

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2015

Diane M. Fremgen
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. 2014AP2712

Cir. Ct. No. 2013FA3876

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

EVA M. FERRARA VASE,

PETITIONER-RESPONDENT,

V.

JOSEPH S. FERRARA, JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARSHALL B. MURRAY, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Joseph Ferrara appeals an order that denied his motion to terminate or modify maintenance paid to his ex-wife Eva Ferrara Vase. He argues that the circuit court erroneously ruled that he failed to show any

substantial change in circumstances from the time of divorce to the time of his motion “that would warrant either a termination of maintenance or modification of maintenance.” Specifically, Ferrara argues that he did show substantial changes in circumstances, namely that his wages and fringe benefits decreased substantially, that the parties’ son turned eighteen, and that Vase failed to seek and obtain employment. Ferrara also argues that the court erred in failing to recognize that continuing to order the current amount of maintenance is not fair to him in light of his “need for financial resources and ability to fund a reasonable lifestyle.” We reject Ferrara’s arguments and affirm.

BACKGROUND

¶2 The following undisputed facts were established in testimony and evidence presented at hearings before the circuit court. Ferrara and Vase were married in 1989 in Wisconsin and divorced in 2010 in England pursuant to a consent order issued by a British court; the consent order reflects terms stipulated to by the parties. As pertinent here, the consent order provides that Ferrara shall pay Vase maintenance of £36,000 per year until Ferrara retires, Vase remarries, or either party dies, whichever occurs first; and the maintenance amount will be adjusted annually according to the British Retail Price Index, a measure of inflation. The consent order also provides that if Vase obtains employment and her annual net income is less than £36,000, Ferrara will supplement her income up to £36,000 per year until he retires.

¶3 Ferrara and Vase submitted a “Statement of Information” to the British court for it to consider as background before entering the proposed consent order. The statement of information discloses the parties’ then-current financial situations and states: “periodical payments are expressed as a global sum,

however, the amount payable for [the parties' child] equates to £700 per month;" Vase's "maintenance will be reviewed in two years, when [the parties' child] is 18 years, at which time the maintenance will reduce to around £2300 per month;" and, "[i]t is envisaged that the maintenance will further reduce in 2015 to around £2,000 and will end in 2017." These statements were not referenced in any manner in the consent order issued by the British court.

¶4 During the marriage, Ferrara's employer transferred him from the United States to a series of other countries, and ultimately to England in 2000. Prior to Ferrara's transfer out of the United States, Vase worked in a corporate job for a different employer. While abroad, including during the time in England, Vase took primary care of the family, and Ferrara frequently travelled for work. While the parties lived in England, Vase owned a clothing store until March 2008. Vase began to search for jobs thereafter, but stopped searching after the parties' younger son died in an accident in 2008. Vase has not been employed since.

¶5 After the divorce, Ferrara remarried and Ferrara's employer promoted him and relocated him to Wisconsin, where Ferrara bought a house that is larger than the house in which he lived with Vase in England and where he now lives with his current wife and her two daughters. Vase bought a house in England that is smaller than the house in which she lived with Ferrara, where she now lives with the parties' older son when he is home from college.

¶6 The monthly maintenance payment pursuant to the 2010 consent order (£3,000) equaled \$5,158 in 2013 and \$5,187 in 2014. Ferrara moved to terminate or modify maintenance in August 2013. Between September 2013 and October 2014, the circuit court held several hearings at which Ferrara, Vase, a vocational expert retained by Vase, and two British lawyers testified.

¶7 The circuit court denied Ferrara’s motion to terminate or modify maintenance. As pertinent to this appeal, and as summarized here, the court made the following findings in its decision:

- Ferrara “has been under a continuing order of maintenance in the amount of 3,000 Pounds per month.”
- “There is no substantial change in circumstances, from the time ... [of] divorce in 2010 ... that would warrant either a termination of maintenance or modification of maintenance.”
- At the time of divorce, Ferrara’s annual gross income was \$97,728 plus his annual bonus of \$29,460, for total annual compensation of \$127,188.
- In 2014, Ferrara’s annual gross income is approximately \$120,000, plus an average annual bonus of \$32,000, for total annual compensation of \$152,000.
- Ferrara’s income has increased since the divorce.
- Prior to the divorce, Vase dedicated herself to parenting their two children and supporting Ferrara during the relocations required by his job, and she had been out of the corporate workforce for so much time that she was not able to find a job similar to what she had when she worked in the United States.
- Since the divorce and the death of the parties’ younger son, Vase is not able to work for reasons cited by the vocational expert.

DISCUSSION

¶8 Ferrara challenges the circuit court’s denial of his motion to modify or terminate maintenance on two sets of grounds. First, Ferrara argues that the circuit court erroneously determined that there is no substantial change in circumstances to warrant modification or termination of maintenance, because this determination did not account for Ferrara’s showings that his wages and fringe benefits had decreased substantially since the divorce, that the parties’ son had turned eighteen, and that Vase had failed to seek and obtain employment. Second,

Ferrara argues that the circuit court was obligated to consider the fairness to him of the maintenance amount in the consent order, and that to continue the ordered amount of maintenance is not fair to him in light of his “need for financial resources and ability to fund a reasonable lifestyle.” We address and reject Ferrara’s arguments as follows.

I. Substantial Change in Circumstances

¶9 A court may modify or terminate maintenance “only upon a finding of a substantial change in circumstances.” WIS. STAT. § 767.59(1f) (2013-14).¹ “This change must be substantial and relate to a change in the financial circumstances of the parties. The burden of demonstrating the substantial change in circumstances rests with the party seeking the change.” *Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999) (citations omitted). “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.

¶10 “Whether there has been a substantial change in circumstances presents a mixed question of fact and law.” *Brin v. Brin*, 2014 WI App 68, ¶8, 354 Wis. 2d 510, 849 N.W.2d 900. “Whether the change is substantial is a question of law that we review independently.” *Id.* “A [circuit] court’s findings of fact will be upheld unless clearly erroneous.” *Id.*

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

A. Changes in income

¶11 Ferrara argues that the reduction in his income, specifically a reduction in his “taxable wages” and “fringe benefits,” is a substantial change in circumstances warranting reduction or termination of the maintenance amount in the consent order. “A [circuit] court’s income determinations are findings of fact which we will not set aside unless clearly erroneous.” *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989). As we now explain, Ferrara fails to show that the circuit court’s finding—that his income increased since the divorce—is clearly erroneous.

¶12 As summarized above, the circuit court found that at the time of the divorce in 2010, Ferrara’s gross income consisted of his salary of \$97,728, plus his bonus of \$29,460, for “total compensation” of \$127,188; and that in 2014, Ferrara’s gross income consisted of his salary of \$120,000, plus an average annual bonus of \$32,000, for “total compensation” of \$152,000. Accordingly, the circuit court found that Ferrara’s income had increased from 2010 to 2014.

¶13 Ferrara does not contest any of these particular findings. However, he contends that the circuit court should have compared the “total compensation” of \$152,000 in 2014 to his “taxable wages” in 2010 of \$184,076.02 and find that the decrease of approximately “\$32,000 in income is a substantial change in circumstances.” In substance, we understand Ferrara to be arguing that the circuit court erroneously excluded the cost of living and housing allowances that Ferrara received while in England in 2010, which the circuit court found totaled \$56,888, in its determination of Ferrara’s gross income in 2010.

¶14 However, Ferrara does not develop this argument or support it with any legal authority regarding how a maintenance payer’s income should be

calculated. Specifically, he fails to explain why the circuit court was required to include the cost of living and housing allowances he received while in England in its determination of income. Rather, Ferrara himself testified that in 2010 his income, comprising his salary plus annual bonus, was \$126,000. The circuit court expressly compared Ferrara's 2010 income to his 2014 income, excluding the cost of living and housing allowances because, consistent with Ferrara's own testimony, those allowances were to cover the difference between the costs of living and housing in England and in Wisconsin, and the allowances are not needed in Wisconsin where the costs of living and housing are lower.

¶15 Ferrara also argues that his fringe benefits decreased so substantially as to amount to a significant change in circumstances. However, Ferrara acknowledged in his testimony that he retains significant fringe benefits, and that they cover only expenses that he has incurred, such as country club dues and use of a car, and are not "cash in [his] pocket." Ferrara fails to demonstrate that changes in his fringe benefits substantially changed his income.²

B. Son turning eighteen

¶16 Ferrara argues that his and Vase's son turning eighteen is a substantial change in circumstances warranting reduction of the monthly

² Ferrara argues for the first time in his reply brief that a large portion of his fringe benefits in England comprised income tax payments by his employer on his behalf. Putting aside the problem represented by his raising this argument for the first time in his reply brief, it is unclear whether the loss of income tax payments after he moved back to the United States has any effect on his overall income given his increase in salary and bonuses. The lack of clarity is dispositive on this issue. It was Ferrara's burden to demonstrate what the ramifications of the loss of that particular fringe benefit are relative to his increase in salary and bonuses. Because he failed to do so, we conclude that the circuit court did not err in not including this fringe benefit in its determination of income.

maintenance amount by £700 and cites to WIS. STAT. § 767.59(1f)(b)2. in support of this argument. However, that statute merely creates a rebuttable presumption of a substantial change in circumstances when considering an action to revise an order of *child support*.³ Here, the consent order, on its face, addresses only maintenance to Vase as Ferrara’s former spouse and does not mention child support, except that Ferrara shall pay maintenance to Vase “together with the payments (if any) ... to the Child Support Agency.” Ferrara fails to develop any argument as to how § 767.59(1f)(b)2. is pertinent here, and fails to persuade us that the parties’ son turning eighteen is a substantial change in circumstances with respect to an order for maintenance paid to Vase.

C. Vase’s failure to obtain employment

¶17 Ferrara suggests that Vase’s failure to obtain employment is a violation of the consent order that constitutes a substantial change in circumstances warranting termination or modification of the maintenance amount. The circuit court found no such violation, and Ferrara does not persuade us that that finding is clearly erroneous.

¶18 The consent order provides that Vase shall:

³ In a separate section of his brief, Ferrara argues that the circuit court ignored evidence that showed that a portion of the monthly maintenance to Vase is for child support, which ended when the son turned eighteen. Ferrara points to the statement of information that was submitted by the parties to the British court to support his allegation that the parties had agreed that maintenance would be modified upon their son turning eighteen. However, Ferrara does not cite any legal authority that indicates that the statement of information legally binds the parties, or that we are required to consider it here, where the order as stipulated to by the parties unambiguously requires Ferrara to pay Vase maintenance in the amount of £3000 per month until one of these events occur: (1) Ferrara retires, (2) Vase remarries, or (3) either party dies, and makes no pertinent reference to the topic of child support.

undertak[e] to use her best endeavours to secure financial independence from [Ferrara], by securing future paid employment; but in any event agreeing [to] the current level of spousal maintenance [of £36,000]. The level of spousal maintenance will in any event be reviewable after the expiry of two years and on an annual basis, thereafter. However, if [Vase] secures employment but her total annual income from all sources is less than £36,000 net [Ferrara] will continue to supplement [Vase's] salary up to £36,000 net per annum until his retirement.

¶19 The circuit court found that Vase supported her children and Ferrara as Ferrara was transferred from country to country and traveled for work, and that her being out of the workforce for that period of time resulted in her not being able to find a job similar to the position she held when she was in the United States. The court also relied on testimony by Vase and the vocational expert to find that, while Vase wants to work, she has been unable to do so since the death of the parties' youngest child. Based on the evidence presented, we conclude that the circuit court's finding that Vase's conduct did not violate the consent order is not erroneous. Accordingly, Ferrara's argument, that a substantial change in circumstances exists based on Vase's failure to obtain employment, itself fails.

II. Fairness of Maintenance Amount

¶20 Finally, Ferrara argues that the circuit court was obligated to consider the fairness to him of the maintenance amount in the consent order, and that the continuation of the maintenance amount in the consent order is not fair to him because he is left with insufficient funds to cover all of his expenses. Ferrara points to *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶32, 269 Wis. 2d 598, 676 N.W.2d 452, for the proposition that a circuit court considering a motion for modification of maintenance “should consider fairness to both of the parties under all of the circumstances,” and argues that the circuit court here considered only

Vase’s needs and not Ferrara’s “need for financial resources and ability to fund a reasonable lifestyle.”

¶21 However, Ferrara misunderstands the law. The circuit court does not proceed to consider fairness in addressing a motion to modify a maintenance award where the movant has not demonstrated the requisite substantial change in financial circumstances. *See Kenyon v. Kenyon*, 2004 WI 147, ¶39, 277 Wis. 2d 47, 690 N.W.2d 251 (clarifying “that once a substantial change in the parties’ financial circumstances is demonstrated, the circuit court must consider the dual maintenance objectives of support and fairness *when modifying a maintenance award*” (emphasis added)). As explained above, the court did not err in determining that Ferrara failed to show a substantial change in financial circumstances. Accordingly, the circuit court did not need to further consider the fairness objective of maintenance in addressing the motion to terminate or modify maintenance.

CONCLUSION

¶22 For the reasons stated above, we affirm the circuit court’s order denying Ferrara’s motion to terminate or modify maintenance.

By the Court.—Order affirmed.

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

