

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP2568

Cir. Ct. No. 2006FA154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JOANN MARIE WITT,

PETITIONER-RESPONDENT,

V.

STERLING GALE WITT,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. McALPINE, Judge. *Reversed and cause remanded.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Sterling Witt appeals the maintenance component of his divorce judgment. He argues that the circuit court erroneously exercised its

discretion by basing the award on his earning capacity rather than his actual earnings. We agree, and therefore reverse and remand this matter for further proceedings consistent with this opinion.

BACKGROUND

¶2 Sterling and Joann Witt were divorced in 2008 after a marriage of twenty-three years. At the time of the divorce, Sterling was forty-five years old and Joann was fifty years old. Neither party had any significant health concerns, and neither party had made any significant educational advances during the marriage. Upon accepting a partial marital settlement agreement proposed by the parties, the trial court ordered Sterling to make a property equalization payment of \$122,763. The court also ordered Sterling to pay child support in the agreed-upon amount of \$225 per month, plus certain expenses.

¶3 The trial court found that Joann could earn between \$30,000 and \$35,000 per year working at a trucking company, which would allow her to become self-supporting at a standard similar to that enjoyed during the marriage.

¶4 Sterling had earned between \$48,000 and \$49,000 as a truck dispatcher for four years during the marriage. Prior to that he had farmed and worked as a company paid truck driver. However, in 2005 the parties agreed that he would leave his dispatching job in order to relieve himself from the stress of that position, and to start his own business as a self-employed truck driver. Sterling's net income in 2007 as a self-employed truck driver was \$25,926. Sterling presented expert testimony that his income was a "middle of the road" result for self-employed truck drivers. However, the court noted there was testimony in the record that truck drivers could earn about \$60,000 per year. The court reasoned it would be fair to set Sterling's earning capacity at \$48,000 "based

upon what he would have earned had he worked an entire year in 2005 from being self-employed.”¹

¶5 The court then set maintenance in the amount of \$225 per month, commencing in June of 2009, when the parties’ youngest child was expected to graduate from high school, and continuing until Joann’s 65th birthday. Sterling argues that the trial court erred in using his earning capacity to set his maintenance obligation without making any finding that his decision to become self-employed was unreasonable.

STANDARD OF REVIEW

¶6 The voluntariness of a decision to reduce income is a question of fact which we will uphold unless it is clearly erroneous; the reasonableness of such a decision is a question of law to which we will accord some degree of deference because it is intertwined with factual determinations. *Chen v. Warner*, 2004 WI App 112, ¶12, 274 Wis. 2d 443, 683 N.W.2d 468.

DISCUSSION

¶7 WISCONSIN STAT. § 767.56 (2007-08)² lists a number of factors for a trial court to consider when determining the amount and duration of a maintenance award, including the length of the marriage, the age and health of the parties, the property division, the parties’ respective educational levels, the earning capacity of

¹ It is not clear whether the trial court understood that Joann’s testimony about what truck drivers could earn referred to company-employed drivers rather than self-employed drivers.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the party seeking maintenance, the contributions of one party to the education or earning power of the other, tax consequences, and the standard of living enjoyed during the marriage. These factors “are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective).” *LaRocque v. LaRocque*, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987).

¶8 Courts may use the earning capacity, rather than actual earnings, to determine the amount of support payments when that party has been found to be shirking. *Chen*, 274 Wis. 2d 443, ¶11. The term “shirking” refers to a voluntary and unreasonable employment decision which reduces income. *Id.*

¶9 Joann points out that the shirking analysis stems from a line of child support cases, and argues that it should not be extended to maintenance decisions, since the maintenance statute already refers to earning capacity. We note, however, that the statute refers to the earning capacity *of the party seeking maintenance*, not the party from whom maintenance is sought. WIS. STAT. § 767.56(5). In any event, the shirking analysis has already been applied in the maintenance context, and we are satisfied that it is appropriate to do so here. *See, e.g., Scheuer v. Scheuer*, 2006 WI App 38, ¶¶9-12, 290 Wis. 2d 250, 711 N.W.2d 698.

¶10 Here, Sterling does not dispute the trial court’s finding that his decision to become a self-employed truck driver was voluntary. However, he contends that the decision was not unreasonable under the circumstances because the parties mutually agreed to it well before the divorce action began. We agree.

This is not a situation in which one party unilaterally reduced his income. Rather, the parties decided together that Sterling would pursue self-employment in order to reduce stress, and with the hope of eventually increasing his income. It was also undisputed that Sterling was driving about 3,000 miles in a typical week, and spent around 241 nights on the road in 2007, driving up to 11 hours a day, which would plainly indicate that he was working full time.

¶11 We conclude, as a matter of law, that the record does not support a shirking determination. Therefore, the trial court erroneously exercised its discretion by setting a maintenance award based on Sterling's earning capacity.³ Accordingly, we hereby reverse the maintenance component of the divorce judgment and remand with directions that the trial court reconsider the maintenance issue based upon Sterling's actual income as a self-employed truck driver. In light of our decision, we also deny Joann's motion to impose costs and attorney fees for filing a frivolous appeal.

By the Court.—Judgment reversed and cause remanded.

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

³ Joann also argues that the \$48,000 figure used by the trial court *did* represent Sterling's actual income, prior to major tax deductions such as depreciation on his truck. She admitted, however, that he would be unable to operate without taking such deductions and we see no basis in the record for using anything other than Sterling's net income on his tax return as his actual income.

