

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 5, 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. 2008AP2879

Cir. Ct. No. 2006FA630

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JULIE A. SKUBAL,

PETITIONER-RESPONDENT,

V.

THOMAS M. SKUBAL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas Skubal appeals the judgment dissolving his marriage to Julie Skubal. He challenges the circuit court's decisions on

maintenance, support and property division as erroneous exercises of discretion. We conclude that the circuit court properly exercised its discretion in these matters, and therefore affirm.

¶2 The parties were married for thirteen years, and have two children. Thomas was fifty-eight and retired at the time of divorce, and the circuit court imputed an income capacity to Thomas of \$5200 per month based on his pension and earning capacity, and found his monthly living expenses to be \$3600 per month. Julie, then forty-three, worked full time, and the court found that she earned approximately \$8,000 per month. They stipulated to equal physical placement of the children.

¶3 The parties litigated the issues of maintenance, child support and property division. The court denied Thomas's claim for maintenance, noting the moderate length of the marriage, the parties' good health, his income capacity, his expenses, and his ability to live at the standard he expected when he retired. The court awarded him \$525 per month in child support based on the percentage child support guidelines, commencing July 1, 2008. The court found that Thomas had wasted \$24,000 on gambling losses and adjusted the equalized property division accordingly. On appeal, Thomas contends that the court erroneously exercised its discretion by denying maintenance, imputing work income to him although he was retired, not making its support award retroactive, and debiting him for gambling losses.

¶4 Maintenance, child support, and property division determinations are entrusted to the discretion of the circuit court and we uphold them absent an erroneous exercise of that discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. A court properly exercises its discretion by

examining the relevant facts, applying a proper standard of law, and using a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Id.*

¶5 The circuit court properly exercised its discretion when it denied maintenance. Among the factors the court may consider in awarding maintenance are the length of the marriage, the health of the parties, the earning capacity of the party seeking maintenance, and the chances of the party seeking maintenance to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. *See* WIS. STAT. § 767.56 (2007-08).¹ The circuit court considered these factors and reasonably concluded that maintenance to Thomas was not appropriate under the circumstances. Maintenance is designed to maintain a party at a standard of living reasonably comparable to that enjoyed during the marriage. *Vander Perren v. Vander Perren*, 105 Wis. 2d 219, 228-30, 313 N.W.2d 813 (1982). If Thomas earns to capacity, his monthly income will substantially exceed his monthly expenses. He will, under the property division, continue to live in the family home. He did not show, under those circumstances, that he needed maintenance to maintain a reasonably comparable standard of living.

¶6 Additionally, the court reasonably characterized the marriage as one of moderate length. We disagree with Thomas's contention that the court was obligated to consider a thirteen-year marriage as one subject to the rules governing maintenance at the conclusion of long term marriages.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶7 The court properly imputed earnings to Thomas in considering whether to award him maintenance. He contends that the imputation was erroneous, because there was no evidence he was shirking. However, courts apply the concept of “shirking” to a party seeking to evade or reduce a support or maintenance obligation. *See Chen v. Warner*, 2005 WI 55, ¶107, 280 Wis. 2d 344, 695 N.W.2d 758 (“the whole purpose of the shirking analysis is to inquire whether a parent is reasonably fulfilling his or her financial support obligations”). There is no authority for the proposition that the court must find shirking on the part of the party claiming maintenance, before imputing earnings to that person to determine his or her need for maintenance. The court should always consider the earning capacity of the party claiming maintenance when evaluating the claim. *See WIS. STAT. § 767.56(5)*.

¶8 The court reasonably chose to award prospective child support only. Thomas contends that the court should have awarded support from either the date of the temporary hearing in December 2006, or the beginning of the trial in October 2007. Except at the very beginning of the proceeding, the parties had equal placement during its pendency. The temporary order did not impose a child support obligation on Julie, but did require her to pay 64.3% of the children’s variable costs.² That provision gave Thomas a form of support, and the court reasonably determined that no further retroactive award was needed. Further, Thomas testified that, except for attorney fees, he was able to meet his budget during the proceeding.

² The parties’ temporary order defined “variable costs” as the reasonable costs incurred by or on behalf of the children above basic support costs.

¶9 The circuit court properly included \$24,000 in gambling losses into the property division. There was no certain figure for Thomas's gambling losses. In a letter to the parties' children, Thomas admitted gambling away joint funds, and estimated the amount he lost at \$18,000 to \$24,000. In the absence of more specific evidence of the amount, but with Thomas admitting to substantial losses, and with estimates ranging from a few thousand to over \$200,000, the court reasonably adopted the high end of Thomas's admission to his children.

By the Court.—Judgment affirmed.

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

