COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2017

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. 2016AP2242-FT **Cir. Ct. No. 2011FA520**

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

IN RE THE MARRIAGE OF:

HIEU N. ARNHOLT,

PETITIONER-APPELLANT,

V.

JEFFREY C. ARNHOLT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Hieu Arnholt appeals a postdivorce order reducing the monthly amount of her former husband's limited-term maintenance payments.[1] We conclude the circuit court could reasonably find a substantial change of circumstances, it adequately considered both the support and fairness objectives underlying the maintenance award, and it did not otherwise erroneously exercise its discretion in reducing the maintenance award. We therefore affirm.

BACKGROUND

¶2 Jeffrey Arnholt is a medical doctor who began his residency around the time the parties married in 1999.[2] The parties' first child was born soon after they married. Hieu agreed to stay home and be the primary caregiver so as to enable Jeffrey to focus on his career, which required him to work often. Hieu thus handled most matters related to their house and children. Prior to the marriage, Hieu had worked as an occupational therapist from 1991 to 1999. In 2003 or 2004, Hieu suggested that she return to the workforce, but Jeffrey disagreed, citing a projected net negative financial impact on the family in her doing so. By 2009, Jeffrey was earning $525,000 a year.

¶3 The parties divorced in Minnesota in November 2009. The Minnesota court awarded Hieu sole custody and placement of the couple's five children (then aged 1, 3, 5, 7 and 9), and it ordered Jeffrey to pay $2085 per month in child support. As to spousal support, the Minnesota court made the following finding of fact:

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise stated.

[2] Given that the parties share the same last name, we will refer to each of them by their first name for the remainder of this opinion.

> Ten years is a sufficient duration for the spousal maintenance obligation. By that time, the parties' youngest children [sic] will be twelve years of age and the oldest child will have obtained the age of majority. [Hieu] will no longer need to stay at home as much to care for the children. She will be able to re-enter the workforce in some capacity, whether as an Occupational Therapist, Registered Nurse, or otherwise.

The court also stated a related "conclusion of law":

> [Jeffrey] shall pay to [Hieu] $6,000 per month in Spousal Support, … until July 1, 2019. The Court finds that this is fair and equitable for this 10 year marriage, and is required by [Hieu] to maintain the lifestyle to which she has grown accustomed. Within this 10 year period, [Hieu] shall be able to reintegrate herself into the workforce.

¶4 Both parties eventually moved to the Eau Claire area, and the divorce case was transferred to the Eau Claire County Circuit Court in 2011. Thereafter, numerous court proceedings occurred, which initially centered on unaddressed financial issues but later involved disputes regarding child custody and placement. As Jeffrey's career advanced, he earned more money. Jeffrey earned $912,000 in 2014, and $794,000 in 2015, and he was expected to make $625,000 in 2016 and $650,000 in 2017.

¶5 Meanwhile, Hieu returned to the workforce in 2015 when she began part-time work as a special education assistant with the Eau Claire School District. She also obtained her Wisconsin occupational therapist license during this time. Hieu then became employed as an occupational therapist at a health care company in February 2016. Her pay has been based on certain "productivity" measures, such that, although she worked "full-time" as an occupational therapist, occasionally she was paid for less than forty hours of work per week. Hieu testified she will not be "fully integrated" into the workforce until, at a minimum, she has established several years with her company. At the time of the circuit

court's decision modifying maintenance, Hieu's gross pay was around $4,300 per month (approximately $51,600 annually). According to Hieu, her monthly expenses were about $3,623.[3]

¶6 In early June 2016, the circuit court granted Jeffrey, who by then lived in the Green Bay area, sole custody and physical placement of the children. The court's decision was based largely on Hieu's unreasonable and persistent lack of cooperation with Jeffrey regarding their children, her parenting problems, and her disregard of court orders regarding the children and financial issues related to the children. At that time, the court also suspended Jeffrey's child support and maintenance payments. The court suspended the latter because record evidence showed Jeffrey might be entitled to reimbursement for attorney's fees and guardian ad litem expenses, given Hieu's unreasonable approach to postdivorce litigation.

¶7 On August 25, 2016, Jeffrey moved the circuit court to terminate any further maintenance and child support obligations on his part, and to receive child support from Hieu if his maintenance obligation was not completely terminated. He contended that a substantial change in circumstances had occurred because Hieu had reintegrated into the workforce and was no longer responsible for caring for, housing or otherwise supporting their children. Following an evidentiary hearing, the circuit court denied Jeffrey's request for child support, but it also

[3] In her initial brief to this court, Hieu claimed her monthly expenses were $5,295 per month, but those numbers were apparently from 2009. The record reflects that, at the time of the September 13, 2016 hearing, Hieu's expenses appeared to be $3,623 per month. However, during cross-examination, Hieu admitted this amount included $742 a month in food expenses based on her feeding the parties' children who no longer lived with her. The circuit court never made an express finding of fact regarding Hieu's monthly expenses.

permanently terminated Jeffery's own child support obligation and reduced his monthly maintenance payment from $6000 to $500 for the remaining duration of the original ten-year postdivorce period. According to the court, none of the factors the Minnesota court relied on "are in play anymore," and with the change in the children's custody, Hieu is no longer a stay-at-home mother unable to work outside the home, but rather she is employed with income adequate to support herself. Other parts of the circuit court's decision and order are discussed below as necessary.

¶8 Hieu now appeals the order reducing Jeffrey's monthly maintenance.

DISCUSSION

¶9 WISCONSIN STAT. 767.59(1c)(a)1., permits a circuit court to modify a divorce maintenance award. For a maintenance order to be modified, the movant must demonstrate "a substantial change in circumstances warranting the proposed modification." ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. A "substantial change" in circumstances "must relate to a change in the financial circumstances of the parties." ***Kenyon v. Kenyon***, 2004 WI 147, ¶13, 277 Wis. 2d 47, 690 N.W.2d 251 (citation omitted).

> The term "substantial change of circumstances" is well known in family law. It focuses on the facts. It compares the facts then and now. It requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order.

Licary v. Licary, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992). A court reviewing a modification request should adhere to the findings of fact made in the previous proceeding setting maintenance and may not retry the factual determinations decided in that proceeding. ***Kenyon***, 277 Wis. 2d 47, ¶27.

¶10 We will affirm the circuit court's decision on whether there is a substantial change in circumstances if there is a reasonable basis in the record for the decision. ***Cashin v. Cashin***, 2004 WI App 92, ¶44, 273 Wis. 2d 754, 681 N.W.2d 255. Stated another way, we will uphold a circuit court's decision if there was sufficient evidence from which the circuit court could reasonably find a substantial change in the parties' circumstances that would justify the modification or termination of maintenance. ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶17.

¶11 Once a circuit court finds a substantial change in the parties' financial circumstances, the decision whether to modify the amount or duration of maintenance is committed to the court's sound discretion. ***Id.*** The court must reconsider the factors used to arrive at the initial maintenance award under WIS. STAT. § 767.56. ***Kenyon***, 277 Wis. 2d 47, ¶13 (referring to WIS. STAT. § 767.32 (2000-01), which has been amended and is now § 767.56). The factors provided in § 767.56 are designed to further two distinct goals with respect to maintenance: (1) support of the recipient spouse "in accordance with the needs and earning capacities of both the recipient spouse and the payor spouse"; and (2) "a fair and equitable financial arrangement between the parties." ***Kenyon***, 277 Wis. 2d 47, ¶29; ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶29.

¶12 With respect to limited-term maintenance, the support objective considers the recipient spouse's ability to become self-supporting at a standard of living reasonably similar to that enjoyed before divorce, the ability of the payor spouse to pay maintenance, and the need for the court to continue jurisdiction regarding maintenance. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 41, 406 N.W.2d 736 (1987); ***Vander Perren v. Vander Perren***, 105 Wis. 2d 219, 228, 230, 313 N.W.2d 813 (1982). The fairness objective considers "fairness to both of the parties under all the circumstances," and it is relevant to both the length and

amount of maintenance. ***Kenyon***, 277 Wis. 2d 47, ¶¶29-30, 37. "Fairness" often focuses on the noneconomic contributions made by a spouse during the marriage. ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶31; ***LaRocque***, 139 Wis. 2d at 37-38.

¶13 Hieu essentially raises four arguments regarding the circuit court's order reducing Jeffrey's maintenance from $6000 to $500 per month. Three arguments relate to her contention the court erred when considering the "support" objective for a maintenance award, and one argument concerns the court's consideration of the "fairness" objective for such awards.

Support Objective

¶14 We conclude there was sufficient evidence from which the circuit court could reasonably find a substantial change in the parties' circumstances that would justify the reduction of maintenance as ordered. The undisputed facts are that Jeffrey, not Hieu, now has custody and placement of the couple's five children, and that Hieu is now fully able to pursue a career in her chosen profession.[4] These are significant changes from which a court could reasonably conclude modification of the maintenance award was warranted. As further explained below, the original divorce judgment, in its findings of fact, expressly noted that Hieu would not return to her full-time employment as an occupational therapist until 2019, when the parties' youngest child would be twelve years old. Because of the change in custody and placement of the children, and because Hieu returned to the workforce sooner than expected and began earning over $50,000 a

[4] The circuit court's decision notes that the eldest child was about to begin her senior year of high school at the time the circuit court ordered Jeffrey to receive sole custody and placement of all the children. That child was allowed to continue living in the Eau Claire area to finish high school, but she decided to live with another family willing to house her rather than with Hieu.

year, it is reasonable to conclude a substantial change of circumstances has occurred.

¶15 In attempting to overcome the foregoing, Hieu contends the circuit court erred when it failed to honor the Minnesota court's original finding that $6000 per month was necessary for Hieu to maintain a standard of living reasonably comparable to that she enjoyed during the marriage. Hieu acknowledges that while the Minnesota court's ordering of Jeffrey to pay $6000 per month for ten years was necessary "to maintain the lifestyle to which [Hieu] has grown accustomed," the Minnesota court also found that the Arnholts' lifestyle was "not lavish or extravagant," but rather was "comfortably middle class[.]" Hieu argues the circuit court, here, improperly rejected this factual finding and made its own by stating that "every evidentiary hearing before me has been totally devoid of any evidence of what might be expected of a highly paid physician's family," and that the parties lived a "simple, austere lifestyle." Hieu contends these statements regarding the parties' "lifestyle" at the time of the divorce amounted to the circuit court violating the mandate in ***Kenyon*** that it not "retry the issues" or modify fact findings made in the prior proceeding. ***Kenyon***, 277 Wis. 2d 47, ¶27.

¶16 We disagree. There is no inconsistency between the circuit court's comments at issue and the Minnesota court's findings regarding the parties' standard of living at the time of the divorce. Indeed, we have a difficult time discerning any meaningful difference between the characterization of a "simple, austere lifestyle" versus that of a "not lavish" or "extravagant," but rather "comfortably middle class" standard of living. Moreover, Hieu's argument ignores, as the circuit court aptly noted, that the Minnesota court "never identified any significant standards of living that applied at the time" of the parties' divorce.

Hieu's argument in this regard more appropriately relates to her next argument, which addresses whether Hieu's new employment—and other lifestyle changes—properly may constitute a substantial change in circumstances vis-à-vis the parties' pre-divorce lifestyle. There is no support, however, for the notion the circuit court erred by disregarding the Minnesota court's factual findings regarding the parties' pre-divorce lifestyle.

¶17 Hieu next argues there did not exist a substantial change in circumstances—at least not one "*which warranted* the ordered modification of maintenance." This is so, she contends, because Jeffrey's ability to pay has not changed, Hieu's needs continue to exceed her income, and Hieu's employment prior to the end of the ten-year maintenance period is not a "change" but rather is consistent with the intent of the original order. The first two considerations—both of which merely acknowledge circumstances that have not changed—are of little moment to our analysis.[5] Rather, the issue is whether the totality of the parties' financial and other lifestyle circumstances has substantially changed so as to warrant a modification of the previously ordered maintenance. In this regard, the circuit court expressly concluded "the evidence shows that Hieu needs absolutely no maintenance in order to support herself."

[5] This said, we note that Hieu's arguments regarding her expenses—and thus the amount of her net income-versus-expenses—are premised on an amount the circuit court appears to have disregarded as unsupported by the weight of the credible evidence. This lack of supporting evidence appears to have been occasioned by Hieu's repeated refusals to complete a financial disclosure form as ordered by the circuit court and to turn over other financial documentation. Moreover, when she did provide any such information, the court determined it included some dubious sums. All of these issues led to the circuit court to make an express, adverse credibility finding regarding Hieu—and in particular, regarding her testimony about her various expenses.

¶18 Hieu contends her employment as an occupational therapist is not a substantial change in circumstances because her full-time employment during the ten-year maintenance period is consistent with the original intent of the maintenance order.[6] Hieu argues the Minnesota court expressly anticipated Hieu would need to begin working before the ten-year period had expired. To do so, she latches on to certain language in the Minnesota court's conclusions of law—namely, that "within" the ten-year maintenance period, Hieu "shall be able to reintegrate herself into the workforce." She also points to her own testimony that it has taken (and will continue to take) much effort to fully establish herself as an occupational therapist earning a true "full-time" income.

¶19 We conclude that the circuit court did not err in finding Hieu's full-time employment as an occupational therapist constitutes a substantial change. Hieu obtained her Wisconsin occupational therapist license and began working again in that field several years before the limited term of maintenance ended. Hieu overreads the language in the Minnesota court's conclusion of law that she emphasized from the court's eighteen-page order. More germane are the other portions of the order, including the applicable finding of fact, which plainly contemplated that Hieu would not be returning to the workforce as a full-time occupational therapist until 2019, when her youngest child turns twelve years old. Likewise, the circuit court was not required to credit Hieu's testimony regarding how allegedly tenuous both her job retention and net income are, but rather it could focus on the evidence regarding the actual income she was receiving.

[6] Hieu also contends she was entitled to, and did, rely on the ten-year period she was given by the Minnesota court to become self-supporting. This argument merely begs the question of whether her employment during the ten-year maintenance period is, in fact, consistent with the original intent of the maintenance order, such that her reliance would be reasonable.

¶20 Hieu's last argument regarding the support objective concerns whether the circuit court adequately addressed the factors contained in WIS. STAT. § 767.56. Citing ***Vander Perren***, 105 Wis. 2d at 230, in which our supreme court concluded the statutory factors had not been sufficiently addressed by the circuit court, Hieu contends the circuit court erred "because it did not expressly apply *any* of the factors under WIS. STAT. § 767.56 in its decision." Hieu's argument in this regard—the sum total of which we have just quoted—is conclusory and undeveloped, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), and ignores our standard for reviewing discretionary decisions that requires us to search the record for support for the circuit court's decision, *see* ***State v. Thiel***, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388.

¶21 In any event, the circuit court did expressly acknowledge it was to consider the WIS. STAT. § 767.56 factors, and it extensively questioned Hieu at the evidentiary hearing as to how those factors might impact her case. These factors included Hieu's current employment, licensure and certification, and continuing education expenses, as well as both parties' educational background, their health, and their agreement that Hieu would primarily be responsible for rearing their children in order to support Jeffrey's career. Merely because the circuit court's written decision did not elaborate on these specific § 767.56 factors does not mean the circuit court failed to consider them. The record belies this assertion.

Fairness Objective

¶22 Finally, Hieu argues the circuit court erroneously exercised its discretion in addressing the fairness objective because it failed to consider the fairness to both parties and that the resulting incomes are "grossly disproportionate

to each other." Indeed, Hieu's "fairness" argument is almost entirely derived from the parties' income disparity.

¶23 The circuit court acknowledged Jeffrey's large anticipated salaries in the coming years. It then offered the following analysis:

> In light of the substantial amount of money Jeffrey makes in comparison to the amount of money Hieu makes, the fairness objective requires that Jeffrey pay some small amount to Hieu. Although she was unable to articulate figures during the September 13, 2016 hearing, Hieu explained that she has continuing education obligations for which her employer might not fully reimburse her. Although grossing $51,000.00 per year for a single person is adequate to support Hieu, if she ever decides to visit her children in the Green Bay area, she is going to incur travel expense, hotel expense, food expense and entertainment expense outside the Eau Claire area. Thus, it is not unreasonable for Jeffrey to pay $500.00 per month until the end of June, 2019. Even assuming Jeffrey earns as little as $550,000.00 in calendar year 2016, that will still be ten times more than Hieu earns in calendar year 2016. Jeffrey can afford to pay Hieu $500.00 per month.

¶24 Hieu argues the foregoing is an erroneous discretionary application of the required fairness objective. She first contends the court's analysis does not consider the "fairness to both of the parties under all of the circumstances," *see* ***Kenyon***, 277 Wis. 2d 47, ¶¶30, 37, including, in particular, the noneconomic contributions Hieu made to Jeffrey's career, at the expense to her career. She argues the facts surrounding both their marriage and their lives immediately after the divorce demonstrate that "this is the classic case where one spouse has subordinated her career for the other's." She also notes the Minnesota court's finding in 2009 that Hieu had already "lost earnings, seniority, retirement benefits, and other employment opportunities …." She then contends "the court's order produced a grotesque disparity between the post-divorce incomes of the parties."

¶25 Despite the foregoing, we cannot conclude the circuit court erroneously exercised its discretion in this instance. Here, the court had already concluded that "the evidence shows that Hieu needs absolutely no maintenance in order to support herself." It found that Hieu never used the proceeds allocated to her from the sale of the parties Mankato, Minnesota, home to buy a new residence in Eau Claire, as contemplated in the Minnesota court's decision (Hieu rented instead). The court also found the evidence supported the notion Hieu has sufficient personal property to provide for her reasonable needs. We also observe that the circuit court denied Jeffrey's request for child support payments from Hieu (which payments, the court noted, would amount to $1,445.00 per month, according to the Mac Davis calculator), even though he had custody and placement of the couple's numerous children and there was evidence during the motion hearing that Hieu was doing little to support the children. *Cf.* ***Enders v. Enders***, 147 Wis. 2d 138, 145-46, 432 N.W.2d 638 (Ct. App. 1988) (concluding the circuit court did not erroneously exercise its discretion when considering its decision not to issue a child support order against a former spouse when setting the maintenance award to that spouse). The court opted not to order such child support expressly out of fairness to Hieu.

¶26 Furthermore, the circuit court's decision to reduce maintenance was done to account for the substantial change of circumstances that had occurred in the seventh year of the ten years of limited-term maintenance payments. Despite these substantial changes, despite the above-noted findings by the circuit court, despite Hieu's substantial lack of cooperation in the postdivorce proceedings and excessive litigation of matters, and despite the denial of any child support payments from Hieu to Jeffrey, the court still ordered Jeffrey to make $500 in monthly maintenance payments for the remainder of the ten-year term. Under all

of the circumstances, we cannot conclude the circuit court erroneously exercised its discretion in determining that fairness to both parties warranted this modification of the maintenance award.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).