COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 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. 2008AP51

Cir. Ct. No. 2001FA223

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

RUSSELL W. FLATH,

PETITIONER-RESPONDENT,

V.

MARY ANN FLATH,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 NEUBAUER, J. Mary Ann Flath appeals from a trial court order granting a reduction in the maintenance paid to her by her former spouse, Russell Flath. Mary contends that the trial court erroneously exercised its discretion in

reducing the maintenance order based on a finding that Russell's voluntary change in employment resulting in a substantially reduced salary was reasonable, and in failing to consider the factors set forth in WIS. STAT. § 767.56. Because Russell's decision to voluntarily terminate his employment was reasonable under the circumstances and because the trial court properly exercised its discretion in modifying maintenance, we affirm.

BACKGROUND

¶2 Russell and Mary were married on June 7, 1974. They divorced on June 11, 2002, after twenty-eight years of marriage. At the time of the divorce, Russell was employed as a supervisor with gross monthly earnings of $5,429.67. Mary was employed as a waitress with gross monthly earnings of $1,716.91. Pursuant to the judgment of divorce, Russell was ordered to pay Mary $1800 per month in maintenance until March 2003 at which time maintenance would be reduced to $1700 per month. Russell was ordered to pay maintenance until further order of the court or until Mary remarried.

¶3 On September 5, 2006, Russell filed a motion to modify his maintenance payments pursuant to WIS. STAT. § 767.32 (2003-04)[1] due to a decrease in income after a voluntary change in his employment. In his affidavit in support of his motion, Russell stated that he voluntarily retired from his employment "as a result of chest pains that have been ongoing for the past 12 years, but have increased due to [his] health concerns." Russell averred that as of

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[1] WISCONSIN STAT. ch. 767 was substantially renumbered and revised by 2005 Wis. Act 443 § 110. Section 767.32 was renumbered § 767.59. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

September 5, 2006, he would no longer have an income but that he was looking for employment in a less stressful job area. Russell commenced new employment the next day, September 6, 2006, with annual earnings of approximately $40,000.

¶4 After a hearing on Russell's motion, Court Commissioner David Reddy found that Russell's reduced income resulted from an unreasonable and voluntary change of employment and therefore his "earning capacity shall be established at the same level as his most recent employment [at his former employer]." Russell filed a motion for de novo review of Commissioner Reddy's decision.[2] The trial court held a modification hearing on September 6, 2007, and on November 20, 2007.

¶5 Russell and his current wife, Deanna Weber, both testified at the hearing, as did Mary. On November 20, 2007, the trial court issued its decision. The trial court found that Mary was working at her earning capacity and that Russell's decision to leave his employment was reasonable. The court adopted Russell's income analysis, which essentially equalized the parties' incomes, and ordered maintenance in the amount of $6500 per year, approximately $550 per month, *nunc pro tunc* to the date of the filing of the motion. Mary appeals.

DISCUSSION

¶6 Mary argues on appeal that the trial court erred in finding Russell's decision to leave his former employment to be reasonable and that the trial court

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[2] During the pendency of Russell's motion, Mary had filed an order to show cause for contempt based on Russell's failure to make his court-ordered maintenance payments. Russell stopped making full maintenance payments in August 2006, and was $6582.51 in arrears at the time the motion was filed in July 2007.

erroneously exercised its discretion by failing to apply the factors set forth in WIS. STAT. § 767.56 when modifying maintenance.

¶7 *Standard of Review*. When a trial court modifies a maintenance award, it applies the same factors that govern the original determination of maintenance. *See* ***Hacker v. Hacker***, 2005 WI App 211, ¶9, 287 Wis. 2d 180, 704 N.W.2d 371; WIS. STAT. § 767.56. The statutory factors further two distinct but related maintenance objectives: (1) the "support" objective which is to support the recipient spouse in a manner that reflects the needs and earning capacities of the parties, and (2) the "fairness objective" which is to ensure a fair and equitable financial arrangement between the spouses. ***Hacker***, 287 Wis. 2d 180, ¶9 (citing ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987)).

¶8 "In order to modify a maintenance award, the party seeking modification must demonstrate that there has been a substantial change in circumstances warranting the proposed modification." ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452; *see also* WIS. STAT. § 767.59(1f)(a). The moving party bears the burden of proving the existence of a substantial change of circumstances that demands a modification. ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶30.

¶9 A substantial reduction in actual earnings that would demand reconsideration of maintenance under WIS. STAT. § 767.59 cannot be the result of shirking. ***Scheuer v. Scheuer***, 2006 WI App 38, ¶9, 290 Wis. 2d 250, 711 N.W.2d 698. Shirking occurs when "the reduction of actual earnings was voluntary and unreasonable under the circumstances." ***Id.***, ¶11. If a court finds that shirking has occurred, it should determine maintenance according to earning capacity, not actual earnings. ***Id.***, ¶9.

¶10 In reviewing whether a decision to terminate employment is reasonable, we apply the standard of review set forth in ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 496 N.W.2d 660 (Ct. App. 1992), and adopted in ***Chen v. Warner***, 2005 WI 55, ¶¶34, 43, 280 Wis. 2d 344, 695 N.W.2d 758. That standard provides: "[A]lthough the application of a legal standard, here reasonableness, to the facts is a question of law determined independently by an appellate court, when a legal conclusion is extensively intertwined with factual conclusions, an appellate court should give appropriate deference to the circuit court, but … the circuit court's decision is not controlling."[3] ***Chen***, 280 Wis. 2d 344, ¶34 (citations omitted). We therefore review a shirking determination as a question of law, but one to which we pay appropriate deference. ***Scheuer***, 290 Wis. 2d 250, ¶9.

¶11 *Reasonableness of Employment Termination.* On September 6, 2006, Russell voluntarily quit his job as a supervisor at USF Holland to take a less stressful job at Reynolds Cartage which commenced that same day. This job change reduced his salary of approximately $70,000 to approximately $40,000. As stated in his motion for modification, Russell's reasons for the voluntary termination were primarily health related. Russell testified as to those issues during the de novo hearing. The record from that hearing reveals that on February 14, 1994, Russell had a heart attack while working at USF Holland.

[3] The supreme court explained its reasoning for adopting this standard of review: "We adopt this standard because the legal question of reasonableness in a shirking case is a question of law (ordinarily suitable for independent appellate determination) that is intertwined with the facts (ordinarily suitable for appellate court deference to the circuit court). Concerns of judicial administration—efficiency, accuracy, and precedence—make this standard of appellate review appropriate." ***Chen v. Warner***, 2005 WI 55, ¶43, 280 Wis. 2d 344, 695 N.W.2d 758.

¶12 With respect to his recent issues, Russell testified that the work environment at USF Holland caused him to suffer chest pains, foot ache, and coughing. Russell testified that USF Holland had been sold twice since the parties' divorce and that after management changed hands at USF Holland, it became a much more stressful work environment. Russell, who was a non-union management employee, testified that the Teamster employees at USF Holland became very confrontational after the change in ownership and increased productivity requirements, causing him increased stress. During these increasingly frequent confrontations, Russell would experience chest pain.

¶13 The trial court, after hearing the testimony, found that Russell was old and tired and that he had a right to find a job that was less stressful. The trial court prefaced its decision with the observation that "the object of maintenance for a long-term marriage such as this is fairness and support." It found:

> [Mary] is working to her earning capacity…. She is not a high school graduate…. I imagine when she gets home at night her feet are tired and her back aches. I wouldn't expect any more out of her….
>
> We look at [Russell], he is older. He is old. He is sick —at least he is tired. He fears death from his coronary heart disease. The evidence was presented. I don't know how you can deny that [Russell] has coronary heart disease. According to his doctor he is doing well. He did have some chest pains and underwent stress testing. He has had no recurrence since then. He has a different job which is a lower stress level and he remains active. He should exercise more and he probably has to look at his cholesterol levels. He has a positive history for coronary heart disease in this family. Obviously anybody at age sixty with a family history should exercise more but also he fears death if he keeps that stress up. He is tired just as [Mary] is tired….
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> He is tired. He has a right to be tired. He is sixty years old. He is having kind of an old sixty. He doesn't have the stamina anymore. He can't deal with the Teamster's…. Teamster's are a rough, tough, outfit….

> He's working for a non-union shop now where he probably has to deal with the drivers now. But when he was working for USF Holland he was dealing with—on those loading docks with some pretty tough customers, and he just doesn't have the stamina anymore. He just doesn't have the ability to face those guys down. And with his coronary artery disease although he does have it[, it] is stable. He doesn't have angina. He still has the right in my opinion to find a job that was more—less stressful. I believe he did exactly what was reasonable under the circumstances….
>
> I make a finding that both parties have done what's reasonable under the circumstances …. [B]oth parties have used a Mac Davis program and I simply choose to use [Russell's] ….

Based on Russell's proposal, the trial court reduced maintenance from $1700 per month to approximately $541 per month, or $6500 per year.[4]

¶14 Mary contends that Russell failed to meet his burden of proving that he did not have the ability to meet the support obligation established by the court. Mary's contention centers on Russell's failure to present medical evidence at the hearing to support his claim that he was medically unable to work or that his work conditions impacted his health such that his termination was essentially involuntary. In support of her argument, Mary cites to ***Smith v. Smith***, 177 Wis. 2d 128, 501 N.W.2d 850 (Ct. App. 1993).

¶15 In ***Smith***, the trial court denied Donald Smith's motion to reduce his child support obligations based on a reduction in earnings resulting from a change in employment. ***Id.*** at 130. Donald had terminated his employment as a machinist earning approximately $19,600 annually due to medical problems but had continued to operate his thirty-three acre farm. ***Id***. at 131. The trial court found

[4] Russell's proposal essentially equalized the parties' incomes.

that Donald's termination was not the result of medical problems. ***Id.*** at 132-33. We upheld the trial court's determination noting that Donald had introduced no medical evidence to support his claim that he was physically unable to continue working and that the trial court was not required to accept Donald's assertion when he had been offered "light duty" work at his former employer and continued with the physical demands of farming. ***Id.*** at 133-34.

¶16 We conclude that ***Smith*** is distinguishable from this case. While Russell did not introduce medical evidence to support his claim, Mary did submit certified medical records. The medical records establish Russell's history of coronary heart disease and previous heart attack, neither of which is disputed. Unlike in ***Smith***, here there was sufficient medical evidence in the record and the trial court found credible Russell's testimony regarding the stress experienced at his former employment and the impact of this stress on his physical condition. While Mary introduced medical records to suggest that a change in employment was not absolutely necessary, those records also confirmed the existence of Russell's coronary heart disease and the negative impact stress could have on his condition. Finally, in ***Smith***, Donald voluntarily terminated his employment and made no effort to secure alternate employment, instead choosing to operate a farm which failed to produce any income. ***Id.*** at 139. Here, Russell had an identifiable health condition, made reasonable efforts to secure less stressful employment, and continued full-time employment in a less stressful environment.

¶17 Mary additionally relies on our decision in ***Van Offeren***, 173 Wis. 2d 482, in which we addressed the "reasonableness" standard to be applied when a reduction in income results from a voluntary termination of employment. We observed:

> [E]ven where the obligated person's voluntary reduction in income is well intended, we conclude it is proper … to assess the reasonableness of that decision in light of the person's support or maintenance obligations. Such a rule adequately protects those entitled to support and maintenance, yet permits the obligor to *reasonably choose* a means of livelihood and to pursue what the obligor honestly believes are the best opportunities though the financial returns may, for the present, be less.

Id. at 496-97. However, the standard as applied by the ***Van Offeren*** court to the facts of that case, further support the trial court's determination that Russell's voluntary reduction in income was the result of a reasonable choice in livelihood given his health concerns.

¶18 In ***Van Offeren***, we concluded that the obligor's voluntary decision to terminate well-paying employment that enabled him to meet his child support obligations without first securing a comparable source of income was unreasonable. ***Id.*** at 497. The obligor chose to terminate his employment in order to pursue a business venture that he knew would take five or six years to produce income comparable to what he had earned at his former employment, by which time the majority of his children would be adults. ***Id.*** The court also found that the obligor could have stayed at his job, started the new business venture, and left his job when it was producing income sufficient to meet his support obligation. ***Id.***

¶19 Here, Russell's pursuit of employment in his field that would involve less stressful and reduced supervisory duties[5] was not unreasonable in light of his age and health history. Russell neither abandoned gainful employment nor significantly reduced his hours. Although Russell's earnings have decreased along with the decrease in his responsibilities, the trial court clearly found credible Russell's health-related reasons for seeking a decrease in those work-related responsibilities that Russell felt were detrimental to his health.

¶20 In making a reasonableness determination, the trial court was required to consider not only Russell's conditional right to make a career decision but also the effect of such a decision on those to whom Russell owed legal obligations of support and maintenance. *See* ***id.*** Based on our review of the record, we conclude that the trial court properly examined the parties' situations and acknowledged the difficulties presented before arriving at its determination that Russell's decision was reasonable. As the party demanding modification, Russell bears the burden of proving the existence of a substantial change of circumstance that is not the result of shirking. *See* ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶30; ***Scheuer***, 290 Wis. 2d 250, ¶9. We conclude that he has done so.

[5] Russell described his duties at his new employment as "[p]rimarily customer service, answering the phone, taking pickups, and doing O, S and D work which is shortages and damages of freight, and payroll, and driver manifesting." In addition, Russell was not responsible "in a supervisory way" for employees, he could sit at his desk for most of the day in a climate controlled office and, while Russell worked some overtime, his start time in the morning was consistently 6:00 a.m. as opposed to inconsistent start times at USF Holland ranging from 3:00 or 4:00 in the morning to as early as midnight.

¶21 *Application of Wis. Stat. § 767.56 Factors*.[6] Having found that Russell's voluntary termination of employment was reasonable and therefore he had demonstrated a substantial change of circumstances, the trial court then modified maintenance based on Russell's actual earnings at his current employment essentially continuing the approximate equalization of income

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[6] WISCONSIN STAT. § 767.56, governing maintenance, provides in relevant part:

> Upon a judgment of … divorce … the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:
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> (1) The length of the marriage.
>
> (2) The age and physical and emotional health of the parties.
>
> (3) The division of property made under s. 767.61.
>
> (4) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (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.
>
> (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (7) The tax consequences to each party.
>
> (8) Any mutual agreement made by the parties before or during the marriage ….
>
> (9) The contribution by one party to the education, training or increased earning power of the other.
>
> (10) Such other factors as the court may in each individual case determine to be relevant.

achieved by the judgment of divorce.[7] Mary contends that in doing so the trial court failed to apply certain factors set forth in WIS. STAT. § 767.56. Specifically, Mary argues that the trial court "ignored the feasibility that Mary could become self supporting at a standard of living comparable to that enjoyed during the marriage; the mutual agreement made by the parties during marriage and other relevant factors" including Russell's current wife's income.[8]

¶22 Upon a showing of a substantial change in circumstances, the level at which to set the maintenance payments is within the discretion of the trial court. ***Seidlitz v. Seidlitz***, 217 Wis. 2d 82, 88, 578 N.W.2d 638 (Ct. App. 1998). We will not disturb the trial court's decision regarding the amount of maintenance absent an erroneous exercise of discretion. ***Id.*** at 86. The trial court has appropriately exercised its discretion if, in its explanation of its decision, it demonstrates that it considered the relevant facts and reached a reasonable conclusion that is consistent with the applicable law. ***Gerrits v. Gerrits***, 167 Wis. 2d 429, 441, 482 N.W.2d 134 (Ct. App. 1992). If a trial court properly exercises its discretion, we will affirm the decision even if it is not one with which we ourselves would agree. ***Id.***

¶23 "When modifying maintenance awards, the circuit court must consider the same factors governing the original determination of maintenance" as set forth in WIS. STAT. § 767.56, including the overarching goals of fairness to both parties under the circumstances. *See* ***Poindexter v. Poindexter***, 142 Wis. 2d

[7] At the time of the judgment of divorce in June 2002, Russell was earning a gross income of $65,156.04; Mary was earning a gross annual income of $20,602.92. Russell paid maintenance to Mary in the amount of $1800 per month ($21,600 per year) until March 2003 at which time he paid maintenance in the amount of $1700 per month ($20,400 per year).

[8] We therefore construe Mary's argument to center on WIS. STAT. § 767.56(6), (8), and (10).

517, 531, 419 N.W.2d 223 (1988); ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶32. The starting point for a maintenance evaluation following a long-term marriage is to award the dependent spouse half of the total combined earnings of the parties. ***Schmitt v. Schmitt***, 2001 WI App 78, ¶13, 242 Wis. 2d 565, 626 N.W.2d 14. This amount may then "be adjusted following reasoned consideration of the statutorily enumerated maintenance factors." ***Id.*** We have reviewed the trial court's decision and are satisfied that the court considered the relevant factors under WIS. STAT. § 767.56 and properly exercised its discretion.

¶24 With respect to WIS. STAT. § 767.56(6), the feasibility of the party seeking maintenance to become self supporting at a standard of living comparable to that enjoyed during the marriage, the trial court essentially found that as the parties increased in age and were less able to cope with the demands in the workplace, their incomes would be effected, regardless of its finding that both parties had acted reasonably under the circumstances. As Russell notes, the trial court additionally declined to terminate maintenance, therefore implicitly acknowledging that Mary would not be able to become self supporting within a specific time frame. Mary testified that she was a waitress when she and Russell first married but then the parties agreed that she would stay home with their children. During the marriage, Mary did work part time periodically at a dental office and as a waitress, but did not continue with her education because Russell "didn't want [her] to." In making its decision, the trial court rejected Russell's argument that Mary had not done enough to increase her earnings and "advance herself," noting instead that Mary did not have a high school education and that she had made a reasonable job choice in waitressing.

¶25 As to Mary's standard of living, there is certainly evidence in the record that it is not comparable to that enjoyed during the marriage. However,

there is also evidence in the record that given Russell's reasonable change in employment, the parties' incomes are such that this standard may not be able to be achieved. *See* ***Hubert v. Hubert***, 159 Wis. 2d 803, 821, 465 N.W.2d 252 (Ct. App. 1990) (the trial court should consider maintenance allowing the payee to maintain a standard of living comparable to that enjoyed during the marriage provided the payor can afford maintenance to achieve this standard). The trial court's decision reflects consideration of both parties' financial situations.

¶26 In equalizing the parties' incomes, the trial court acknowledged that both parties were working to their capacities. Before accepting Russell's income analysis, the trial court considered each proposal, including those in which Mary had included Russell's wife's income as part of his total financial situation. However, the trial court declined to examine Russell's current wife's income based on its determination that Russell was not "liv[ing] off" of his wife's income but had found reasonable employment.[9] Although Mary's income analysis attempts to demonstrate that Russell's income combined with his wife's income is approximately equal to his prior income at USF Holland, she fails to acknowledge that this additional income must also contribute to the support of two additional people—Russell's wife and their child.

¶27 In focusing her argument on Russell's total household income, Mary overlooks that Russell has also taken a substantial cut as a result of his change in employment. While Mary's income had increased very slightly since the divorce, Russell's change in employment resulted in a significant decrease in his gross

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[9] While Mary devoted much of her argument, both at trial and on appeal, to the relevancy of Russell's current wife's income, she fails to provide citation to supporting law.

monthly income from $5,429.67 at the time of the divorce judgment to $3,335.23. Based on the income analysis adopted by the court, Russell's disposable income after maintenance is $2,128; Mary's is $2,136.

¶28 Given the income analyses presented and the trial court's finding that Russell's voluntary reduction of income was reasonable, we conclude that the trial court's continued equalization of the parties' income was not an erroneous exercise of discretion.

¶29 As we have already noted, a modification of maintenance is within the discretion of the trial court and, while we uphold the trial court's determination as supported by the record, we are mindful of the difficult situation this presents to Mary. However, a discretionary decision will not be disturbed merely because another court reasonably could have reached a different result. *See* ***Liddle v. Liddle***, 140 Wis. 2d 132, 156, 410 N.W.2d 196 (Ct. App. 1987).

CONCLUSION

¶30 We conclude that Russell's voluntary reduction in income was reasonable under the circumstances. We further conclude that the trial court properly exercised its discretion in modifying the maintenance award to achieve an equalization of income based on Russell's decreased earnings. We affirm the trial court order modifying maintenance.

By the Court.—Order affirmed.

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