COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3096 **Cir. Ct. No. 1998FA569**

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

IN RE THE MARRIAGE OF:

MARY ELIZABETH SHORTTS,

PETITIONER-RESPONDENT,

V.

FREDERICK T. SHORTTS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Frederick Shortts appeals the denial of a post-judgment motion seeking to eliminate or modify his maintenance payments to Mary Elizabeth Shortts (hereinafter, "Elizabeth"). Frederick argues the trial court

erred by failing to impute income to her sufficient to terminate or substantially reduce his maintenance payments, and by failing to find that Elizabeth was shirking. Frederick also contends the trial court erred in requiring him to contribute toward Elizabeth's attorney fees for responding to his motion. We affirm.

¶2 Frederick and Elizabeth were divorced on November 19, 1999, when each was fifty years old. Although Elizabeth was unemployed at the time, the trial court imputed annual income to her as a registered nurse of $36,000. Frederick's income as a professional engineer at the time of trial was $66,000. The trial court ordered Frederick to pay limited term maintenance in the amount of $510 every two weeks until Elizabeth turns sixty-five. The divorce judgment was the subject of a previous appeal in which the divorce judgment was summarily affirmed. ***Shortts v. Shortts***, No. 2000AP945 unpublished slip op. (Wis. Ct. App. Jan. 9, 2001).

¶3 On April 14, 2004, Frederick filed a motion to eliminate or reduce his maintenance. At the time, Elizabeth was living in the Milwaukee area with her son and working full-time as a nurse in Racine. On June 3, 2004, Elizabeth moved to Canada, where she currently works seventy-two out of eighty hours every two weeks at the Red Cross for $33,378 per year. The trial court concluded there had been no substantial change in circumstances and denied the motion.

¶4 In order to seek a modification of a maintenance award, the party seeking a change in maintenance has the burden of proof to show that there has been a substantial change in circumstances warranting the proposed modification. ***Cashin v. Cashin***, 2004 WI App 92, ¶41, 273 Wis. 2d 754, 681 N.W.2d 255. We review a decision to deny a maintenance modification request as a discretionary

decision, including whether there is a substantial change in circumstances. ***Id.***, ¶43. We will not reverse if there is a reasonable basis for the trial court's decision. Because the exercise of discretion is essential to the trial court's functioning, we look for reasons to sustain discretionary decisions, not for evidence to support findings the court could have but did not reach. While reasons must be stated, it need not be a lengthy process. *See* ***Gerrits v. Gerrits***, 167 Wis. 2d 429, 441, 482 N.W.2d 134 (Ct. App. 1992).

¶5 We conclude the trial court properly exercised its discretion by denying Frederick's motion. The court considered Frederick's earnings at the time of the divorce, and found that his average income between 2000 and 2004 would be "about $74,000 …. So his income I think has gone up a little bit." The court also noted that Elizabeth's income was imputed at the time of the divorce at $36,000. The court found that Elizabeth was "substantially full-time employed right now at the five days one week and four days the next week, earning about $33,000 that way, and if she was full-time employed, it would be about $37,800…." The court concluded that Elizabeth's income was "close to the $36,000" the court imputed to her at the time of the original divorce trial.

¶6 The trial court stated, "Basically, what I'm saying is I don't see anything that changes the Court's feeling that she has an ability to earn any income above $36,000 right now." The court noted in order to make a substantially higher salary, Elizabeth would have to go back to school and obtain a bachelor's degree. The court stated, "I know from other cases that I have had

where there are nurses involved that, yes, it's better to have the diploma than it is a certificate or something."[1]

¶7 Frederick contends the trial court did not consider his 2005 income when finding there had been no substantial change in financial circumstances. Frederick insists his income at the time of the motion hearing was $65,000 per year, less than the $74,000 average income ascribed to him by the court for the years 2000-2004. However, by Frederick's own admission at the hearing, the $65,000 does not include a $500 monthly car allowance, which results in an additional $6,000 yearly totaling an income of $71,000 a year. Accordingly, for every year after the divorce, Frederick's income exceeded the $66,000 found by the court at the time of the divorce. The court did not erroneously exercise its discretion in denying Frederick's motion.

¶8 Frederick also insists the trial court erred by failing to find that Elizabeth was shirking. Frederick argues that Elizabeth has been employed only 59% of the time since the divorce. Frederick also contends that within two months of being served with Frederick's modification motion, Elizabeth voluntarily gave up a full-time job and moved to Canada. According to Frederick, the "more logical inference" is that upon being served with Frederick's motion, Elizabeth

[1] The court also indicated that Elizabeth would be required to pass the NCLEX test, referred to as a Visascreen Certification, which is a state licensing exam that Elizabeth contends a nurse is now required to pass in order to work in a particular state. Previously, when Elizabeth worked in the United States, she did not have to pass the NCLEX test. She claims the events of September 11, 2001, changed that. Frederick insists that Elizabeth would be exempt from taking the NCLEX because she is currently licensed in the State of Wisconsin. However, Elizabeth claims that testimony that she would be required to take the NCLEX to be able to work in the United States was unrefuted at trial. We do not locate reference to the trial transcript in Frederick's reply brief to support an argument that this issue was refuted at trial and therefore conclude the issue is conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979)

realized she would probably see her maintenance reduced or eliminated, so she quickly quit her job and fled to Canada to avoid this result.

¶9 To support a shirking determination, the trial court must find 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. We review a shirking determination as a question of law, but one to which we pay appropriate deference to the trial court because the court's legal conclusion is so intertwined with the factual findings necessary to support it. ***Id.***, ¶43.

¶10 In reviewing discretionary decisions, we do not determine which among reasonable inferences is "more logical." Our task is to determine whether a court could reasonably come to the conclusion it reached. In this case, Frederick's conclusion is an inference the trial court did not accept. The record shows the court's conclusion was reasonable.

¶11 Frederick overlooks that Elizabeth was unemployed at the time of the divorce hearing, but has worked since and was employed seventy-two hours out of a possible eighty hours on the date of the hearing. Prior to her employment at Red Cross, it appears she was only able to work temporary assignments or part-time on occasions and went to the Red Cross to work more hours. Furthermore, she indicated at one time she needed to have surgery. Finally, Canada was her home country, and Canada had what Elizabeth considered a superior national health program. The record supports the conclusion that Elizabeth's job choices have not always been voluntary and have been reasonable under the circumstances.

¶12 The court discussed many of the factors raised in Frederick's shirking argument at the time of trial. After considering these factors, the court concluded Elizabeth's income should reasonably be imputed at $36,000. The court was not convinced after the hearing on the motion for modification that a substantial change in circumstances existed. The court therefore denied the motion. The court's decision shows no erroneous exercise of discretion.

¶13 Finally, Frederick contends the trial court erred by requiring him to contribute $2,500 toward Elizabeth's attorney fees of $6,377.42 for responding to his motion. WISCONSIN STAT. § 767.262(1)(a) provides that in actions affecting the family, "after considering the financial resources of both parties," the court may order either party to pay a reasonable amount of the costs and attorney fees of the other party. An award of attorney fees is discretionary. ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 499, 496 N.W.2d 660 (Ct. App. 1992). Fees may be awarded upon a showing of need by one party, ability to pay by the other, and the reasonableness of the fees. *See* ***id.***

¶14 Here, the trial court considered the financial resources of both parties. The court noted that Frederick's earning capacity had gone up from what the court imputed to him at the time of the divorce, and Elizabeth's effectively had not. When Frederick's counsel asked for clarification, the court stated:

> I'm basing it primarily upon the fact that he has an earning capacity that has gone up. [Hers] has not from what I imputed last time. I'm looking at his income as being – as between 66 and $70,000 right now. Her income is around $30,000. That alone I think justifies a contribution toward attorney's fees.[2]

[2] Frederick also argues the trial court considered proceedings before the modification motion. That argument is belied by the court's explicit statement to the contrary.

¶15 Although not explicitly discussed, we also consider it implicit in the court's decision that it found Elizabeth's attorney fees reasonable. We conclude the court did not erroneously exercise its discretion in requiring Frederick to contribute $2,500 toward Elizabeth's fees of $6,377.42 incurred in defending against his motion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).