

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 24, 2009**

David R. Schanker  
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. 2008AP1193**

**Cir. Ct. No. 2001FA389**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**BRIAN C. STECKER,**

**PETITIONER-APPELLANT-  
CROSS-RESPONDENT,**

**v.**

**KATIE L. WILLINGER-STECKER,**

**RESPONDENT-RESPONDENT-  
CROSS-APPELLANT.**

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APPEAL and CROSS-APPEAL from an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Brian Stecker appeals the trial court's order reducing the amount of and continuing indefinitely the maintenance he is required

to pay his ex-wife, Katie Willinger-Stecker, entered following Stecker's postdivorce motion seeking to modify or terminate maintenance. He argues that the trial court erroneously exercised its discretion when it failed to terminate maintenance. Willinger-Stecker cross-appeals, arguing that the trial court erroneously exercised its discretion in determining that a substantial change of circumstances had occurred since the date of divorce and in reducing its earlier maintenance award. Because there is a reasonable basis in the record for the trial court's finding of a substantial change of circumstances and a reasonable basis for the reduced, as opposed to terminated, maintenance award, we affirm.

### I. BACKGROUND.

¶2 In 2001, Brian Stecker filed a divorce petition seeking a divorce from his then-wife, Katie Willinger-Stecker. The parties attempted a reconciliation, but ultimately, after a contested trial on a limited number of issues, a divorce was granted on October 30, 2002. The findings of fact and conclusions of law reflect that at the time of the divorce, Stecker was forty-four years old, and Willinger-Stecker forty-three years of age. The parties had been married for approximately fourteen years. According to the divorce judgment, Stecker was grossing \$232,055 per year in his practice as a pediatric dentist, while Willinger-Stecker was making \$55,557 working at the University of Wisconsin-Milwaukee. One of the contested issues was maintenance. Besides the obvious disparity in their incomes, Willinger-Stecker had had some serious health problems during the marriage. After considering the factors found in WIS. STAT. § 767.26 (2001-02),<sup>1</sup>

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<sup>1</sup> WISCONSIN STAT. § 767.26 has since been amended and renumbered WIS. STAT. § 767.56 *See* 2005 Wis. Act 443, §§ 110, 267 (eff. Jan. 1, 2007).

(continued)

the trial court found “that a reasonable sum for the petitioner to pay the respondent as and for maintenance is \$4,200.00 per month.” This amount was reached by calculating the net income of the parties, with approximately 60% going to Stecker, and 40% going to Willinger-Stecker. The trial court did not set a date upon which the maintenance would terminate.

¶3 On April 20, 2007, Stecker filed a motion seeking to modify maintenance. In the motion he alleged that there had been a substantial change of circumstances because his income had “substantially decreased through no fault of his own.” The trial court heard extensive testimony, including expert witnesses for both sides, and ordered briefs.<sup>2</sup> Ultimately the trial court, in a written decision and order, determined that there was “a substantial change in circumstances due to a decrease in the petitioner’s income and an increase in the respondent’s income and while this would support a modification of the judgment of divorce as relates to maintenance, the evidence does not support the petitioner’s request to terminate maintenance.”

¶4 After making several adjustments to Stecker’s income on minor financial matters, the trial court determined Stecker’s income available for support and applied the same 60%/40% split of the disposable income of the parties as had been utilized at the time of the divorce. This yielded a payment by Stecker of \$2500 a month to Willinger-Stecker for maintenance. Stecker then filed a notice of appeal and Willinger-Stecker cross-appealed.

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All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

<sup>2</sup> The briefing schedule was delayed because the court reporter who had transcribed the hearing suffered a stroke.

## II. ANALYSIS.

### A. *Standard of Review*

¶5 The modification of maintenance involves the exercise of the trial court's discretion. *Dowd v. Dowd*, 167 Wis. 2d 409, 413, 481 N.W.2d 504 (Ct. App. 1992). In order to modify a maintenance award, the party seeking modification must demonstrate that there has been a substantial change in circumstances warranting the proposed modification. *Fobes v. Fobes*, 124 Wis. 2d 72, 80-81, 368 N.W.2d 643 (1985), *overruled on other grounds by Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶32, 269 Wis. 2d 598, 676 N.W.2d 452. We review a trial court's decision to modify maintenance, including the decision whether there is a substantial change in circumstances, as a discretionary decision. *Cashin v. Cashin*, 2004 WI App 92, ¶44, 273 Wis. 2d 754, 681 N.W.2d 255. Thus, we affirm the trial court's decision if there is a reasonable basis in the record for it. *Id.*

¶6 The burden is upon the party seeking modification to show that the circumstances upon which the initial order was based have substantially changed. *Thies v. MacDonald*, 51 Wis. 2d 296, 301, 187 N.W.2d 186 (1971). The correct test on a motion to modify maintenance is for the trial court to “consider fairness to both of the parties under all [of] the circumstances.” *Cashin*, 273 Wis. 2d 754, ¶41 (quoting *Rohde-Giovanni*, 269 Wis. 2d 598, ¶32). “[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Rohde-Giovanni*, 269 Wis. 2d 598, ¶18 (citation omitted). A trial court's exercise of discretion is erroneous if it makes factual or legal errors. *Id.*

*B. The trial court properly exercised its discretion when it determined that there was a substantial change of circumstances.*

¶7 We choose to first address the issue raised in the cross-appeal because if we were to agree with Willinger-Stecker, the issue raised by Stecker would be moot. Willinger-Stecker submits that the trial court erroneously exercised its discretion when it determined that a substantial change of circumstances had occurred since the time of the divorce.

¶8 Willinger-Stecker first argues that Stecker’s decision, in response to increased competition, to buy a \$360,000 building and relocate his practice at a cost of \$400,000 for leasehold improvements, to purchase all new equipment, computer system, etc., for approximately \$225,000, and to change his practice from a sole proprietorship to a limited liability company (LLC) were business choices that will ultimately benefit him, and these “temporary, self-induced increases in expenses” should not be “a means to terminate or decrease” Willinger-Stecker’s support. In addition, Willinger-Stecker points out that Stecker’s gross receipts have, for the most part, continued to increase, and it is the expense side of the ledger that accounts for his decreased income. Willinger-Stecker suggests that Stecker is “build[ing] his net worth and his income stream on [Willinger-Stecker’s] financial back.”

¶9 Willinger-Stecker also challenges the trial court’s findings regarding Stecker’s income, and, as explained by her expert witness, a more in-depth look at Stecker’s financial information reveals that some of the reasons his income has fallen have to do with: (1) the significantly increased rent his practice pays to the LLC, which he created to manage the new building; (2) the reconfiguration of his taxes, including his property tax, due to the change in the structure of his practice; and (3) the large increase in his interest expense due to all his new purchases.

Willinger-Stecker also argues that her expenses have remained essentially the same, while Stecker's expenses have increased significantly.

¶10 As noted, the trial court found that a substantial change in circumstances had occurred since the divorce. In doing so, the trial court acknowledged that Stecker faced increased competition, both from two new pediatric dentists, and from reduced referrals from general practice dentists who are now providing services to children. The trial court found convincing Stecker's expert witness's testimony that Stecker's previous dental office was "extremely inadequate," with the office being the equivalent of a twenty-eight-foot by twenty-eight-foot room containing old furniture and outdated equipment. The trial court observed that in order to compete, Stecker was required to create a pleasant office environment to attract his clients' parents. Under these circumstances, the trial court found Stecker's decision to relocate and refurbish the office "reasonable." Implicit in this determination was the trial court's approval of the restructuring of Stecker's practice to a LLC.

¶11 The trial court also observed that Willinger-Stecker's expert witness "[i]n large part ... agreed with the expenses shown in the general ledger of [Stecker's] dental practice." In those areas where Willinger-Stecker's expert witness disagreed with Stecker's expert witness's explanation, the trial court either accepted the higher figures deemed reasonable by Stecker's expert as being necessary to the purchase and furnishing of the new building and equipment, including paying significant property taxes for the building, or, in some other circumstances, the trial court made some downward adjustments to Stecker's expense figures in calculating Stecker's professional profit. Examples of this are when the trial court accepted the high rent figure which Willinger-Stecker's expert disputed and found it to be reasonable when compared to the rent being paid by

Stecker's tenant, and when the trial court reduced the amount listed by Stecker for maintenance and repairs to the building by almost \$6000. With regard to a dispute over Stecker's 2007 income (the hearing took place on August 23, 2007), the trial court elected to approximate the 2007 income by taking the 2006 figure and adding to it an additional \$14,000 because testimony strongly suggested that Stecker's income was going to be higher in 2007. The trial court also was aware of the fact that Stecker had remarried, and many of the expenses he listed were for two people. The trial court, after establishing Stecker's income, then applied the 60%/40% split used to calculate maintenance at the time of the divorce.

¶12 We are satisfied that evidence in the record supports the trial court's decision. While the characterization by Stecker that his income "has substantially decreased through no fault of his own" is not totally accurate, in that Stecker voluntarily upgraded the location, size of his office, furnishings, equipment, and changed his way of doing business, nevertheless we agree with the trial court that Stecker's decision was a reasonable one. It was reasonable because testimony suggested that, without having made such an expensive move, Stecker's practice was likely to decline, leaving Stecker with a diminished practice and concomitantly decreased income. The cost of these changes resulted in significant expenses for Stecker, which in turn lowered Stecker's income. This fact, coupled with the undisputed rise of Willinger-Stecker's income from \$55,557 at the time of the divorce, to \$75,000 at the time of the hearing, constituted a substantial change in circumstances.

*C. The trial court properly determined that maintenance should not be terminated, but instead, reduced.*

¶13 Stecker argues that the trial court erroneously exercised its discretion because "it ignored several of the factors under [WIS. STAT.] § 767.56 and it

improperly weighed others.” He claims that “only two [of the ten factors found in the statute] arguably support maintenance continuing indefinitely and even they are debatable.” Stecker insists that the other factors in § 767.56 weigh in favor of a complete denial of maintenance. To buttress these arguments, Stecker cites to a variety of maintenance cases with different facts, and concludes that neither the support objective nor the fairness objective relied upon by the trial court requires a continuation of maintenance. We disagree and find the trial court’s reduced maintenance order reasonable.

¶14 In addressing its decision not to terminate maintenance, the trial court wrote:

Petitioner has argued that the court should terminate maintenance. I believe that would be inappropriate. While respondent’s physical health has not interfered with her job in the past five years, there are still substantial concerns about her health. Based upon those concerns, I do not believe it would [be] appropriate to terminate maintenance.

Petitioner also argues that the parties’ fourteen[-]year[-] marriage is not a long[-]term marriage so as to justify permanent maintenance. While I agree that this was not a long[-]term marriage[,], it was also not of short duration. Respondent continues to need maintenance to support herself at a standard of living reasonabl[y] comparable to what she enjoyed during the marriage.

The trial court also touched on the fairness issue, commenting that:

Because each of the parties ha[s] enough money to cover a reasonable budget, I believe that the fairness factor has also been met. While petitioner receives more than half of the net income of the parties combined, this is fair due to [his] having acquired his degree before the marriage.

¶15 WISCONSIN STAT. § 767.56 requires the trial court to consider the following factors when relevant:

**Maintenance.** Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.61.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.
- (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
- (9) The contribution by one party to the education, training or increased earning power of the other.
- (10) Such other factors as the court may in each individual case determine to be relevant.

¶16 The trial court commented on the factors found in WIS. STAT. § 767.56 that were relevant. The trial court was not obligated to address factors that were not applicable. The trial court made note of the fact that the marriage

had lasted for fourteen years, which was neither a long nor a short marriage, and also observed that “there are still substantial concerns about [Willinger-Stecker’s] health.” Although Stecker argued that Willinger-Stecker’s health concerns had not kept her from working full-time, the testimony of Willinger-Stecker’s doctor revealed that Willinger-Stecker had some suspicious symptoms and test results that raised concerns about her future health, which may impact her ability to work in the future. The trial court also took into consideration the fact that Stecker had earned his degree prior to the marriage when giving Stecker 60% of the available income and Willinger-Stecker 40%. In setting the maintenance amount, the trial court concluded that the amount awarded to Willinger-Stecker was needed to support her “at a standard of living reasonabl[y] comparable to what she enjoyed during the marriage.”

¶17 The trial court also discussed both the fairness objective and the support objective, and felt that maintenance of \$2500 a month satisfied both objectives.<sup>3</sup> Because the trial court reviewed all the pertinent facts, applied the correct law, and reached a reasonable determination, the result here was a maintenance award that was fair and equitable to both parties. Thus, we conclude that the trial court properly exercised its discretion. Accordingly, we affirm.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

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<sup>3</sup> We also note that the judge presiding over the postdivorce hearing was the same judge who presided over the divorce trial and set the original maintenance amount, which neither party appealed.

