COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2612 **Cir. Ct. No. 1997FA529**

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

IN RE THE MARRIAGE OF:

BONNIE J. HATHAWAY,

PETITIONER-APPELLANT,

V.

MARK A. HATHAWAY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Bonnie Hathaway appeals from an order terminating maintenance from Mark Hathaway and denying her motion to have

Mark held in contempt for failing to timely execute a qualified domestic relations order (QDRO) and complete necessary steps for issuance of a life insurance policy. Bonnie contends that Mark is shirking his duty of support by selling his business and working as a salaried employee elsewhere and that the decision to terminate maintenance is based on factual errors and a failure to consider relevant factors. She also argues that the circuit court erroneously exercised its discretion in denying her contempt motion and request for attorney fees. We affirm the order.

¶2 After twenty-six years of marriage, the parties were divorced. A final judgment was entered on November 29, 2001, incorporating the circuit court's written decision on maintenance, child support and property division. The circuit court found that Mark's income from his sales career with his solely owned corporation, Gaumond & Cella, Inc. (Gaumond), was actually $220,000 per year, although Mark had artificially inflated his income in prior years by withdrawing capital from the corporation. Mark was ordered to pay Bonnie maintenance of $101,180 annually. Maintenance was for an unlimited term with the court finding that Bonnie could not "realistically contribute to the income earning stream." It found it speculative to place a value on Gaumond and ordered Mark to hold his ownership interest in constructive trust and that all payments from Gaumond be shared with Bonnie. It directed that in the event Gaumond is sold, Bonnie must be allowed to participate in the sales decision. The pension and profit-sharing plan

for Gaumond was to be divided equally by a QDRO.[1] The circuit court's decision recognized that nothing prevents Bonnie from taking out life insurance on Mark.

¶3 In April 2003, Mark moved to reduce or terminate maintenance and for approval of the sale of Gaumond. He indicated that Gaumond was insolvent due to a downturn in business and that he wanted to sell the corporation for the then only existing offer to purchase for $1,250,000. Mark accepted employment at Mestek Corporation in May 2003 at an annual salary of $60,000. Bonnie responded with a motion to have Mark found in contempt for the failure to make certain maintenance payments, for hindering her ability to timely obtain a life insurance policy on him, and for his failure to timely provide or execute a QDRO. With respect to the last alleged contemptuous conduct, Bonnie claimed that since December 31, 2000, she suffered a significant loss in her one-half value of the pension and profit-sharing plan. She asked that she be awarded a sum equal to one-half of the plan's value on December 31, 2000.

¶4 Eventually, and before the circuit court conducted any evidentiary hearing on the pending motions, Bonnie agreed to the sale of Gaumond. Due to the passage of time, the sale price was greatly reduced. The sale resulted in seven yearly payments of $35,000 each to Mark and Bonnie.

¶5 The circuit court granted Mark's request to terminate maintenance. Mark was found in contempt for not timely paying maintenance and nonpayment of real estate taxes. The contempt penalty was stayed pending payment of the

[1] Profit sharing was to be divided as of the date of the divorce and the pension divided as of December 31, 2000. The divorce was granted on August 31, 2000, although the decision on contested issues was not entered until July 23, 2001.

outstanding amount. The court did not require Mark to pay the increased cost of life insurance and ordered the QDRO to divide the pension and profit-sharing plan at its current value, not the value at the time of the divorce.

¶6 The modification of maintenance involves the exercise of the circuit court's discretion. ***Dowd v. Dowd***, 167 Wis. 2d 409, 413, 481 N.W.2d 504 (Ct. App. 1992). Under WIS. STAT. § 767.32 (2003-04),[2] the circuit court may revise a maintenance order if there has been a substantial change in the parties' financial circumstances. ***Dahlke v. Dahlke***, 2002 WI App 282, ¶8, 258 Wis. 2d 764, 654 N.W.2d 73. We review a circuit 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 circuit court's decision if there is a reasonable basis in the record for it. ***Id.*** "[T]he correct test on a motion to modify maintenance 'should consider fairness to both of the parties under all the circumstances.'" ***Id.***, ¶41 (quoting ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶32, 269 Wis. 2d 598, 676 N.W.2d 452).

¶7 Bonnie argues that the change in Mark's financial circumstances should not be considered because the reduction in his income is due to voluntary and unreasonable decisions. In other words, she contends that Mark is shirking and maintenance considerations should be based on Mark's earning capacity rather than his actual earnings. To conclude that one spouse is shirking, "a circuit court is not required to find that a former spouse deliberately reduced earnings to avoid

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

support obligations or to gain some advantage over the other party. A circuit court need find only that a party's employment decision to reduce or forgo income is voluntary and unreasonable under the circumstances." ***Chen v. Warner***, 2005 WI 55, ¶20, 695 N.W.2d 758. The issue of reasonableness is a question of law, but one in which an appellate court gives appropriate weight to the circuit court's decision. ***Id.***, ¶¶38, 43.

¶8 Bonnie does not suggest that Mark's decision to take a salaried position at Mestek was unreasonable. She concedes that when Mark took that job his income actually increased because he continued to own Gaumond. Bonnie concedes that the decision to sell Gaumond was not, in and of itself, unreasonable.[3] She contends that Mark is shirking because of his decision to work at Mestek after the sale of Gaumond rather than seeking different or additional employment that would result in income similar to what he was receiving prior to the sale of the corporation. She looks back to the original determination that Mark's earning capacity, independent of his ownership of Gaumond, was $200,000 annually plus an additional $20,000 in bonuses. She faults Mark for not providing any evidence that there were no opportunities available to him at the higher income level.

¶9 Limiting our review to Mark's decision to continue with employment at Mestek, we conclude that it was not an unreasonable job choice. The original determination of maintenance recognized that the financial future of Gaumond was "shadowy" in light of the total dependence the corporation had in

[3] Bonnie explains that because Gaumond was a marital asset, the focus of the shirking analysis is not on Mark's decision to sell Gaumond but on his employment decisions which led to the reduction of income.

continuing to serve principals who could at any moment render the business worthless by terminating their relationship with Gaumond. The circuit court found that although Mark had achieved a high level of success with Gaumond, it involved the sale of specialized industrial products and it was questionable whether Mark could translate his experience into other areas with equal success. The circuit court's original concerns came to pass, particularly with the downturn of the general economy after the terrorist acts of September 11, 2001. Mark accepted employment with Mestek, anticipating the need to sell Gaumond. By the time Gaumond was sold, Mark had not collected any salary from Gaumond for approximately four months. On the modification motion, the circuit court found that Mark's employment with Mestek is in the same sales field as his work for Gaumond and is more stable. It found that although significantly reduced, Mark's annual salary is a good wage and there was no evidence of Mark's ability to earn more in a similar sales field. The sale of Gaumond, which Bonnie approved, included a noncompete agreement that prevents Mark from working for Gaumond or dealing with Gaumond's two principal clients. Considering all of the circumstances, we conclude, as the circuit court did, that Mark's decision to sell Gaumond and accept stable salaried employment was reasonable. It was not error for the circuit court to look at Mark's actual income in concluding that a substantial change of circumstances occurred.

¶10 "When modifying maintenance awards, the circuit court must consider the same factors governing the original determination of maintenance" as set forth in WIS. STAT. § 767.26. ***Poindexter v. Poindexter***, 142 Wis. 2d 517, 531, 419 N.W.2d 223 (1988). Bonnie contends that the circuit court ignored her health problems and failed to defer to the findings made in the original maintenance determination. *See* ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶33 ("a judge who reviews

a request to modify a maintenance award should adhere to the findings of fact made by the circuit court that handled the parties' divorce proceedings"). The circuit court recognized that the original maintenance determination rested on the finding that Bonnie could not contribute to the income stream because her anger and emotional upset related to the divorce were impediments to productive employment. The circuit court found, however, that now Bonnie was "over it," meaning the extreme emotional upset related to the divorce. Those were in fact the words Bonnie used in her testimony. The circuit court did not disregard the findings made in the original maintenance determination; it found that circumstances had changed. Although Bonnie testified that she suffered from high blood pressure, high cholesterol, stress, and borderline diabetes, she did not indicate that those conditions significantly affected her ability to work. We cannot conclude that the circuit court ignored her health.

¶11 Bonnie argues that the circuit court's finding that she is now able to earn a good wage and support a good standard of living is clearly erroneous. The circuit court found that since the divorce, Bonnie has moved to Ohio and is motivated to do well with her real estate broker's license. Bonnie points out that she does not hold a real estate broker's license but is only licensed as a real estate agent, a less lucrative career than that envisioned by the circuit court. Nothing in the record suggests that the circuit court's use of the term "broker" was intended to mean anything other than a regular real estate agent. Bonnie explained the way her employment with a real estate listing company worked—that she had to find her own listings and pay all related expenses. The circuit court merely used a different term to describe Bonnie's status as a real estate sales agent. In recognizing that neither party could achieve the standard of living he or she enjoyed during the marriage, the circuit court demonstrated that it had no

grandiose notions about the amount of income Bonnie could earn as a real estate agent.

¶12 Bonnie claims it was improper for the circuit court to include in her income the anticipated payouts she would receive from the sale of Gaumond because Gaumond was treated as a marital asset in the property division. The circuit court did not include the sale proceeds from Gaumond as income to Bonnie. Indeed, the circuit court only referenced the sale proceeds in discussing Mark's decision to sell Gaumond and never in the context of Bonnie's income or ability to support herself. We reject Bonnie's claim that the circuit court was indirectly requiring her to invade her share of the property division to support herself.

¶13 In summary, the circuit court's findings with respect to the changes that occurred are not clearly erroneous. The circuit court considered the fairness objective of maintenance in deciding to terminate maintenance. The decision is a proper exercise of discretion.

¶14 Bonnie next argues that the circuit court erroneously exercised its discretion in denying her motion to have Mark held in contempt for not timely executing a QDRO to divide Gaumond's pension and profit sharing before the value significantly dropped. *See* ***City of Wis. Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995) ("A trial court's use of its contempt power is reviewed to determine if the trial court properly exercised its discretion.") The circuit court's findings of fact with respect to contempt are conclusive unless clearly erroneous. *See* ***Town of Seymour v. City of Eau Claire***, 112 Wis. 2d 313, 318, 332 N.W.2d 821 (Ct. App. 1983).

¶15 We first observe that Bonnie earlier litigated Mark's failure to cooperate with respect to the QDRO in a contempt motion filed November 20, 2002. A January 21, 2003 order found Mark in contempt for not executing the QDRO and required him to do so by February 7, 2003. By a letter dated February 4, 2003, Mark provided Bonnie with a QDRO, but Bonnie never signed it. It does not appear that in her first contempt motion Bonnie requested the relief sought in her second contempt motion—the division of the accounts based on their value on the date of the divorce. Mark does not suggest that Bonnie should not be allowed to relitigate the remedy for his alleged contempt.

¶16 The circuit court found that Bonnie caused part of the delay in getting the QDRO completed. That finding is not clearly erroneous. The judgment of divorce was entered on November 29, 2001. Bonnie did not get any response to her requests that Mark divide the account. Not until August 7, 2002, did Bonnie's attorney submit a proposed QDRO to the administrator of the plan.

¶17 We also reject Bonnie's contention that the remedy she seeks is merely one of enforcing the provision in the judgment of divorce that the pension and profit-sharing account be divided as of December 31, 2000. The value of the account was not set forth in the judgment of divorce. The judgment does not guarantee Bonnie a sum certain from the account. Bonnie ignores that Mark shares equally in the reduced value of the account and that to award her one-half the value as of December 31, 2000, decreases Mark's share and upsets the property division.[4] The circuit court recognized that such a result would be

[4] In her testimony, Bonnie acknowledged that due to the terrorist acts of September 11, 2001, the value of the account was substantially less by the time the final judgment was entered in November 2001 than it was on December 31, 2000.

inequitable. *See* ***Taylor v. Taylor***, 2002 WI App 253, ¶¶13-14, 258 Wis. 2d 290, 653 N.W.2d 524. Moreover, the circuit court had no authority to revise the final property division. *See* ***id.***, ¶12. We affirm the circuit court's denial of Bonnie's request that the QDRO divide the account based on its December 31, 2000 value.

¶18 Bonnie's final claim is that as a remedy for Mark's contempt in timely completing a life insurance application, she is entitled to an order requiring Mark to pay the higher cost of life insurance. This issue is moot since maintenance is terminated and the provision in the judgment of divorce that Bonnie may obtain life insurance to cover maintenance is no longer enforceable. The same is true of Bonnie's claim that she should have been awarded attorney fees incurred in the prosecution of her contempt motion. There is no finding of contempt to support an award of attorney fees.

By the Court.—Order affirmed.

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