

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 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. 03-1141
STATE OF WISCONSIN**

Cir. Ct. No. 91-FA-336

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

OTTO MOGGED, III,

PETITIONER-APPELLANT,

V.

MARGARET A. MOGGED,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Shawano County:
JAMES P. JANSEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Otto Mogged appeals an order denying his motion to modify his maintenance obligation. He argues that the trial court erroneously determined that Margaret Mogged's increase in income was not a substantial

change requiring a maintenance reduction. He also contends that the trial court erroneously exercised its discretion when it denied the reduction despite its finding that Otto had a substantial change in his economic circumstances. We are unpersuaded and the order is affirmed.

¶2 Otto and Margaret were divorced in 1992 after a twenty-five year marriage. At the time of the divorce, Otto earned approximately \$150,000 per year. The court ordered Otto to pay \$2,000 per month child support and \$2,800 per month maintenance. After their youngest child reached age eighteen, Margaret returned to school and, in 1997, obtained employment as a computer programmer. Otto commenced litigation involving maintenance modification.

¶3 This appeal arises from an order entered at the latest hearing in 2002. The record shows that Margaret's income has increased since 1998 from \$35,000 to \$45,463 in 2001. It is now projected at approximately \$55,000 annually, assuming ten hours per week overtime.

¶4 In 1998, Otto earned \$530,451. He claimed that by the end of 2001, his company's sales were reduced by 50% and due to subsequent losses, his income diminished. Otto projected an annual 2002 income of \$142,000. The trial court denied Otto's motion to modify maintenance. Otto appeals.

¶5 WISCONSIN STAT. § 767.32(1)(a)¹ allows the family court to modify maintenance when it concludes that there has been a substantial change in circumstances. *Rosplock v. Rosplock*, 217 Wis. 2d 22, 32, 577 N.W.2d 32 (Ct.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

App. 1998). Whether there has been a substantial change of circumstances presents a mixed question of fact and law. *Id.* at 32-33. The trial court’s findings of fact regarding the “before” and “after” circumstances and whether a change has occurred will not be disturbed unless it is clearly erroneous. *See id.* at 33. Whether the change is substantial is a question of law that we review de novo. *See Harris v. Harris*, 141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987).

¶6 When a trial court concludes circumstances have substantially changed, whether an award modification should occur is discretionary. *Seidlitz v. Seidlitz*, 217 Wis. 2d 82, 86, 578 N.W.2d 638 (Ct. App. 1998). To be sustained, a discretionary decision must be one that a reasonable judge could reach by consideration of the relevant law, the facts and a legal reasoning process. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶7 The record reflects a rational basis for the court’s order. The court noted that Otto’s income had decreased and that Margaret’s income had increased. The court found, however, that Margaret was “working overtime to keep the ship afloat” and, based on her current financial statement, she was not able to keep the lifestyle consistent with the one the parties enjoyed during the marriage. The court also took into account that Otto declared income of \$147,000 at the time of the divorce. His income substantially increased over the next several years, culminating in 1998 with the high point of \$530,000,² yet his maintenance obligation did not increase proportionately.

² Margaret points out that in 1998, Otto also derived income from the sale of \$415,000 in corporate assets.

¶8 As a result, the court could reasonably determine that when Otto's income decreased to a level similar to that at the time of the divorce, the decrease did not call for a reduction. The court considered Otto's ability to pay, and Margaret's needs. A reasonable maintenance award is not measured by average annual earnings over the duration of a long marriage, but the lifestyle the parties enjoyed in the years immediately before the divorce and could anticipate if they were to stay married. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 36, 406 N.W.2d 736 (1987). The court could reasonably conclude that even considering Margaret's increased earnings, the \$2,000 per month award was required to allow her to maintain a lifestyle commensurate with that enjoyed during the marriage.

¶9 Otto also argues that he was required to reinvest large sums of money in his company to ensure its liquidity. This argument is unpersuasive. In effect, Otto's analysis would have Margaret contribute her entitled maintenance to Otto's company. Because the record reflects a reasonable basis to deny Otto's motion, the order is not disturbed on appeal.

¶10 Otto further contends that paying the present level of maintenance imposes a hardship on him. The court stated, "While it may be a hardship for the first time, [Otto] still has sufficient income from the corporation to make a \$2,000 payment." The court added:

[Otto] cannot have it both ways. During the periods of prosperity he may have looked at the maintenance payment as a nuisance because it did not affect his income or lifestyle to any appreciable amount. Now that his financial position has gone down, the maintenance is probably a bigger issue. However, the court, as stated above is satisfied that there is sufficient income derived from the corporation to make the maintenance payment of \$2,000 per month.

We are satisfied that in context, the court used the term “hardship” in a relative sense, comparing Otto’s \$142,000 annual income to his vastly higher income in previous years. We are unpersuaded that Otto has demonstrated that because of hardship, the court’s decision reflects an erroneous exercise of discretion.

By the Court.—Order affirmed.

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

