COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1761 **Cir. Ct. No. 2003FA163**

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

IN RE THE MARRIAGE OF:

BRUCE A. FINDLEY,

PETITIONER-RESPONDENT,

V.

ELLEN V. GIBBONS P/K/A ELLEN V. FINDLEY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. This is the second visit of Bruce A. Findley and Ellen V. Gibbons, formerly Findley, to this court since they divorced in 2004.

Gibbons persists in trying to collect from Findley the remainder owed to her from the property division portion of the divorce judgment. The circuit court found that Findley's continued inability to pay does not stem from a willful intent to avoid his obligation, and declined to find him in contempt or to order periodic payments. Courts do not have the power to squeeze blood from a turnip. We affirm.

¶2 Before and throughout the parties' seven-year marriage, Findley owned Meandaur, a successful corporation. During the marriage, Gibbons was a Meandaur employee and shareholder. The parties' comprehensive marital settlement agreement, incorporated into the judgment of divorce, resolved claims between Gibbons and Meandaur, waived maintenance to both parties and divided their property accordingly. As part of the property division, Findley agreed to pay Gibbons $300,000 at divorce, then annual payments of $162,500 on April 1 of each of 2005, 2006, 2007 and 2008, for a total of $950,000.

¶3 Meandaur's—and Findley's—fortunes changed. The loss of a major client sent the business into a death spiral despite Findley's substantial cash infusions. By September 2007 Meandaur was defunct. Findley lost nearly everything awarded to him in the divorce and faced over $3 million in judgments.

¶4 Findley advised Gibbons he could not make the 2007 property division payment. Gibbons contended he was shirking and brought an order to show cause for contempt. The circuit court found that Findley's failure to pay Gibbons was due to inability, not a willful intent to avoid doing so. This court affirmed, and further held that a shirking analysis does not apply to property division matters. *See* ***Findley v. Findley***, No. 2008AP1599, unpublished slip op. ¶1 (WI App Dec. 23, 2008).

¶5 When Findley missed the 2008 payment, Gibbons brought a motion under WIS. STAT. § 767.78 (2008-09)[1] to enforce the divorce judgment. She argued that Findley's financial picture had improved since 2007 and that he was intentionally avoiding payment. Findley currently resides in a Florida retirement community ("Shell Point"), draws social security and a salary as the director of LEAF, Ltd.[2], a private charitable foundation, lives with a woman who shares his expenses and is the beneficiary of a trust established upon his father's death in 2008. The circuit court again disagreed and denied the motion. Gibbons appeals.

¶6 Gibbons first contends the trial court erred in failing to enforce the divorce judgment or to find Findley in contempt. We review the circuit court's decision regarding contempt to determine if the court properly exercised its discretion. ***Krieman v. Goldberg***, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997). We generally look for reasons to sustain the court's discretionary decision. ***Gerrits v. Gerrits***, 167 Wis. 2d 429, 441, 482 N.W.2d 134 (Ct. App. 1992). It is sufficient if the record demonstrates that the court undertook a reasonable inquiry and examination of the facts and had a reasonable basis for its decision. *See* ***id.*** at 440.

¶7 Findley's undisputed failure to make the ordered payments is an insufficient basis, in and of itself, for a contempt finding. *See* ***Benn v. Benn***, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999). The court also had to find that Findley was able to pay, and that his refusal to do so was willful and with the intent to avoid payment. *See* ***id.*** at 309-10. We will not set aside a trial court's

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

[2] Findley and Gibbons established LEAF, Ltd., during their marriage.

factual findings underlying its contempt decision unless those findings are clearly erroneous. *See* ***Krieman***, 214 Wis. 2d at 169.

¶8 The court found that: the 2004 property division was premised in large part on Meandaur's success at the time; Findley invested personal assets and borrowed sums in a vain effort to save Meandaur; it would take diligence and luck for Findley, who runs a monthly deficit, is nearly seventy and resides in an area with high unemployment, to find a job that would put much of a dent in that deficit; leaving Shell Point for an alternative living arrangement[3] would be even less advantageous now than in 2007; the initial trust balance of $162,000 is declining and Findley cannot require the trustees to cover more of his expenses; LEAF's asset balance was declining; there was no evidence that a project LEAF is developing has produced any revenue; two LEAF employees earn more than Findley but there was no evidence that their compensation is inconsistent with their services or that Findley could assume their duties; unpursued debts listed on the financial statement were not a significant factor to the court; Findley's overall circumstances are unchanged since 2007; and there is no money available even for installment payments.

¶9 Gibbons contends those findings are clearly erroneous. She argues that before 2007, LEAF paid Findley in the mid-six figures for consulting work and now pays him only $17,500 annually as a full-time director; that Findley also spends about ten hours a week doing unpaid volunteer work; that Findley's live-in

[3] Shell Point is a "life care" retirement community that, for the same monthly fee, provides levels of living arrangements from independent living to skilled nursing care. Findley bought into Shell Point before filing for divorce for approximately $200,000. That sum is not equity and would be forfeited if he were to leave.

girlfriend is a LEAF employee paid $72,000 a year; and that, although the purpose of the trust is to assist with Findley's uninsured medical and Shell Point expenses, he did not seek reimbursement for those incurred before the trust was established.

¶10 Gibbons contends the evidence shows that Findley "has intentionally minimized his income and that any resulting inability to pay [her] is self-inflicted." This sounds much like a shirking argument. *See* ***Wallen v. Wallen***, 139 Wis. 2d 217, 225-26, 407 N.W.2d 293 (Ct. App. 1987) (stating that a common factor accompanying a finding of "shirking" is a voluntary or self-inflicted reduced ability to pay a support obligation). To the extent that it is, we address it no further.

¶11 In any event, we are bound to sustain the circuit court's findings. The evidence may have presented competing factual inferences, but reversal is not justified unless the evidence for a contrary finding itself constitutes the great weight and clear preponderance of the evidence. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979). Moreover, besides Findley and Gibbons, the attorney who drafted the trust agreement and served as co-trustee also testified at the hearing. Implicit in the circuit court's findings, therefore, are credibility determinations which we must accept. *See* ***id.*** That is why the clearly erroneous standard is so difficult to overcome. For purposes of our review, it does not matter, as Gibbons urges, that some alternate finding "would have been more reasonable."

¶12 Gibbons also contends that Findley's claimed inability to pay the full amount does not justify the court's failure to order him to pay *something*. She directs us to ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 548 N.W.2d 535 (Ct. App. 1996) which, by her reading, stands for the proposition that "if [the non-payor]

had the ability to pay 'even one dime' he had some 'ability to pay' and was not excused from contempt on the basis [that] he couldn't pay the entire [amount]." We disagree.

¶13 The ***Haeuser*** court expressly noted that the husband's failure to make part of the ordered payments was *not* due to inability to pay, but to his intentional refusal based on his erroneous belief that a foreign judgment shielded him from the obligation. *See* ***Haeuser***, 200 Wis. 2d at 767-68. Thus, ***Haeuser*** emphasizes that the principal findings a court must make before finding the nonpayor in contempt are that the person is able to pay and willfully refuses with intent to avoid payment. *See* ***id.*** at 767. Nothing in ***Haeuser*** removes a contempt finding from the realm of discretion.

¶14 Findley, as the alleged contemnor, bore the burden of proving that he was unable to satisfy the debt and that the failure was not intentional. *See* ***Besaw v. Besaw***, 89 Wis. 2d 509, 517, 279 N.W.2d 192 (1979). We reject Gibbons' argument that the circuit court improperly engaged in a "substantial change of circumstances" analysis, thus shifting the burden of proof to her. When Findley made a prima facie case, only the burden of production shifted to Gibbons. *See* ***Reinke v. Personnel Bd.***, 53 Wis. 2d 123, 133, 191 N.W.2d 833 (1971) (stating that the burden of proof does not shift because a prima facie case has been made). The burden of proof remained with Findley to the end. *See* ***id.***

¶15 Gibbons testified about all she had relinquished in the divorce, such as the Meandaur job she enjoyed, 401(k) and social security growth based on her Meandaur salary, the marital home and its furnishings, medical and life insurance and her interest in a boat. After that recitation, the court asked Gibbons' counsel what was being argued that had not already been addressed. The court was not

requiring that Gibbons prove a substantial change in circumstances. Instead, it simply was asking how her evidence could rebut Findley's prima facie case that he was no more able to pay and his inability was no more intentional and willful now than in 2007.

By the Court.—Order affirmed.

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