**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 3, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP610** **Cir. Ct. No. 2007FA1555**

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

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**IN RE THE MARRIAGE OF:**

**KELLY LYNN KINJERSKI,**

**PETITIONER-RESPONDENT,**

**V.**

**WAYNE ALLEN KINJERSKI,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Wayne Kinjerski appeals his judgment of divorce. Wayne alleges errors concerning maintenance and child support.[1] We affirm.

¶2 Wayne and Kelly Kinjerski were married in 1995. Two children were born to the marriage. At the time of the final hearing, Wayne was thirty-eight years old and employed as a network engineer by Humana with an annual salary of approximately $100,000. Kelly was thirty-nine years old and employed as an administrative assistant by the Oneida Tribe with an annual salary of approximately $30,000. The parties stipulated to property division and physical placement. The issues of maintenance and child support were addressed at the final hearing. The circuit court awarded Kelly limited term maintenance of $1,000 monthly for a period of sixty months. The court also awarded child support in the amount of $990.60 monthly. A motion for reconsideration was denied, and Wayne now appeals.

¶3 Maintenance and child support are decisions entrusted to the circuit court's sound discretion, and are not disturbed on appeal unless the court has erroneously exercised its discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We generally look for reasons to sustain the circuit court's decisions. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662,

[1] Wayne uses the phrase, "abused its discretion." In 1992, our supreme court changed the terminology from "abuse of discretion" to "erroneous exercise of discretion." ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). Wayne also refers to the parties as "Respondent-Appellant" and "Petitioner-Respondent," in violation of WIS. STAT. RULE 809.19(1)(i), which requires references to the parties by name, rather than by party designation. Counsel is admonished that future violations of RULE 809.19 may result in sanctions.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

158 N.W.2d 318 (1968). "[W]e may search the record to determine if it supports the court's discretionary determinations." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We will sustain discretionary decisions if the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of facts will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2). The circuit court is also the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶4 Wayne fails to appreciate the deferential standard of review. First, the circuit court considered proper relevant statutory maintenance factors and gave lengthy explanations supporting its maintenance decision. Specifically, the court considered the length of the marriage and the parties' ages and health. It also noted the parties stipulated to an approximately equalized property division. The court discussed the contributions to the parties' educational levels, and indicated Wayne obtained his bachelor's degree and was working on his master's degree during the marriage. The court also indicated Kelly would like to return to school and found that a maintenance award of $1,000 monthly for sixty months would allow her the opportunity to complete her education and increase her earning capacity. The court considered the parties' earning capacities and took into account that Kelly was working thirty-eight hours a week. The court also considered the tax consequences to the parties.[2]

[2] The circuit court specifically noted, "No evidence was presented to the court indicating tax brackets or other tax consequences."

¶5 In discussing the feasibility that the party seeking maintenance can become self-supporting, the court stated the maintenance award will "put the parties in a more equal position to make their respective budgets and give both parties the opportunity to live at the lifestyle that they were accustomed to during the marriage."[3] The court also stated the maintenance award satisfies the fairness and support objectives. The court specifically found that Kelly "was a marital partner with Mr. Kinjerski in acquiring the salary he has acquired. I find that his employment is a 'team effort.' The amount and length of maintenance I have ordered treats it as such."

¶6 Wayne raises infidelity and marital misconduct issues. The circuit court specifically addressed these issues and noted marital misconduct is not a proper factor for courts to consider when making maintenance determinations. *See* ***Dixon v. Dixon***, 107 Wis. 2d 492, 505, 319 N.W.2d 846 (1982). Any alleged extramarital relationships are irrelevant.

¶7 Our review of the record demonstrates the circuit court considered proper relevant statutory maintenance factors, employed a process of reasoning based upon the facts of record, and reached a conclusion based upon a logical rationale. The court thoroughly discussed each issue raised and appropriately exercised its discretion in setting the amount and duration of maintenance.

¶8 Regarding child support, the parties agreed to the baseline child support amount at the trial court level. Based upon the shared placement and the

[3] We note the court eliminated $660 of Wayne's expenses, finding "several of the listed expenses are unreasonable." We conclude the court properly exercised its discretion in this regard.

parties' actual incomes at the time of the divorce, the court utilized the statutory guidelines and deviated from those guidelines to allow Wayne a credit for payment of the minor children's health insurance premiums.

¶9 Wayne insists on appeal that the court "did not utilize the appropriate income level for Ms. Kinjerski in the child support analysis." According to Wayne, Kelly is capable of working forty hours per week and she "should be held to this amount of hours in the child support analysis." Kelly responds that Wayne "made no objection to the amount of the income attributed to Ms. Kinjerski for purposes of calculating child support." Wayne does not reply to this contention, and we deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). In any event, the court acknowledged that Kelly "could be making more money on the additional 2 hours per week," but also considered the effect on the children of Kelly being removed from the home an additional two hours per week.

¶10 The circuit court considered proper factors regarding deviation from the statutory child support obligation. The court found the children had no independent financial resources. The court considered the parties' financial resources, the maintenance Kelly received, and both parties' standard of living. The court also weighed the desirability that Kelly remain in her home, the daycare costs of the parties and the periods of physical placement. The court considered the parties' health insurance costs and their educational needs.[4]

[4] Wayne makes various factual assertions unsupported by the record on appeal. For example, Wayne contends without citation to the record that Kelly obtained a bonus in her employment. We will not consider unsupported assertions of fact. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶11 The court specifically found it was in the children's best interests not to deviate from the child support formula except to reflect the health insurance premium paid by Wayne. The court was compelled by two particular factors: (1) to ensure the children have the resources to enjoy a similar standard of living when residing with either parent; and (2) the desirability of Kelly staying in the home and not being required to obtain a second job. Without the statutory amount of child support, Kelly may be required to seek additional employment which would take her outside the home more and away from her dependent children. Moreover, the court ordered the parties to equally pay the variable costs for the minor children which would include child care. The court's child support award incorporated appropriate considerations and was a proper exercise of discretion.

*By the Court.*—Judgment affirmed.

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