

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2009AP2287

Cir. Ct. No. 2007FA29

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DAVID MICHAEL PHELAN,

PETITIONER-APPELLANT,

V.

TRACY BETH PHELAN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
JAMES J. BOLGERT, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. David Michael Phelan appeals from that portion of an order of the circuit court that modified the amount of maintenance he pays to Tracy Beth Phelan, and the order that denied his motion to convert child support

and maintenance payments into a family support payment. David argues on appeal that Tracy did not establish that the existing maintenance award was insufficient to enable her to maintain her pre-divorce standard of living, and that the court did not properly explain its decision to deny his request to have the maintenance and child support payments converted to family support. Because we conclude that the circuit court did not properly explain its reasons for both decisions, we reverse and remand the case to the circuit court for further proceedings consistent with this opinion.

¶2 David and Tracy were divorced in August 2007 after a sixteen-year marriage. In June 2007, David had a change in his job responsibilities, which he believed would negatively affect his income. At the divorce hearing, David testified that he believed his income in the new job would be about \$230,000 per year. The court accepted this amount, and set child support and maintenance based on this amount.

¶3 David's estimated income turned out to be too low. Consequently, Tracy moved the circuit court to modify the amount of maintenance and child support she received.¹ At the hearing on the motion to modify, David testified that his income between 2006 and 2009 had ranged from \$255,000 to \$327,000. In fact, his income was never as low as \$230,000.² The circuit court found that at the time of the divorce it had found David's income to be \$230,000, and that David had honestly testified at the divorce hearing that this is what he believed his

¹ David does not challenge that portion of the order that increases the amount of child support he pays.

² David's income for those years was: \$255,000 in 2006; \$289,000 in 2007; \$327,000 (\$50,000 of this was an "unexpected" bonus) in 2008; and \$300,000 in 2009.

income would be. The court also found that David's estimate was wrong, and that his actual income was about \$300,000.

¶4 The court concluded that David's increased income constituted a substantial change in circumstances. The court said:

I think the application of the guidelines is appropriate. I don't see a reason to deviate. The increase in maintenance is substantially less than the increase in income, but there's been no claim that Mrs. Phelan can't live in the lifestyle that she's been accustomed to during the marriage at that amount. So I think her claims for \$5000 to \$6000 [in maintenance] is excessive.

The court then increased the maintenance Tracy received from \$4000 per month to \$4500 per month.

¶5 At a subsequent hearing, the court considered David's request to convert his payments to family support. The court denied that request stating that this was a case where both maintenance and child support were called for, considered the changes in the tax laws, and then said:

So, I think simple is good. I think that's a legitimate interest in the exercise of discretion, I think the award of maintenance and support are supported by the law and the facts, and for those reasons I think that this is best handled the way the Court initially ordered.

¶6 We first consider the court's decision to increase maintenance. We review both the court's determination that there has been a substantial change in circumstances and the amount and duration of the award. A request for a change in a maintenance award rests within the circuit court's discretion. *See Gerrits v. Gerrits*, 167 Wis. 2d 429, 440, 482 N.W.2d 134 (Ct. App. 1992). The modification can be made "only upon a positive showing of a change in circumstances." *Id.* at 437 (quoted source omitted). This change must be

substantial and involve a change in the financial circumstances of the parties. *Id.* The burden of proving the change in circumstances rests with the party seeking the change. *See Miner v. Miner*, 10 Wis.2d 438, 446, 103 N.W.2d 4 (1960). This change must be substantial and involve a change in the financial circumstances of the parties. *Id.* The burden of proving the change in circumstances rests with the party seeking the change. *Id.* The standard of review for whether there has been a substantial change in circumstances is a deferential one, and we will affirm the circuit court’s determination if there is a reasonable basis in the record for the court’s decision. *Hacker v. Hacker*, 2005 WI App 211, ¶6, 287 Wis. 2d 180, 704 N.W.2d 371.

¶7 How much maintenance to award and for how long to avoid it are within the circuit court’s discretion, and we will not disturb those decisions unless discretion was exercised erroneously. *Id.*, ¶10. “Discretionary determinations must be the product of a rational mental process by which the facts of record and the law relied on are stated and considered together ‘for the purpose of achieving a reasoned and reasonable determination.’” *Id.* (citation omitted).

¶8 When determining whether to modify maintenance, the court must consider the same factors used to arrive at the initial award. *Kenyon v. Kenyon*, 2004 WI 147, ¶13, 277 Wis. 2d 47, 690 N.W.2d 251. The statutory factors further two distinct but related maintenance objectives: “to support the spouse who receives maintenance in a manner that reflects the needs and earning capacities of the parties—the ‘support’ objective—and to ensure a fair and equitable financial arrangement between the spouses—the ‘fairness’ objective.” *Hacker*, 287 Wis. 2d 180, ¶9; *see Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶¶31-32, 269 Wis. 2d 598, 676 N.W.2d 452. “A circuit court errs if it misapplies or fails to apply these

factors, or if it fails to ‘give full play’ to maintenance’s dual objectives.” *Hacker*, 287 Wis. 2d 180, ¶11 (citation omitted).

¶9 In his brief to this court, David argues that the circuit court erred when it increased the maintenance payment because:

an existing maintenance award may not be increased due to an unexpected increase in income earned by the payor-spouse absent evidence that the initial award was insufficient to enable the payor-spouse to enjoy the same standard of living they enjoyed during the marriage; here, there was no such evidence.

David then goes on to argue that Tracy did not meet her burden of proof that she needed the increase in maintenance to maintain her pre-divorce standard of living.

¶10 Tracy argues that the change between David’s expected earnings and the actual earnings is a substantial change in circumstance. She does not argue that the income was unexpected, but rather that David’s initial estimate of his earnings was wrong. Tracy does not dispute that she did not prove an increase was necessary to maintain her pre-divorce standard of living. Tracy argues, instead, that she is entitled to an increase in maintenance under the fairness objective.

¶11 The circuit court did not explain the legal or factual basis for its decision to modify maintenance. After finding a substantial change in circumstances due to the updated income information, it explicitly rejected the claims of Tracy that her maintenance should be increased to between \$5000 and \$6000, noting that she had not claimed she needed an increase to maintain her lifestyle. Yet, without further analysis, the court then increased the maintenance \$500 per month. We are not given any reason why. Without an explanation from the court, we cannot determine the basis of the award.

¶12 We also conclude that the circuit court did not adequately explain why it would not allow David to pay family support instead of child support and maintenance. “Simple is good,” is not a legally sufficient reason for denying the motion. Tracy attempts to shore up the trial court’s decision by quoting from a comment in a periodical cautioning practitioners about potential tax ramifications of “family support.” But no record was made of any possible tax ramifications applicable to the facts here and no argument is made now. Consequently, we reverse and remand to the circuit court to reconsider the motions for increase in maintenance and to convert the awards to family support, and direct the circuit court to properly exercise its discretion by explaining the legal and factual bases for its decisions on these motions.

By the Court.—Order reversed and cause remanded.

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

