

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2004

Cornelia G. Clark
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. 03-2322
STATE OF WISCONSIN

Cir. Ct. No. 02-FA-109

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

ELLEN M. WOCKENFUS,

PETITIONER-RESPONDENT,

v.

RANDY L. WOCKENFUS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Randy Wockenfus appeals a divorce judgment denying him maintenance payments from his ex-wife, Ellen Wockenfus. Randy argues the trial court erred by (1) ordering him to attend a vocational assessment; (2) finding he refused to cooperate with the order to attend a vocational assessment; and (3) finding his earning capacity was comparable to Ellen's. We

agree with Randy's third argument, reverse the judgment and remand for a determination whether Randy is entitled to maintenance. Consequently, we need not address the remaining two issues.

BACKGROUND

¶2 Randy and Ellen Wockenfus were divorced in 2003, after over twenty-four years of marriage. During the marriage, Ellen worked as a pharmacist technician, while Randy worked as a dairy farmer. Randy asked the court for an equal division of property as well as maintenance. The court found that Ellen's earning capacity was demonstrated throughout the years of marriage. A comparison of the parties' income entered as an exhibit showed Ellen's income from 1999 to 2002 was between \$38,552 and \$43,311. The court did not make a determination of Randy's earnings. Instead, it ordered a vocational assessment to determine what Randy could earn if he were not farming.

¶3 The court later found that Randy was refusing to cooperate with the order to obtain a vocational assessment. It then found that Randy's earning capacity was more than the \$6,000 per year he was earning by farming. The court concluded that Randy had an earning capacity comparable to Ellen's and therefore did not award Randy maintenance.

DISCUSSION

¶4 Randy argues the court erred in determining that his earning capacity was comparable to Ellen's. The determination of the amount and duration of maintenance is entrusted to the sound discretion of the circuit court, and a reviewing court will uphold the award absent an erroneous exercise of discretion. *Bisone v. Bisone*, 165 Wis. 2d 114, 118, 477 N.W.2d 59 (Ct. App. 1991). We will

disturb the circuit court's determination only when the court failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either excessive or inadequate. *Id.* at 118-19.

¶5 When ordering maintenance, a circuit court considers several factors under WIS. STAT. § 767.26,¹ including

- (5) The earning capacity of the party seeking maintenance including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

The trial court may impute earning capacity when determining a support or maintenance obligation if it finds a spouse's job choice voluntary and unreasonable. *Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 496, 496 N.W.2d 660 (Ct. App. 1992).

¶6 The parties dispute whether the court found that Randy's choice to remain a farmer was unreasonable. However, whether or not the court found Randy's vocational choice unreasonable, the record does not support the court's finding of earning capacity.

¶7 The circuit court found that Randy's earning capacity was comparable to Ellen's. The court realized it needed more information in order to determine Randy's earning capacity, stating, "[Randy is] refusing to cooperate

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

with the Court in seeking the information that I need to make a decision to determine maintenance.”

¶8 Nevertheless, the court determined that Randy “probably” has job skills that would allow him to earn more than the \$6,000 per year he is earning as a farmer. It noted, “I don’t have any specifics because of his non-cooperation to say exactly what he would be able to make, but I think it’s because of his non-cooperation I think I can safely say that ... he has the ability to earn an income that is comparable to his wife’s, and I’m not going to grant any maintenance.” Randy informed the court that a vocational evaluation was scheduled for the next week, but the court stated it was not going to let him take it now.

¶9 A circuit court must examine the appropriate factors when determining a party’s earning capacity. Here, as the court itself acknowledged, it did not have all the information it needed. Nonetheless, the circuit court determined that Randy’s earning capacity was the same as Ellen’s. We are less concerned with the court’s finding that Randy’s earning capacity was greater than \$6,000 than with its finding that his earning capacity was equal to Ellen’s. There is no support in the record for this finding. Thus, the court’s determination of Randy’s earning capacity was erroneous. *See* WIS. STAT. § 805.172(2). We therefore remand for a new hearing on whether Randy is entitled to maintenance.

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

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(01)(b)5.

