COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1677 **Cir. Ct. No. 2005FA48**

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

IN RE THE MARRIAGE OF:

KRISTINE MARIE HERBRAND,

PETITIONER-RESPONDENT,

V.

DANIEL HUBERT HERBRAND,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: GREGORY J. POTTER, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Daniel Herbrand appeals a judgment of divorce. Daniel contends the circuit court erred by: (1) denying him maintenance;

(2) failing to consider for property division or maintenance purposes the economic benefits of Kristine Herbrand's paid health insurance premiums upon retirement; and (3) placing an improper value on Daniel's insurance agency. We affirm.

¶2 The parties were married in 1977 and have two adult children. At the commencement of this action Kristine was fifty-three years old and employed as a music teacher for twenty-nine years with an annual salary of $55,105.[1] Daniel was fifty-two years old, owned an independent insurance agency, and had an income of approximately $46,000 annually.

¶3 A trial was held on contested issues. Daniel requested maintenance. Daniel also argued the economic benefit of Kristine's health insurance benefits at retirement should be considered for property division and maintenance. The parties presented expert testimony on the valuation of Daniel's insurance agency. Following the conclusion of trial the parties submitted written closing arguments. The court subsequently issued an oral ruling. The court denied maintenance and further concluded that Kristine's potential sick leave upon retirement was not an asset in the marital estate. Finally, the court adopted a business valuation for Daniel's insurance agency consistent with the opinion of Kristine's expert witness. Daniel now appeals.

¶4 We turn first to the issue of maintenance. The awarding of maintenance rests 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

[1] Kristine also earned $1,200 annually as a pianist for the church.

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). 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 made but did not. *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).[2] 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 Here the circuit court properly evaluated the multiple statutory factors within WIS. STAT. § 767.56, and gave a lengthy explanation supporting its decision to deny maintenance to Daniel. Specifically, the court considered the length of the marriage and the age and physical health of the parties. The court further noted that it had just ordered an equalized property division. The court discussed the educational levels of the parties at the time of marriage and at the time this action was commenced.[3] In discussing the feasibility that the party seeking maintenance can become self-supporting, the court stated:

> The feasibility that Mr. Herbrand can become self-supporting I think is obvious. He, himself, indicated that he believes he can make more income if he had a full-time

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] Although the court incorrectly suggested both parties had master's degrees, the court subsequently corrected itself which indicates the court was aware Daniel had a bachelor's degree. Moreover, Daniel's counsel corrected the court and indicated Daniel did not have a master's degree and the court acknowledged the correction.

> employee and I believe he would have the ability to do that and therefore be able to equal out the incomes.

¶6 Daniel argues any increase in his revenue by hiring support staff would necessarily result in an increase in his expenses. However, Daniel testified at trial he could generate "substantially" more in commission income if he had a full-time secretary, and he could justify hiring someone once his son was out of college. Daniel testified his son would graduate from college within one month.

¶7 The court also discussed the tax consequences to the parties. The court noted that both parties contributed to the education, training, or increased earning power of the other. The court also addressed the support objective and indicated that although both parties "will be taking a significant hit by having this divorce occur … I think it is basically split equally between the two of them." Under the fairness objective, the court concluded, "I can't find where there is really anything that should be compensated for…." Accordingly, the court denied the request for maintenance.

¶8 We conclude Daniel has not sufficiently demonstrated how the circuit court erred with regard to the denial of maintenance. Our review of the record indicates the court considered the proper statutory factors, employed a process of reasoning based upon the facts of record, and reached a conclusion based upon a logical rationale. The court's decision was an appropriate exercise of discretion.

¶9 Daniel next argues the economic benefit of Kristine's sick-leave benefits at retirement should be considered for property division and maintenance purposes. Daniel argues, without citation to the record on appeal, "[a]s a result of the teaching contract that [Kristine] has, she is entitled to free insurance when she

retires until she goes on Medicare." However, Daniel fails to adequately explain how this alleged health benefit at retirement places Kristine in a better position to pay ongoing maintenance. Indeed, Daniel failed to demonstrate that Kristine's "separation benefits," as they were referred to at trial, have any definable value.[4] Moreover, Kristine represents in her brief to this court that she terminated her employment with the school district, and states: "In that [Kristine] did not retire from the Neilsville School, she no longer has the separation benefit available to her." Daniel does not reply to this contention. Arguments not refuted are deemed admitted. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶10 Finally, Daniel argues the circuit court erred in the valuation of his insurance agency. Each party's expert witness valued the insurance agency utilizing a contract between Daniel and Greater Insurance Service Corporation ("GISC"), but each party utilized a different contract. At trial Kristine's expert witness, Dan Skowronski, valued the life, health, property, and casualty portions of the business utilizing a 1998 contract. Daniel offered the expert testimony of Todd Grams. Grams valued only the property and casualty portion of the business and testified that Daniel had two contacts with GISC, a "Career Agent Property and Casualty Agreement" dated December 1993, and a "Career Agency Contract" dated 1998. Grams testified that although both the 1993 and the 1998 contract were in effect, the 1993 contract "would be applicable" to value the business. The

[4] Kristine asserts in her response brief that Daniel "never made an argument at trial that the 'separation benefit' was an asset subject to division." Daniel does not reply to this argument and it is therefore deemed conceded. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

circuit court disagreed and concluded the 1998 contract superseded the 1993 contract.

¶11 Daniel contends the circuit court applied the wrong contract in analyzing the value of the business. Daniel insists the 1993 contract governed the sale of the business. Daniel argues the 1998 contract did not supersede the 1993 contract but merely "expanded [Daniel's] product line so he was able to sell all of the other lines of insurance handled by GISC."

¶12 The construction of a written contract presents a question of law which we independently review. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987). When the terms of a contract are plain and unambiguous, we will construe it as it stands. ***Id.*** It is not our role to rewrite an unambiguous contract which does not contravene some principle of public policy. ***Id.***

¶13 The 1998 contract provides in part as follows:

> Section One – Sole Agreement
>
> A. This agreement supersedes any and all previous agreements or contracts between GISC and Agent, whether written or oral, pertaining to Agent's service as agent, and to Agent's solicitation or procurement of applications for Insurance underwritten by Insurers, and pertaining to the payment to Agent of commissions on premiums paid for Insurance issued pursuant to applications for Insurance solicited and procured by Agent.

¶14 By its plain language the 1998 contract unambiguously "supersedes any and all previous agreements or contracts between GISC and Agent … pertaining to Agent's service as agent, and to Agent's solicitation or procurement

of applications for Insurance ...."[5] Moreover, the contract's first "Whereas" clause references "Insurance" as life, property, accident and health insurance policies, and annuities. The 1998 contract appoints Daniel "to market, sell, solicit and procure applications for Insurance underwritten by Insurers."

¶15 We therefore agree with the circuit court that the 1998 contract superseded the 1993 contract. The court correctly rejected Daniel's attempt to value the business under the 1993 contract. The court accepted Skowronski's valuation of the insurance agency, and was entitled to do so. Skowronski adequately explained the factors he used to reach his range of values. With a range of $110,000 to $156,022, Skowronski testified that he felt most comfortable valuing the business at $132,000. The circuit court appropriately accepted Skowronski's valuation.[6]

---

[5] Grams testified on cross-examination as follows:

> Q: Mr. Grams, you recall speaking to me yesterday?
>
> A: Yes.
>
> Q: And you recall at the time I asked you if the 1998 contract was the contract that was in effect for Mr. Herbrand?
>
> A: I may have said that. I can't - - I don't recall.
>
> Q: And I referred to the '93 contract and indicated - - asked you if it superseded that and you indicated it did?
>
> A: I don't - - I don't recall. I mean, if I said that, then I said that.

[6] The circuit court indicated Skowronski "came up with a range of 110,00 to 156,000 and he indicated that the conservative amount would be 133,000 and that is the amount I'm most comfortable with and I will put a value on the business of 133,000." Skowronski actually testified to an amount of $132,000. Daniel does not discuss this discrepancy and we therefore will not address it. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (we need not address issues not raised first on appeal).

¶16 Daniel contends the circuit court improperly disregarded the testimony of Grams. Contrary to Daniel's perception, the court did not disregard Grams's testimony. Rather, the court rejected Grams's valuation, because Grams based his business valuation on the 1993 contract and, further, because the court found Skowronski's testimony more credible. In that regard the court specifically noted Grams was president of GISC, and that GISC, unlike Skowronski, "has an interest in what the business would be valued at." The court also observed that a portion of Daniel's business was not valued by Grams.[7] The circuit court is the ultimate arbiter of the credibility of witnesses and of the weight to be accorded evidence. *See* ***Cogswell***, 87 Wis. 2d at 250.

¶17 Daniel also insists that in valuing the business, "the court should look to case law relating to property division in partnership." Daniel asserts that for marital property division purposes, generally "the value of a partner's interest in a professional partnership is determined by the monetary consequences of that partner withdrawing from the business." The circuit court rejected this argument and stated the following in its oral ruling:

> The third factor I looked at was that Mr. Herbrand called this situation a partnership and he wants partnership law to apply. However, it's clear that this is not a partnership. They don't share or split expenses or anything else like a partnership would. The only thing that they split is the commission and that doesn't make a partnership.

[7] As the circuit court also noted, Grams valued only the property and casualty portions of the business utilizing the 1993 contract. Grams testified at trial that property and casualty sales made up seventy-five percent of Daniel's business. Grams testified, "The life and health insurance commissions are also in there but it's not broken down that far." Grams also testified, "I'm just going to say it's going to be another 10 to 15 percent off of that total. I don't have those exact numbers in front of me." The circuit court observed that adding up the totals provided by Grams "does not total 100 percent."

¶18 The 1998 contract clearly supports the circuit court's conclusion. Section Three is entitled: "Relationship" and provides as follows:

> A. Agent shall be an independent contractor and not an employee of GISC. Nothing contained in this Agreement shall create or be construed to create the legal relationship of principal and agent, master and servant, employer and employee, or of partnership between Agent and GISC.

Indeed, even the 1993 contract provided the relationship was that of an "independent contractor for all purposes." Accordingly, we reject Daniel's suggestion that he was a withdrawing partner.

By the Court.—Judgment affirmed.

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