COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0285

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

JEAN M. EBBEN,

PETITIONER-APPELLANT,

V.

GARY J. EBBEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Jean M. Ebben appeals from an order granting Gary J. Ebben's motion to reduce maintenance. She challenges the circuit court's finding that Gary's inability to obtain employment at the salary level contemplated

at the time the parties stipulated to the amount of maintenance was a substantial change of circumstances. We affirm the order.

After nearly twenty-three years of marriage, the parties were divorced on July 11, 1995. The judgment was entered in the State of Illinois and incorporated the parties' Marital Settlement Agreement. The parties stipulated that Gary would pay Jean monthly maintenance of $2700.

In November 1996, Gary moved to reduce maintenance on the grounds that his employment status had changed.[1] The circuit court found that: shortly before the divorce Gary's income went from $125,000 per year to $54,000 per year; Gary agreed to pay $2700 per month maintenance because at the time of the divorce he was engaged in a job search which he believed would result in comparable employment at the higher salary he had previously earned; Gary has not found comparable employment and would not be able to do so in the near future, and Gary earned $50,000 in 1995 and $37,000 in 1996. The court found a substantial change of circumstances and reduced maintenance to one-half of Gary's adjusted gross income, but not less than $1500 nor more than $2700 per month.

The trial court may modify a maintenance award only upon a positive showing of a substantial change in the financial circumstances of the parties. *See* ***Haeuser v. Haeuser***, 200 Wis.2d 750, 764, 548 N.W.2d 535, 541-42 (Ct. App. 1996). A substantial change in circumstances should be such that it would be unjust or inequitable to strictly hold either party to the original

[1] The motion was originally filed in the Illinois court. Jean countered with a motion for contempt for nonpayment of maintenance. The Illinois court transferred the case to the circuit court of Kenosha County because both Gary and Jean live in the State of Wisconsin.

maintenance award. *See* ***Rosplock v. Rosplock***, 217 Wis.2d 22, 33, 577 N.W.2d 32, 37 (1998). The first step in a substantial change analysis is a factual inquiry. *See* ***Eckert v. Eckert***, 144 Wis.2d 770, 774, 424 N.W.2d 759, 761 (Ct. App. 1988). It involves a comparison of the facts when the maintenance order was entered with the present facts. *See* ***Licary v. Licary***, 168 Wis.2d 686, 692, 484 N.W.2d 371, 374 (Ct. App. 1992). The circuit court's factual determinations regarding the "before" and "after" circumstances will not be overturned unless clearly erroneous. *See* ***Rosplock***, 217 Wis.2d at 33, 577 N.W.2d at 37.

Jean argues that the circuit court looked back to the wrong thing when determining the "before" circumstances. Jean points out that at the time the maintenance stipulation was made, Gary was earning $49,500. She contends that the circuit court should not have looked at what Gary's income was seven months before the stipulation was made.

The maintenance award was not the result of a trial as to Gary's income or earning capacity. Neither the judgment of divorce nor the stipulation contains a finding of Gary's income at the time of the divorce. In determining whether a change in circumstances has occurred, a "critical point is whether the trial court took the factor alleged to have changed into account when it made its initial decision." ***Enders v. Enders***, 147 Wis.2d 138, 146, 432 N.W.2d 638, 641 (Ct. App. 1988). Where, as here, the parties themselves reconcile the competing factors affecting maintenance, the thinking behind the stipulation is relevant and critical to determining whether the purpose of the stipulation has been satisfied. *See* ***Rosplock***, 217 Wis.2d at 34, 577 N.W.2d at 38. Thus, the circuit court

properly considered evidence that the stipulation was based on the parties' belief that Gary would obtain comparable high-paying employment.[2]

The circuit court's finding that the stipulation was based on the premise that Gary would find comparable higher-paying employment is not clearly erroneous. Gary testified that even while the divorce was pending, he was attempting to find a comparable job. He indicated that he believed he would find a job that paid him $75,000 to $90,000 and that perhaps he was naïve about a man of his age finding a comparable position. Jean did not dispute Gary's testimony except to say that the $2700 maintenance figure came from an examination of her budget prepared by Gary at the time of the divorce. We are required to give due regard to the opportunity of the circuit court to resolve conflicts in the testimony which requires assessing the credibility of the witnesses. *See* ***Hughes v. Hughes***, 148 Wis.2d 167, 171, 434 N.W.2d 813, 815 (Ct. App. 1988).

Having determined that the circuit court's finding that the stipulation was based on an anticipated increase in Gary's income, it follows that Gary's failure to obtain the anticipated employment was a change of circumstance. Although the determination of whether the changed circumstances are substantial is a legal conclusion, we give weight to the circuit court's conclusion because it is intertwined with factual findings. *See* ***Harris v. Harris***, 141 Wis.2d 569, 574, 415 N.W.2d 586, 589 (Ct. App. 1987). That the change is substantial is illustrated by the fact that the maintenance award uses up over 80% of Gary's present income.

[2] We are offended that Jean suggests that a stipulation that Gary pay maintenance that was nearly 65% of his 1995 income would pass judicial muster, particularly when there was an equal division of property. We cannot fault Gary for being willing to base the stipulation on his anticipated income.

Jean argues that the circuit court erroneously exercised its discretion in setting the new maintenance payment. When modifying maintenance awards, the circuit court must consider the same factors governing the original determination of maintenance set forth in § 767.26, STATS. *See* ***Poindexter v. Poindexter***, 142 Wis.2d 517, 531, 419 N.W.2d 223, 229 (1988). We look to the court's explanation of the reasons underlying its decision, and where it appears that the "court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law," we will affirm the decision as a proper exercise of discretion. ***Grace v. Grace***, 195 Wis.2d 153, 157, 536 N.W.2d 109, 111 (Ct. App. 1995).

Here it is apparent that the circuit court made an award designed to divide the parties' total income.[3] When a couple has been married many years and achieves increased earnings, an equal division of total income is a reasonable starting point in determining maintenance. *See* ***Wikel v. Wikel***, 168 Wis.2d 278, 282, 483 N.W.2d 292, 293 (Ct. App. 1992). The circuit court recognized that because of health problems, Jean has a need for higher maintenance. However, as the court acknowledged, and we have said, it is one of the unfortunate realities of divorce that the economic status of the parties is not sufficient to support them both at precisely the same level as before the divorce. *See* ***Bisone v. Bisone***, 165

[3] In making the award, it appears that the circuit court did not factor in Jean's income from part-time employment. This is a benefit that inures to Jean.

Wis.2d 114, 120, 477 N.W.2d 59, 61 (Ct. App. 1991). Here, neither party could cover his or her budget and each must bear the burden of the financial shortfall.[4]

Jean's final claim is that the payments Gary's solely-owned corporation makes for Gary's health insurance should be added back to his income for the purpose of determining maintenance.[5] She contends that the circuit court's refusal to add back the health insurance cost as a benefit accruing to Gary elevates form over substance. The circuit court found that Jean's employer pays a substantial portion of her health insurance cost and that cost is not deemed income to Jean. The court concluded that it was fair and equal treatment to allow Gary's employer—the solely-owned corporation—to pay the health insurance without the cost being deemed income to Gary. Moreover, the court found that there was no incentive to pay high health insurance premiums for the purpose of reducing income available for maintenance and therefore no possibility that the health insurance cost would become an item permitting income manipulation. We conclude that the circuit court properly exercised its discretion in determining that Gary's health insurance costs should not be added back to income. Additionally, we have previously recognized that the lack of income treatment of health insurance premiums paid by a corporate employer is a matter for the legislature and not this court to correct. *See* ***Weis v. Weis***, 215 Wis.2d 135, 143-44, 572 N.W.2d 123, 126-27 (Ct. App. 1997). The corporate form cannot be invaded in the absence of evidence of income manipulation. *See* ***Lendman v. Lendman***, 157 Wis.2d 606, 614-15, 460 N.W.2d 781, 784-85 (Ct. App. 1990).

[4] Again, it is unconscionable for Jean to suggest that maintenance be set at a level that uses up most of Gary's pretax earnings. Jean offers no explanation as to why life insurance, disability insurance and IRA contributions should be eliminated from Gary's monthly budget.

[5] The corporation's health insurance deduction is $3000 annually.

By the Court.—Order affirmed.

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