

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2009

David R. Schanker
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. 2008AP2139

Cir. Ct. No. 2006FA92

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JULIE A. PORTO,

JOINT-PETITIONER-APPELLANT,

V.

JOHN A. PORTO,

JOINT-PETITIONER-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
WILLIAM E. HANRAHAN, Judge. *Reversed and cause remanded with
directions.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 BRIDGE, J. Julie Porto appeals a judgment of divorce from John Porto. She challenges the circuit court's ruling regarding maintenance,

alleging three errors. First, Julie argues that the circuit court erroneously exercised its discretion when it imputed to John an earning capacity of \$9.00 per hour. We disagree. Second, she argues that the court erroneously exercised its discretion when it took into account her earnings from both a full-time and a part-time job, but only imputed to John earnings for one full-time job. We disagree. Third, Julie contends that the court erroneously exercised its discretion by failing to consider her significantly higher health care costs. We agree. We therefore reverse and remand the matter for further proceedings consistent with this opinion.

BACKGROUND

¶2 Julie and John were married in 1973. At the time of the divorce trial, John was fifty-seven and Julie was fifty-five. Throughout almost the entire duration of their marriage, John was employed by the United States Postal Service. He began as a letter carrier and later became a supervisor, a position he held for approximately sixteen years. Around 2004, John gave up his supervisory position and returned to a position as a letter carrier. His income for the three years immediately before trial was \$68,893 (2004), \$66,196 (2005), and \$64,965 (2006). Through his employment, John also received health insurance and retirement benefits.

¶3 For over ten years during the early years of the parties' marriage, Julie did not work outside the home but instead focused on caring for the parties' five children. In 1990, however, she re-entered the job market. Between 1988 and the present, she has held a number of full-time and part-time jobs. In 2004, after a brief period of unemployment, she obtained her real estate license and since that time has worked as a real estate agent. At the time of the divorce proceeding, Julie's income from her employment as a realtor was approximately \$19,500 per

year. She had also taken a second part-time job for which she earned approximately \$15,600 per year. Julie did not receive health insurance or retirement benefits from either of her jobs.

¶4 In August 2007, while the parties' divorce was pending,¹ John retired from his job with the Postal Service. He was fifty-seven years old at the time. At trial, John testified that he elected to retire because of the mental and physical stress associated with his job, and also so that he could enjoy the remainder of his life without the burden of working.

¶5 Due to the length of his employment with the Postal Service, John earned the right to participate in the Civil Service Retirement System. The retirement system includes a pension which guarantees financial security for the duration of a beneficiary's life and is subject to periodic cost-of-living increases. At the time of trial, John was drawing \$2,976 in monthly retirement benefits on a joint and survivor annuity. In addition, John had lifetime eligibility for health insurance coverage through the Federal Employee Health Benefits program. As John's former spouse, Julie was also eligible for continued insurance coverage under the program as long as she received either a share of John's retirement pension or a survivor annuity when John dies. Although the federal government subsidizes between 72-75% of the health insurance cost under the health insurance program for former employees such as John, it does not do so for former spouses such as Julie. John testified that he would have an estimated monthly health

¹ The divorce was commenced by the filing of a joint petition in January 2006, and was tried to the court on November 14 and 16, 2007.

insurance expense of \$124, while Julie estimated that her monthly insurance expense under the program would be approximately \$458.

¶6 The circuit court considered the length of the marriage, the parties' ages, and their substantially equal efforts to ensure the success of the marriage, and ordered that the parties' disposable income be equalized. The court treated the pension as marital property and divided it equally. It also awarded Julie a survivor annuity from the pension in order to provide her with the same security she would have enjoyed had the marriage remained intact.²

¶7 In addition, the circuit court found that, in spite of disciplined savings for retirement and the base financial security provided by the pension, the parties' marital estate was insufficient to provide either party with a secure retirement income at the time of the divorce. The court determined that both the fairness and support goals of maintenance³ required that maintenance be held open for both parties. It stated, however, that both parties had an obligation to use their skills and efforts to provide support and additional retirement resources for themselves before expecting their former spouse to support them.

¶8 The court then calculated the parties' respective incomes, in addition to the pension income, for purposes of equalizing their disposable income. With respect to Julie, the court found that she was using appropriate efforts to provide financial support for herself and calculated her total yearly income at \$34,572, an

² In addition to the pension, John's and Julie's major assets included four IRAs which had a total net value of \$110,837, a 1996 Nissan valued at \$2,610, a 1999 Honda valued at \$5,490, and an investment valued at \$129,491. These assets were also divided equally between the parties.

³ See *Hacker v. Hacker*, 2005 WI App 211, ¶9, 287 Wis. 2d 180, 704 N.W.2d 371.

amount which took into account both her employment as a real estate agent and her part-time employment. With respect to John, the court found that although it was his legal right to retire at age fifty-seven, it was not his right to be awarded maintenance from Julie unless he made appropriate efforts to support himself and to accumulate additional resources for himself in retirement.⁴ In a footnote to its written decision in the matter, the court stated as follows:

While the husband has physical complaints of aches and pains in his legs, back and hand, there is no medical evidence that he is disabled from work. He has substantial supervisory experience and a college education, which can likely result in employment on either a full or part time basis, if he puts forth the effort to obtain gainful employment. I conclude that he has the ability to obtain full time employment at more than the minimum wage, but will encounter barriers based upon his age. I reject the assertion that he can earn \$65,000 per year after he quit the Postal Service. Rather, I find he can achieve the equivalent of a full time position at the rate of at least \$9 an hour, for annual earnings of \$18,720. There is no evidence that his aches and pains cannot be treated with over the counter analgesics, or prescription NSAIDs, if necessary. He has had since July of 2007 to date, a period of seven months, to recuperate from the physical and emotional strains of his Postal Service employment. It is time for him to resume responsibility for his own support, or be credited with the wages he is reasonably capable of earning.

⁴ The court did not specifically find that John was shirking, and the parties disagree as to whether such a finding was implicit in the court's ruling. In order to find that an individual is shirking, a circuit court is not obligated to specifically use the word "shirking." *Scheuer v. Scheuer*, 2006 WI App 38, ¶11, 290 Wis. 2d 250, 711 N.W.2d 698. Further, a court may consider an individual's earning capacity rather than his or her actual earnings only if the court has concluded that the individual has been shirking. *Chen v. Warner*, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. In any event, John has not appealed the circuit court's decision to impute an earning capacity to him for purposes of determining maintenance. Thus, the only issue in need of resolution relates not to the court's decision to impute earnings to him in the first instance, but instead relates to the circuit court's exercise of its discretion in setting the *amount* of John's imputed earnings.

¶9 After adding together the pension income and Julie’s wages from both jobs, the court calculated that Julie had a total annual disposable income of \$52,428. After adding together the pension income and John’s imputed earning capacity, the court calculated that John had annual disposable income of \$36,576. To equalize the parties’ disposable income, the court ordered that Julie pay John monthly maintenance in the amount of \$660.60 until such time as there is a change in their income or earning capacity, or until each party reaches the age of 66. The court made no adjustment to account for Julie’s significantly higher monthly insurance costs.

¶10 Following the circuit court’s decision, Julie moved for both clarification and reconsideration. The court clarified the prior decision in certain respects, but declined to reconsider the decision regarding maintenance. Judgment was subsequently entered dissolving the parties’ marriage. This appeal follows. We reference additional facts as needed in the discussion below.

STANDARD OF REVIEW

¶11 We review a maintenance award for an erroneous exercise of discretion. *Olson v. Olson*, 186 Wis. 2d 287, 292, 520 N.W.2d 284 (Ct. App. 1994). The court’s exercise of discretion is not the same as unfettered decision-making. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). It is instead “the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Id.* (citation omitted). A court’s exercise of discretion is erroneous if it fails to consider proper factors, bases the award upon factual errors, or the award itself is either excessive or

inadequate. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 582-83, 445 N.W.2d 676 (Ct. App. 1989).

DISCUSSION

¶12 Julie contends the circuit court erroneously exercised its discretion regarding the maintenance award in three respects by: (1) imputing to John an earning capacity of \$9 per hour; (2) taking into account the earnings from both her employment as a real estate agent and her part-time job, while imputing to John only the earnings for one full-time job; and (3) failing to consider her significantly higher monthly health insurance expenses. We address each argument in turn.

EARNING CAPACITY

¶13 Julie first argues that the circuit court's determination imputing income to John at less than one-third of what he earned immediately prior to retirement is insufficient in light of John's education, income history, and substantial supervisory experience, and that nothing in the record supports imputing such a low hourly wage to him. A circuit court's determination as to the amount of income that should be imputed is a factual determination which may be set aside only if the determination is clearly erroneous. *See, e.g., Sellers v. Sellers*, 201 Wis. 2d 578, 589, 549 N.W.2d 481 (Ct. App. 1996); WIS. STAT. § 805.17(2) (2007-08). Factual determinations are not clearly erroneous if supported by the record. *See Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

¶14 Evidence presented at trial regarding John's earning capacity included the undisputed fact that prior to his retirement, John earned more than \$60,000 annually. John's testimony with respect to his prospects for future work

related primarily to his assertions that he suffers physical pains which made carrying mail on a daily basis difficult, and that he found employment as a supervisor stressful. However, as noted above, the circuit court expressly rejected any assertion that these physical ailments inhibited his ability to work.

¶15 Although Julie contends that the hourly wage imputed to John is too low based on his work history, there is no evidence in the record to suggest that John is likely to obtain future employment at a higher wage based on his past experience as a letter carrier and a supervisor in the postal system. Julie emphasizes his supervisory experience. However, working as a supervisor in the Postal Service setting does not necessarily qualify an individual to work as a supervisor in other settings; to assume so is purely speculative.

¶16 The circuit court observed that John will encounter employment barriers based on his age. This is a relevant factor because John was fifty-seven years old. In addition, the court concluded that John has the ability to obtain employment at more than the minimum wage, and set the amount somewhat above the minimum. However, the court further ruled that this amount serves only as a baseline, finding that John can achieve “*at least*” \$9.00 per hour. If he earns more, as we understand the ruling, Julie’s maintenance obligation will be reduced accordingly. We conclude that the circuit court did not erroneously exercise its discretion in setting a maintenance award based on the earning capacity imputed to John.

PART-TIME WORK

¶17 Julie contends that the circuit court erroneously exercised its discretion in setting the maintenance award because the court’s calculation

considered Julie's earnings from both her full-time and part-time jobs, but used only a forty-hour work week to calculate John's imputed income. She argues that the fairness objective of maintenance is frustrated because the court set different employment standards for her than it did for John.

¶18 We are mindful that by using two jobs for Julie and only one for John, the court's calculation may be seen as inconsistent with its court's determination that the parties' incomes should be equalized. In setting income for purposes of determining maintenance, however, a court may include income earned from any employment in excess of a traditional forty-hour work week. *See, e.g., DeLaMatter*, 151 Wis. 2d at 589 (in which the court included overtime and "sideline" work in calculating income for purposes of maintenance). Julie has cited no authority for the proposition that a circuit court's award of maintenance must be based on the earnings of the parties for an identical number of hours per week. We thus conclude that the court properly exercised its discretion by considering all of Julie's earnings, including those stemming from work in excess of forty hours a week, and by imputing to John earnings for a forty-hour work week.

INSURANCE COSTS

¶19 Julie also contends that the maintenance award was an abuse of the circuit court's discretion because the court did not take into account her significantly more expensive monthly health insurance premiums. John suggests

that the health insurance plan which Julie selected is one of the most costly versions of the various plans available to her, and that there were several other options available at substantially less cost. In response, Julie notes that John's insurance is 72% to 75% subsidized, and costs John approximately \$124 per month.

¶20 The court's final computation of the maintenance obligation does not contain any adjustment for Julie's higher health insurance costs, nor does it contain an explicit finding as to why no adjustment was made. If a circuit court does not make an explicit factual finding, we normally assume that the court made the finding in a manner that supports its final decision. *See State v. Pallone*, 2000 WI 77, ¶44 n.13., 236 Wis. 2d 162, 613 N.W.2d 568. Thus, we would ordinarily assume that the court chose to disregard what appears to be Julie's disproportionate financial obligation with respect to health insurance costs. However, such an assumption is inconsistent with the court's stated objective of achieving an equal distribution between the parties. On this record, we are unable to discern whether the court did indeed conclude that Julie had selected an unduly expensive plan and thus rejected the expense on that basis; whether the court chose instead to reject the expense on a different basis; or whether the court simply made an error when it failed to adjust the seemingly disproportionate cost.⁵ In the absence of any explanation of the reasoning employed by the court, we conclude that the court's decision in this regard is not a reasoned determination

⁵ Between the time of the circuit court's findings of fact and conclusions of law following trial and Julie's motion for clarification and reconsideration, the judge who presided over the parties' divorce proceeding retired. Thus, Julie's motion was heard by a different judge, and the final judgment of divorce was rendered by the second judge. As a result, the judge who presided over the trial and considered the evidence regarding the differential in the parties' health care costs did not have the opportunity to review or clarify its prior ruling on this issue.

based on the record and thus constitutes an erroneous exercise of the court's discretion.

CONCLUSION

¶21 For the reasons discussed above, we reverse the maintenance component of the divorce judgment and remand with directions that the circuit court reconsider the issue of maintenance in light of the higher cost of Julie's monthly health care expenses.

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

Not recommended for publication in the official reports.

