subsequently seeks to be released from the terms of the court order on the grounds that the court could not have entered the order it did without the parties' agreement.

Id. at 596.

¶6 The *Rintelman* factors were further developed in *Nichols v. Nichols*, 162 Wis. 2d 96, 469 N.W.2d 619 (1991). There, our supreme court held that a party to a divorce judgment is estopped from seeking modification of a stipulated maintenance award if four conditions are met:

[F]irst, the parties freely and knowingly stipulated to fixed, permanent, and nonmodifiable maintenance payments and said stipulation was incorporated into the divorce judgment; second, the stipulation was part of a comprehensive settlement of all property and maintenance issues which was approved by the circuit court; third, the overall settlement, at the time it was incorporated into the divorce judgment, was fair, equitable, not illegal, and not against public policy; and, fourth, the party seeking release from the terms of the divorce judgment is seeking release on the grounds that the court did not have the power to enter the judgment without the parties' agreement.

Id. at 100.

¶7 In the present case, the circuit court concluded that the parties freely and knowingly stipulated to fixed, permanent, and nonmodifiable maintenance payments. The judgment, which incorporated the oral agreement of the parties, states in relevant part:

Commencing June 1, 1995, and for an indefinite period thereafter, Respondent shall pay to Petitioner the sum of ONE THOUSAND SEVENTY-ONE AND NO/100 (\$1,071.00) DOLLARS per month as and for maintenance of the Petitioner.

Maintenance payments to the Petitioner shall terminate upon the death or the remarriage of the Petitioner.

¶8 Based on this language, the circuit court concluded that the maintenance payments were fixed at \$1,071, and the payments were permanent since they were to cease only upon Diane’s death or remarriage. The court reasoned that “the specific language in the Marital Settlement Agreement which states maintenance payments are required for ‘an indefinite period thereafter’ reasonably demonstrates that said payments are to be fixed and permanent.” We disagree.¹ The fact that the parties’ agreement uses the word “indefinite,” however, does not make the payments “permanent.” *See Hefty v. Hefty*, 172 Wis. 2d 124, 138, 493 N.W.2d 33 (1992). Because the parties did not freely and knowingly stipulate to fixed, permanent and nonmodifiable maintenance payments, the circuit court erred by concluding Frank was estopped from moving for maintenance modification. We will therefore reverse the order denying Frank’s motion for modification of maintenance and remand the matter with directions to consider the merits of his claim that there has been a substantial change in cost of living justifying modification. *See WIS. STAT. § 767.59(1k)*.

¹ Because we conclude the first condition is not satisfied, we need not address the court’s discussion of the remaining conditions.

¶9 Frank also challenges the order finding him in contempt for failing to pay previously ordered maintenance. We review a circuit court’s use of its contempt power to determine whether the court properly exercised its discretion. *See City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995). Additionally, determining the type of remedial sanctions to impose for contempt is a discretionary determination. *See* WIS. STAT. §§ 785.02 and 785.04(1) (2005-06).

¶10 Here, the court concluded that Frank was in contempt of court from the date he stopped making payments to the date he filed his motion for modification of maintenance. Because the court reasonably exercised its discretion by finding Frank in contempt for waiting three months to move for maintenance modification, we affirm that part of the contempt order. The court additionally concluded, however, that Frank “continues to be in contempt for failing to follow a court order in paying monthly maintenance as well as arrears to ... Diane.” Because we are remanding the matter with directions to consider the merits of Frank’s maintenance modification motion, that part of the order finding Frank in contempt for failing to make maintenance payments after the date his motion was filed should likewise be revisited. The portion of the order finding Frank in contempt for failing to make payments after his motion was filed is therefore reversed.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

