

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2006

Cornelia G. Clark
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. 2005AP710

Cir. Ct. No. 1997FA5020

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

KAREN LEE BOLDT,

PETITIONER-APPELLANT,

V.

JAMES EDWARD BOLDT, JR.,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County:
DOMINIC S. AMATO, Judge. *Reversed and cause remanded with directions.*

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

¶1 WEDEMEYER, P.J. Karen Lee Boldt appeals from post-divorce orders modifying the family support awarded under the judgment of divorce. Karen claims the trial court: (1) erroneously exercised its discretion in modifying

the family support award; (2) erred when it failed to hold James Edward Boldt, Jr. in contempt; (3) should have awarded her attorney's fees incurred in responding to James's failure to comply with the original judgment of divorce; (4) should have ruled on the issue of whether James failed to split his frequent flier tickets through 2004 as set forth in the marital settlement agreement; and (5) erred in its ruling with respect to maintenance. Because the trial court erroneously exercised its discretion in the manner in which it modified the family support award, we reverse the orders and remand the matter for further proceedings consistent with this opinion. We also conclude that the trial court erred in dismissing Karen's request to hold James in contempt; that the trial court should have ordered James to pay Karen's attorney's fees with regard to the family support modification proceedings; that the trial court erred in declining to resolve the frequent flier ticket dispute; and, the trial court erroneously exercised its discretion with respect to the maintenance determination.

BACKGROUND

¶2 James and Karen were married on November 2, 1974. They had three children: James (d.o.b. 12/28/76); Elizabeth Ann (d.o.b. 10/29/79); and Lindsey Beth (d.o.b. 08/19/86). They were married for twenty-four years before divorcing on November 11, 1998. Karen was primarily responsible for the children and the home and had no earned income at the time of the divorce. James was employed as vice-president of Wayne Pigment. He was a partner and 22.15% owner, earning \$195,216 annually at the time of the divorce.

¶3 James and Karen stipulated to a negotiated marital settlement agreement, which was incorporated into the judgment of divorce. As relevant to the current dispute, the marital settlement agreement provided:

Pursuant to §767.261, Wis. Stats., Mr. Boldt will pay \$9,208 per month, as and for family support. Mr. Boldt will make the payments every two weeks, consistent with his paycheck, in the amount of \$4,250 every two weeks, commencing December 10, 1998.

....

Through February, 2005, the parties agree that these family support payments will be increased on a yearly basis, effective December 1 of each year, by increasing the monthly payment to Ms. Boldt by a net amount of \$200.

The agreement also stated:

Maintenance to Ms. Boldt is held open, and is currently provided for below in the Family Support provisions. When family support ends, the parties will revisit the issue of maintenance for Ms. Boldt

With respect to the frequent flier tickets, the agreement provided:

[A]dditionally, Ms. Boldt shall receive one-half the number of any airline tickets earned by Mr. Boldt by his frequent flyer benefits in every year through 2004[.]

¶4 On April 13, 2004, James resigned his position as an officer and director at Wayne Pigment. As a result, he stopped making the required family support payments. James filed an order to show cause for modification of the divorce judgment stating:

Due to a number of circumstances, but primarily as a direct result of [his] current health, [James] resigned his position as an officer and director at Wayne Pigment effective April 13, 2004.... Effective May 1, 2004, [James] is unemployed and will have no earned income, and accordingly requests that family support be modified and all support be held open, or terminated, effective April 30, 2004.

¶5 Karen responded by asking the court to deny James's modification request, find him in contempt for his intentional failure to pay family support, and

order him to pay the actual reasonable attorney's fees she incurred in responding to his termination of family support.

¶6 A family court commissioner held a hearing on July 8, 2004, and thereafter denied James's request to terminate or modify family support. The commissioner held that: "Even though he is not gainfully employed at this time, he still has the ability to meet his obligations." That opinion also stated:

While [James's] decision to resign from his position given the combination of health and work-relationships may be understandable, and it may be reasonable for him to conclude that he would get out of his work situation, it does not follow that he would therefore be relieved of his obligations.... He is capable of work but has chosen not to do so. He has been able to make this choice due to a combination of fortunate circumstances. He is remarried and his current wife is gainfully employed. In fact, it was stated that he himself would be responsible for \$1200 of monthly expenses. He has a buy-out agreement that will be providing him with substantial income. Without these two factors, [he] would be forced to seek work at this time. Fortunately, he has been able to make other choices.

¶7 The commissioner certified three issues to the trial court for review: the contempt issue, the attorney's fees request, and the division of the frequent flier tickets. The trial court conducted a *de novo* hearing on November 18-19, 2004. The trial court ruled that: (1) James was obligated in accordance with the divorce judgment to pay family support through August 2004, but relieved of paying any additional family support after that date; (2) James was not guilty of contempt; (3) each party should be responsible for their own attorney's fees; (4) the court did not have jurisdiction to resolve the frequent flier ticket dispute; and (5) maintenance would be held open. Karen moved for reconsideration, which was also, in essence, denied. She now appeals.

DISCUSSION

A. Family Support.

¶8 Karen argues that the trial court erroneously exercised its discretion in its ruling on family support. We will affirm a trial court's discretionary determination on this issue if it considered the pertinent facts, applied the correct law and reached a reasonable determination. See *Vlies v. Brookman*, 2005 WI App 158, ¶13, 285 Wis. 2d 411, 701 N.W.2d 642. Here, we conclude that the trial court did not apply the correct law or reach a reasonable determination. Accordingly, its decision constituted an erroneous exercise of discretion and is hereby reversed.

¶9 The record reflects that the trial court did not understand the law regarding family support or the correct interpretation of shirking. The trial court addressed the issue of family support, indicating that it is for child support purposes and therefore should terminate at the time the youngest child turns eighteen. In this case, that was August of 2004; hence, the trial court ruled that James was no longer obligated to make the family support payments after that date, despite what the marital settlement agreement stated. The trial court's interpretation of the law was incorrect.

¶10 Family support awards are intended to encompass *both* child support and spousal maintenance. *Id.*, ¶¶7-9 (“The family support alternative, therefore, encompasses the support objectives of its component parts, child support and maintenance, in a single obligation.”). There are significant federal income tax advantages to this type of award. *Id.*, ¶9. Here, in the marital settlement agreement Karen and James agreed to family support payments, which were to increase by \$200 per month annually until February 2005. At that point in time,

family support payments plateaued. Although the agreement set forth a termination date for the increase in the family support payment, it did not set a termination date for paying family support. The agreement, however, did state that when family support payments stopped, maintenance payments would then be considered. It is also important to note that \$1000 of the monthly family support payment constituted interest on the property division debt that James still owed to Karen.¹ Significantly, James *agreed* to pay family support under the terms and conditions set forth in the marital settlement agreement. His obligations in this regard were not a court-inflicted order. The marital settlement agreement was incorporated into the judgment of divorce. The parties were obligated by that agreement unless an order from a court directed otherwise.

¶11 Here, the facts reflect that James decided to voluntarily quit his job and stop making the family support payments, including the \$1000 per month property division payment, before he received the court's permission to do so. The trial court found that James's decision to quit was related to health concerns and conflicts with his business partners. The trial court found that those decisions, while understandable, were poor choices and did not relieve James of his obligation to pay family support. The trial court found that James was capable of working, and should not be relieved of his family support obligations. There was no evidence that any physician declared James unable to work or placed restrictions on him with respect to hours he could work. The trial court then went on to order James to pay the family support only through August 2004, when his

¹ In dividing the property, James's share in his company was valued at approximately one million dollars. In order to account for Karen's portion of the company and a certain amount of future interest, James agreed to pay \$1000 per month as part of the family support payment.

youngest child would turn eighteen years old. The trial court did so on the basis that this factor constituted a substantial change in circumstances. The trial court erred in reaching this determination for several reasons.

¶12 First, when the parties entered into the marital settlement agreement, they were fully aware that their youngest daughter would turn eighteen in August 2004. Nevertheless, they negotiated continued family support payments beyond that date. A substantial change in circumstances is some unforeseen event, which occurs after an agreement has been executed. This birthday does not satisfy the definition of a substantial change in circumstances.

¶13 Second, James's determination to terminate his employment cannot constitute a change in circumstances if the decision amounts to "shirking." *See Wallen v. Wallen*, 139 Wis. 2d 217, 225-26, 407 N.W.2d 293 (Ct. App. 1987). "Shirking" is a voluntary and unreasonable reduction in income by a person who has a duty of support. *Smith v. Smith*, 177 Wis. 2d 128, 137-38, 501 N.W.2d 850 (Ct. App. 1993).

¶14 Here, James tried to argue that his decision was reasonable and involuntary. The trial court, however, disagreed with that characterization. The trial court found that James's decision was a "poor choice" and therefore not reasonable. The record supports the trial court's finding. The record reflects that James is capable of working. There is no medical testimony to suggest that he was forced to retire because of any medical condition. No physician put any restrictions on James or told him he must quit working. There is no mental or physical disability which prevents him from continuing employment. James testified that his cardiologist told him he needed to reduce his stress. James had been treated for hypertension since the 1980's. James explained that he was

experiencing conflicts with his partners at work, which contributed to his decision to retire. It appears that the conflicts with his partners were long-standing, and exacerbated when James chose to move to Atlanta, Georgia, to live with his new wife.

¶15 In addressing this issue, however, the trial court found that the conflicts with James's business partners resulted in large part because James chose to live in Atlanta, Georgia, and commute to his job in Milwaukee:

[Y]ou made a choice to move there instead of her moving up here, you have got a home down there, you've got a business up here, your partners want to see you. They want you to be available. You have to hang around the shop. You have to be there. If you are not there and you are 1,000 miles away and you are not on business trying to sell a product, but you are at home in Atlanta, your availability and acting as a team player, as one of the players like a football team, the daily interaction of running an office and a business, a multi-million dollar enterprise that has worldwide customers requires quick access, good interaction, good communication, and a good comfort level where all of you can communicate without creating acrimony, trauma, stress, conflict, or tension. And when someone is absent, like an absentee landlord, and they are not there on the premises, problems are going to come up. And if you are not there to have your input, who ever is there has to solve them, and they are not going to be happy if they have to solve them alone by themselves and you are all receiving roughly the same straddle levels of compensation.

So what I'm trying to tell you is that you may in your mind have thought living in Atlanta with an apartment up here was working, I don't know what your partners were actually thinking ... but someone wasn't happy with you and you felt uncomfortable with someone else, and it wasn't working, and that's why you had all the difficulty at your -- at your business.

The trial court also found that James's health condition should not have reasonably required him to retire. The trial court cited the medical testimony that James "can function to carry out his responsibilities." The trial court then ruled:

The evidence is also absolutely clear that you did not have a medical doctor or anyone in a professional discipline of psychiatry or psychology or some health care professional to testify or indicate that because of your health problems and your stress that you would be unable to work or function in your livelihood. Again, it gets back to a choice. And your choice cannot override your obligation to pay family support for your children.

We agree that the record supports these findings. Based on these findings, James's current health does not constitute a substantial change in circumstances. There is nothing to convince us that James's medical condition prevents him from working. Rather, it appears, that he chose to use a preexisting medical condition as an excuse to retire. He is certainly entitled to retire. However, based on the marital property agreement, he is not entitled to simply stop paying family support. When James failed to make his family support payments, he breached both that obligation as well as the property division obligation because \$1000 per month from the family support payment constituted payment pursuant to the property division. Moreover, even without working, James has the financial resources to honor his responsibilities under the marital settlement agreement. Based on the foregoing, we conclude that James's decision constituted shirking and therefore, his change in financial circumstances cannot justify a modification of his family support obligations.

¶16 Accordingly, we hold that the trial court erred in relieving James of his obligation to continue making the \$10,287 monthly family support payment. We reverse and remand the order in this case with directions to the trial court to enter an order requiring James to pay the family support obligation. James's

family support obligation shall continue unless a motion is made with the trial court to conduct a hearing to determine whether the circumstances warrant a change in the family support or maintenance award. If asked to modify the family support payments, the trial court should consider each party's "earning capacity rather than ... actual earnings," *see Chen v. Warner*, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758, together with the other statutorily required factors.

B. Contempt.

¶17 Karen also contends that the trial court erred in dismissing her request to find James in contempt for failing to make the family support payments in accordance with the divorce judgment. Our review of the trial court's ruling is subject to the erroneous exercise of discretion standard. *See Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). Here, the trial court reasoned:

[T]he combination of all of this [evidence] convinces me that you made bad decisions, or careless or negligent decisions, but you didn't willfully intend to quit, resign, or leave ... to avoid your family support payments. So I could not find you in contempt of court on that basis and I will not find you in contempt of court.

¶18 In order to find a person in contempt of court, the trial court must find both that the person is able to pay and that the refusal to pay is willful and with intent to avoid payment. *Id.* at 310. Here, the record reflects that James is able to pay (and able to work), and thus, the remaining question is whether James's refusal to pay was willful and intentional. "The legal definition of 'intentional' is essentially the same, whether found in tort law or in criminal law," and the same definition is applicable to the contempt statutes; "[a] person may be said to have intentionally caused the result where the result is substantially certain to occur from the actor's conduct." *Shepard v. Outagamie County*, 189 Wis. 2d

279, 286-87, 525 N.W.2d 764 (Ct. App. 1994). There is no doubt that James knew the consequences of his actions, even if his motive was different. Thus, the trial court's suggestion that James did not quit his job for the sole purpose of avoiding family support payments is really not relevant to whether he should have been found in contempt.

¶19 “A finding of contempt rests on the trial court's factual findings regarding the person's ability” to comply with the orders. *State v. Rose*, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992). “The critical findings are that the defendant is able to pay and the refusal to pay is willful and with intent to avoid payment.” *Id.* The record demonstrates that James was able to comply with the order and that he intentionally chose to forgo compliance. The intentional act was not tied to James's motive to resign, but in his choosing to stop making the family support payments. Accordingly, the trial court should have found that James was in contempt. We therefore reverse the trial court's finding to the contrary and remand for the trial court to assess an appropriate sanction.

C. Attorney's Fees.

¶20 Karen next argues that the trial court erred in denying her request that James pay her attorney's fees due to the fact that his failure to comply with the marital settlement agreement resulted in her incurring legal fees. Whether to award attorney's fees is a discretionary determination. *See Benn*, 230 Wis. 2d at 308.

¶21 Here, the trial court denied Karen's request, stating: “Each of you will be responsible for your own attorney's fees. I am not going to allocate fault. I think you are both good people, you both got good lawyers, you both wanted to litigate.” We conclude that the basis for the trial court's denial was erroneous.

The attorney's fees Karen incurred were prompted by James's conduct. These parties would not be in court if James had fulfilled his payment obligation under the marital settlement agreement. Accordingly, we conclude that the trial court should have granted Karen's request for attorney's fees. We reverse the trial court's order and remand the matter with directions to the trial court to determine the reasonable amount of fees Karen incurred with respect to enforcement of the marital settlement agreement. James should be ordered to pay that amount to Karen.

D. Frequent Flier Tickets.

¶22 Karen next challenges the trial court's conclusion that it is without jurisdiction to rule on her request that James be ordered to relinquish half of his frequent flier tickets earned through 2004 pursuant to the marital settlement agreement. We agree with Karen and reverse the decision of the trial court.

¶23 This case also involved Karen's request to enforce the divorce judgment with respect to frequent flier tickets, which James earned, but refused to split with her. Karen pointed to the language in the marital settlement agreement, clearly requiring James to relinquish half of all frequent flier tickets earned through 2004. The trial court erroneously ruled that Karen would have to take this dispute to civil court as it was a contract dispute. The trial court was simply wrong.

¶24 The marital settlement agreement was incorporated into the judgment of divorce and approved by the trial court. WISCONSIN STAT. § 767.01(1) (2003-04) provides that trial courts "have jurisdiction of all actions affecting the family and have authority to do all acts and things necessary and proper in such actions and to carry their orders and judgments into execution"

See also Washington v. Washington, 2000 WI 47, ¶15, 234 Wis. 2d 689, 611 N.W.2d 261 (trial court has authority to “effectuate its orders and do justice”). Here, in the original judgment of divorce, James was ordered to split equally all frequent flier tickets earned through 2004. He refused to do so. Clearly, the trial court has jurisdiction to “effectuate” the order in the judgment of divorce by ordering James to comply with the requirements of the agreement.

¶25 Accordingly, the trial court erred in ruling it was without authority to resolve the frequent flier dispute. The trial court’s order in regard to this issue is reversed and remanded with directions to divide equally the frequent flier tickets earned through 2004 between James and Karen.

E. Maintenance.

¶26 Karen also argues that the trial court erred with respect to the handling of the maintenance issue. We agree.

¶27 The issue of maintenance in this case, according to the marital settlement agreement, would be held open until family support payments stopped. At that point in time, the “parties will revisit the issue of maintenance for Ms. Boldt, and the amount and taxable impact of maintenance to her; the principal property division payments she receives from Mr. Boldt hereunder will not be included as income to her for purposes of calculating future maintenance.” The trial court, caught up in its misunderstanding of the family support obligation, also ignored this language in addressing the issue of maintenance. Thus, on remand, if called to, the trial court shall revisit the issue of maintenance consistent with the requirements set forth in the marital settlement agreement.

CONCLUSION

¶28 In sum, we reverse the trial court's orders which: (1) relieved James from paying family support after August 2005; (2) refused to hold James in contempt of court; (3) denied Karen's request for attorney's fees; (4) denied Karen's request for enforcement of the marital settlement agreement regarding frequent flier tickets; and (5) erred with respect to its maintenance ruling. We direct the trial court upon remand to: (1) if requested, revisit the issue of family support based on the parties' earning capacities and statutory standards; (2) order James to pay Karen's attorney's fees related to these proceedings after determining the reasonable amount of fees that were incurred; (3) impose sanctions for James's contempt; (4) order James to turn over to Karen half of all frequent flier tickets received through 2004; and (5) if requested, revisit the issue of maintenance payable to Karen after considering the parties' earning capacities and statutory standards.

By the Court.—Orders reversed and cause remanded with directions.

Not recommended for publication in the official reports.

