COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2815 **Cir. Ct. No. 2004FA231**

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

IN RE THE MARRIAGE OF:

SALLY J. SCHULTZ-FUHRMAN,

PETITIONER-RESPONDENT,

V.

JAMES R. FUHRMAN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. James Fuhrman appeals his judgment of divorce, arguing that the circuit court erred by failing to award him maintenance. James

also contends the court erred by finding that he was shirking, and by failing to find that his ex-wife Sally Schultz-Fuhrman was shirking. We reject James's arguments and affirm.

¶2 The parties filed for divorce after twenty years of marriage. At the time of the marriage, James was employed as a welder at Voith Paper, earning approximately $38,500 annually.[1] When the plant closed in 2002, he lost his job. He received a severance package and unemployment compensation. For the last year, James was employed as a truck driver for Roehl Transport earning $28,000 annually.

¶3 Sally is currently employed full-time as a nursing instructor at Fox Valley Technical College, earning approximately $58,000 per year. In the three years prior to the final hearing, she earned $76,000, $89,000 and $81,000 respectively. At the time of the final hearing, Sally had reduced her teaching load from six or seven classes to four classes. She also opted not to teach any summer classes for the first time in five years. Sally had a bachelor's degree in nursing prior to the marriage and obtained a master's degree during the marriage.

¶4 James insists that the circuit court erroneously exercised its discretion by failing to award him maintenance.[2] We disagree. The division of

[1] James states is his brief at page 8 that "[a]t the time of marriage, he was employed at Voith Paper in Appleton and was the primary wage earner of the family making about $45,000 per year." However, James then argues in his reply brief that Sally mischaracterizes his earnings as a welder at $45,000, because "that amount includes his severance package of about $4,500 and a vacation payout." James insists in his reply brief that his actual income was $38,500 per year. For purposes of this decision, we will utilize the $38,500 figure.

[2] James uses the phrase "abused its discretion." In 1992, our supreme court replaced the phrase "abuse of discretion" with the phrase "erroneous exercise of discretion." *See*, *e.g.*, ***Shirk v. Bowling***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

property and the awarding of maintenance rest within the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). It need not be a lengthy process. While reasons must be stated, they need not be exhaustive. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). When reviewing findings of fact, we search the record for reasons to sustain the circuit court's discretionary decision, not for evidence to support findings the court could have but did not reach. *See* ***Steiner v. Steiner***, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740. Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[3] Where there is conflicting testimony, the circuit court is the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶5 Multiple statutory factors support the denial of maintenance in this case. The court noted that it was a lengthy marriage. Specifically, the court stated this was "somewhere between" a mid-term to long term marriage and that both parties enjoy good health. The court also noted that the parties "really have pretty much established themselves in the workplace." The court considered issues relating to the tax exemptions for the parties' dependents, and how those exemptions would benefit the parties based upon their income levels. The court

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

also recognized that James had liquid assets available to him.[4] With respect to his earning capacity, the court found that James's income was $28,000 but that he had the capacity to earn more. As the court stated:

> James has skills in the area of welding that might increase in the future as well. He has that potential, if he pursues it, and he has the capacity to pursue that. So he has a tremendous upside as far as his earning capacity and the future is concerned.

¶6 The court also considered whether Sally increased her earning capacity at James's expense due to the master's degree she earned while married. Sally had been a cardiac nurse. The court therefore considered the salary of highly skilled nurses and Sally's teaching salary, and determined that any benefit she derived during the marriage from the master's degree so she could be a teacher was "a very de minimus amount." The court determined that the property division was fair and reasonable and that it approximated a 50/50 division of the marital assets and the debts. The court then stated that maintenance was a "difficult question" but concluded under the totality of the circumstances that it was "inclined not to grant an award of maintenance, but to, on the other hand, maybe allow both parties to have the maintenance issue remain open on both sides."

¶7 James insists that the circuit court's decision was in error because it did not apply all of the factors listed in WIS. STAT. § 767.26. Although we agree that the court did not address all of the factors listed in the statute, we disagree that the failure to do so constitutes error. The circuit court is not obligated to consider all the factors enumerated in § 767.26, but only those factors that are relevant to

[4] Maintenance and property division are "interrelated and interdependent," ***Dixon v. Dixon***, 107 Wis. 2d 492, 509, 319 N.W.2d 846 (1982), and property division is an appropriate factor to consider in deciding whether to award maintenance. *See* WIS. STAT. § 767.26(3).

the case. *See* ***Trattles v. Trattles***, 126 Wis. 2d 219, 228, 376 N.W.2d 379 (Ct. App. 1985). In this case, we are satisfied the court considered sufficient relevant factors. While the reasons for the court's determination on maintenance may not have been exhaustive, they need not have been. The court's decision to deny maintenance to James, as a whole, incorporates appropriate considerations and is not an erroneous exercise of discretion.

¶8 We next address the circuit court's decision to hold maintenance open. A court is not precluded from holding open a determination on maintenance. ***Preiss v. Preiss***, 2000 WI App 185, ¶22, 238 Wis. 2d 368, 617 N.W.2d 514. In doing so, however, it must consider the relevant maintenance factors in WIS. STAT. § 767.26, and provide "appropriate and legally sound reasons, based on the facts of record, for holding open a final maintenance decision until a future date." ***Grace v. Grace***, 195 Wis. 2d 153, 158, 536 N.W.2d 109 (Ct. App. 1995).

¶9 We note that the court's explanation for holding maintenance open was stated immediately following the court's recitation of its maintenance analysis. We thus infer that the court's reasoning for holding maintenance open was based upon the totality of the maintenance factors the court had just considered. Perhaps more importantly, it is apparent from the court's oral decision that its primary purpose in holding maintenance open was to assess James's employment and earnings in the future. As the court stated: "If anyone gets maintenance, it would probably be James, but I can leave maintenance open for a period of eight years." The court's decision to hold maintenance open did not constitute an erroneous exercise of discretion.

¶10 James next argues that the court erred by finding that he was shirking. He further contends that it was improper to find shirking without expert testimony "to provide the court with concrete evidence about the job market in the Fox River Valley for welders, what jobs were available, what the positions paid, and whether Mr. Fuhrman would need additional training to be qualified for these jobs, if they existed."

¶11 To support a shirking determination, the trial court "need find only that a party's employment decision to reduce or forego income is voluntary and unreasonable under the circumstances." ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. Ordinarily, the question of reasonableness is a question of law, but because the circuit court's legal conclusion is so intertwined with the factual findings necessary to support it, we give weight to the circuit court's ruling. Therefore, we review a shirking determination as a question of law, but one to which we pay appropriate deference. ***Id.***, ¶43.

¶12 Contrary to James's perception, expert testimony was not necessary to establish shirking in this case. *See* ***Scheuer v. Scheuer***, 2006 WI App 38, ¶10, 711 N.W.2d 698. Here, the circuit court found, and emphasized, that James did not make a reasonable effort to investigate and apply for welding positions. The court stated that James had the potential, "if he pursues it" to earn more as a welder. James was terminated from Voith in December 2002. James drew unemployment compensation for approximately one and one-half years following his termination without diligently pursuing equivalent employment. In June 2004, James began employment as a truck driver with Roehl Transport. James testified that he had not talked to any prospective employers in the three months preceding the final hearing, and had not completed any job applications since he began employment as a truck driver with Roehl Transport more than a year previously.

During the final hearing, his attorney asked James: "Have you been looking for welding opportunities in the Valley?" James responded: "Well, I haven't gotten my disc with my resume on it yet, but when I do from Sally, that is my next step…."

¶13 We discern no clear error in the court's factual findings and we agree with its implicit conclusion that James's failure to actively pursue welding positions was voluntary and unreasonable based upon the evidence in the record. The record supports the circuit court's conclusion that James was not pursuing positions in the welding industry, and therefore was shirking.

¶14 The court also had a sufficient basis to reject the contention that Sally was shirking. At the outset, we note that James has not demonstrated on appeal that he preserved the issue. But regardless, the evidence demonstrates that when Sally discovered that James was going to be losing his job at Voith, she began working close to the equivalent of two full time teaching positions. After the commencement of divorce proceedings, both parties maintained separate households and Sally was awarded primary placement of the children through the temporary order. It is reasonable to conclude that it was not practical for Sally to continue to work the equivalent of two full time positions under these circumstances. Moreover, Sally testified that if summer work became available, she would need to pay for child care. The court did not err by failing to find that Sally was shirking.

¶15 Finally, James alleges circuit court bias and prejudice. James contends that "it is clear that the 800 pound gorilla in the room was gender." James argues that "[o]ne cannot help but believe that the court improperly considered that first, before it even began the maintenance analysis." James fails,

however, to provide any record citations whatsoever to support these serious allegations. The rules of appellate procedure make it clear that a party's brief must make appropriate reference to the record on appeal. *See* WIS. STAT. §§ 809.19(d) and (e). We will not review arguments inadequately briefed. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). [5]

By the Court.—Judgment affirmed.

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

[5] We note, however, that the circuit court agreed with James and found that requiring James to pay child support according to the applicable percentage standard would be unfair, and ordered James to pay $250 per month.