COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2502

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

IN RE THE MARRIAGE OF:

DONNA SUE SPIELMAN,

PETITIONER-RESPONDENT,

V.

JEFFREY ALLEN SPIELMAN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County: CONRAD A. RICHARDS, Judge. *Affirmed.*

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

¶1 PER CURIAM. In this postdivorce proceeding, Jeffrey Spielman appeals an order granting Donna Spielman's motion to modify maintenance. He argues that the court was without authority to modify maintenance because the original maintenance term had expired. He also argues that the court erroneously

exercised its discretion by modifying maintenance because "[t]he factual basis for modifying the existing Order was not fully tried," and the court failed to take into account the standards set out in WIS. STAT. § 767.32. Finally, Jeffrey contends that Donna is prohibited from bringing her motion because the issue had been previously litigated in the bankruptcy court. We affirm the order.

¶2 The parties were divorced in 1996. The divorce decree awarded Donna maintenance of $400 per month for a term of twenty-four months. In addition, it provided: "[Donna] is further awarded the sum of $30,200.00, which sum represents the remaining principal balance due on the promissory note, as additional maintenance" to be paid at the rate of $200 per month for two years and then at the rate of $423.33 per month for sixty months thereafter.

¶3 In January 1999, Jeffrey filed bankruptcy, resulting in the discharge of his $30,200 obligation to Donna. The bankruptcy court determined that the obligation represented property division, not maintenance.[1] In February 2000, Donna filed her motion to modify maintenance based upon Jeffrey's bankruptcy discharge. The trial court determined that Jeffrey's bankruptcy substantially changed the parties' financial circumstances and ordered a modification of maintenance pursuant to WIS. STAT. § 767.32. Jeffrey appeals the order.

¶4 Jeffrey claims the trial court did not have authority to modify maintenance because Donna failed to file her motion in a timely manner. Under ***Dixon v. Dixon***, 107 Wis. 2d 492, 508, 319 N.W.2d 846 (1982), a motion to

[1] The parties agree that a debt resulting from property division is dischargeable in bankruptcy, but that support obligations are not. *See* ***In re Siragusa***, 27 F.3d 406, 407 (9th Cir. 1994).

modify maintenance must be brought before the term of maintenance expires. Jeffrey contends that because the two-year maintenance term expired before Donna brought her motion, the court erroneously granted it.

¶5 Jeffrey failed to make this argument to the trial court. "As a general rule, we will not decide a matter not presented to the trial court." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 125, 334 N.W.2d 580 (Ct. App. 1983). It is the province of this court to correct errors of the trial court. ***Cook v. Cook,*** 208 Wis. 2d 166, 188-89, 560 N.W.2d 246 (1997). Failing to raise issues in the trial court deprives both the adversary and the trial court of the opportunity to address them. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593-94, 218 N.W.2d 129 (1974).

¶6 There is no reason that this court should take a rare departure from this rule because, essentially, Jeffrey's assignment of error is that the trial court did not consider a contention not before it. It is self-evident that the trial court could not err by failing to address an issue that was not advanced. A party must raise an issue with some prominence to allow the court to address the issue and make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). Jeffrey's failure to do so constitutes abandonment of the issue in the trial court. *See* ***Zeller v. Northrup King Co.***, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985); *see also* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("We will not ... blindside trial courts with reversals based on theories which did not originate in their forum."). Accordingly, we do not address this issue.

¶7 Next, Jeffrey argues that the factual basis for modifying the existing order was not fully tried. Jeffrey claims that there was "no opportunity" to provide such evidence. Jeffrey refers us to the record, where the court requested

briefs on the issue of the effect of a discharge in bankruptcy. Jeffrey suggests that the court's request for briefing precluded him from offering evidence. We disagree.

¶8 At the hearing on Donna's motion, Donna relied upon her affidavit and the facts presented at the time of the divorce concerning her health and employment. These included that Donna suffers from multiple sclerosis and, therefore, is unable to work more than thirty hours a week. In its memorandum decision on the modification motion, the court pointed out that its decision to award $400 monthly maintenance for only two years "was premised on the Court's understanding that [Donna] would also be receiving $30,200 …." The court stated that it had based its initial decision both on Donna's need and Jeffrey's ability to pay. It concluded that Jeffrey's bankruptcy discharge affected both his ability to pay and fairness. The court's decision implies that Donna's need has remained unchanged.

¶9 The record fails to show that Jeffrey offered any evidence to rebut Donna's contentions made at the motion hearing. The court considered the facts of record. There is no indication that Jeffrey requested an opportunity to introduce evidence. Further, on appeal, Jeffrey does not reveal what facts he would have introduced had he received the opportunity to do so. On this record, we cannot fault the trial court for any alleged deficiency of a factual record.

¶10 Jeffrey also argues that the court erred because it failed to consider the legal standards set forth in WIS. STAT. § 767.32. The record provides no support for this claim. Whether the court applied the correct legal standard is a question of law that we review de novo. ***Nottelson v. DILHR***, 94 Wis. 2d 106,

116-17, 287 N.W.2d 763 (1980). Our review satisfies us that the court applied the proper legal standard.

¶11 WISCONSIN STAT. § 767.32 authorizes the trial court to modify maintenance upon a showing of a substantial change in circumstances. ***Eckert v. Eckert***, 144 Wis. 2d 770, 774, 424 N.W.2d 759 (Ct. App. 1988). In ***Eckert***, we sustained a trial court's ruling that a bankruptcy discharge resulted in a substantial change of circumstances under § 767.32. ***Id.*** at 774-75. We also concluded that "a state family court may modify a payor spouse's support obligation under sec. 767.32(1), Stats., following the payor's discharge in bankruptcy without doing 'major damage' to the 'clear and substantial' federal interests … served by the bankruptcy code." ***Id.*** at 779 (citation omitted).

¶12 Here, it was essentially undisputed that Jeffrey's discharge in bankruptcy of his obligation to Donna significantly altered her financial circumstances. We conclude that the trial court did not misapply WIS. STAT. § 767.32 when it determined that Jeffrey's bankruptcy demonstrated a substantial change in circumstances entitling Donna to a maintenance modification.

¶13 Finally, Jeffrey argues that the trial court erred because the federal bankruptcy determination that a debt is discharged is binding upon state courts. He contends that whether a payment is "maintenance," as that term is used in bankruptcy law for the purpose of determining the dischargeability of a debt, is a question of federal law and not state law, citing ***In re Baily***, 20 B.R. 906, 909 (Bankr. W.D. Wis. 1982).

¶14 Jeffrey's conclusion does not flow from his premise. It is unquestioned that whether a debt is dischargeable under federal bankruptcy law is a question of federal, not state law. ***Id.***; *see also* ***Spankowski v. Spankowski***, 172

Wis. 2d 285, 493 N.W.2d 737 (1992). Nonetheless, Jeffrey cites no case law holding that a state court is constrained from modifying maintenance due to the discharge of a debt in bankruptcy. A federal case Jeffrey cites actually supports the trial court's action here. In ***In re Siragusa***, 27 F.3d 406, 408 (9th Cir. 1994), the court of appeals held:

> In deciding whether to modify the alimony, the divorce court properly considered Dr. Siragusa's discharge in bankruptcy of the property settlement debt as a "changed circumstance." ***See In re Danley***, 14 B.R. 493, 495 (Bankr.D.N.M.1981); ***In re Reak***, 92 B.R. 804, 807 (Bankr.E.D.Wis.1988). *See also*, Sheryl L. Scheible, *Bankruptcy and the Modification of Support: Fresh Start, Head Start, or False Start*, 69 N.C.L.Rev. 577, 617 (1991) (noting that a bankruptcy discharge granted subsequent to divorce frequently is a factor in determining whether alimony modification is appropriate).
>
> Nothing in the record suggests that the divorce court was attempting to reinstate the property settlement debt; the amount awarded in alimony is not a substitute for the amount of the discharged property settlement. The alimony modification merely takes into account the fact that Ms. Siragusa would no longer receive the property settlement payments upon which the original alimony was premised. The discharge altered both Ms. Siragusa's need and Dr. Siragusa's ability to pay.

¶15 Also, in the case of ***In re Zick***, 123 B.R. 825, 829 (Bankr. E.D. Wis. 1990), it was held that:

> [T]he state court may find that the debtor's discharge constitutes a change of circumstances warranting an increase in maintenance or support of the former spouse or children. ***Eckert v. Eckert***, 144 Wis.2d 770, 424 N.W.2d 759 (Ct.App.1988); ***Myers v. Myers***, 54 Wash.App. 233, 773 P.2d 118 (1989); see, also, ***Hopkins v. Hopkins***, 487 A.2d 500 (R.I.1985) (waiver of alimony was contingent on payment of debts, and bankruptcy was sufficient change in circumstances to warrant imposition of alimony).

¶16 We are persuaded that here the trial court modified Jeffrey's support obligation "under sec. 767.32(1), Stats., following the payor's discharge in bankruptcy without doing 'major damage' to the 'clear and substantial' federal interests served by the bankruptcy code." ***Eckert***, 144 Wis. 2d at 779 (citation omitted). Because Jeffrey fails to demonstrate an error of law, we sustain the court's order.

By the Court.—Order affirmed.[2]

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

[2] Donna argues that Jeffrey's appeal should be dismissed as untimely because it was not filed within 45 days of the notice of order. *See* WIS. STAT. § 808.04. We reject her argument. The record fails to demonstrate a "formal notice of entry of judgment." ***Soquet v. Soquet***, 117 Wis. 2d 553, 345 N.W.2d 401 (1984). Because Jeffrey's notice of appeal was filed within 90 days of entry of the order, it is timely. *See* WIS. STAT. § 808.04(1).