

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP808

Cir. Ct. No. 2011FA44

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

SANDRA G. SHAPIRO,

PETITIONER-APPELLANT,

V.

MARC O. SHAPIRO, II,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Green Lake County: MARK T. SLATE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Sandra Shapiro and Marc Shapiro II divorced after a twenty-two-year marriage. Sandra appeals the maintenance and property division aspects of the judgment. We affirm the judgment in all regards except that we reverse an \$8,000 property division credit awarded to Marc because we cannot determine its basis on the record before us.

Maintenance

¶2 Maintenance determinations are discretionary with the circuit court, “and we will not reverse absent an erroneous exercise of that discretion.” *See Grace v. Grace*, 195 Wis. 2d 153, 157, 536 N.W.2d 109 (Ct. App. 1995). We will affirm the decision as a proper exercise of discretion where it appears that the circuit court looked to and considered the facts of the case and reasoned its way to a conclusion that is one a reasonable judge could reach consistent with applicable law. *See id.*

¶3 Maintenance has two objectives: support and fairness. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987). The former ensures that the payee spouse is supported “in accordance with the needs and earning capacities of the parties;” the latter ensures an equitable financial arrangement between the parties in the individual case. *Id.* We must consider whether the circuit court’s application of the WIS. STAT. § 767.56 factors achieves both objectives. *Forester v. Forester*, 174 Wis. 2d 78, 85, 496 N.W.2d 771 (Ct. App. 1993).

¶4 The circuit court ordered Marc to pay Sandra maintenance of \$500 a month for fourteen months. Sandra contends this award fails to take into account

the longevity of the marriage, her financial needs, her true earning capacity, and how long it realistically will take for her to become self-supporting.¹

¶5 We disagree. The court reviewed each of the statutory factors on the record. It found that Marc earned \$50,000 annually, that Sandra had a bachelor's degree in business administration, that her current employment earning \$12,603 annually as a part-time teacher's aide did not match her earning capacity, that her imputed annual income was \$23,500, that Marc was to pay \$12,891 in child support a year, thus making the parties' incomes roughly equal, and that with Sandra's education and experience she could anticipate an even higher salary in the future. Sandra's disagreement with the court's rationale does not constitute grounds for reversing a determination left wholly to the court's discretion.

Property Division

¶6 The division of property also rests within the sound discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We generally look for reasons to sustain its discretionary decision, *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and will do so if the circuit court examined the relevant facts, applied a proper standard of law, and, using a rational process, reached a decision that a reasonable

¹ Marc contends that Sandra's appeal as to maintenance is untimely because she did not initiate it within forty-five days. *See* WIS. STAT. § 808.04(1). Marc is wrong. Again. He raised the same issue in this court via a motion to dismiss when Sandra commenced the appeal. We denied the motion, explaining that individual underlying orders were not final for purposes of appeal, as they did not dispose of the entire matter in litigation. *See* WIS. STAT. § 808.03(1). We also pointed out that, as no notice of entry of judgment was given, the ninety-day time limit for filing the appeal applied. *See* WIS. STAT. § 808.04(1).

All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

judge could reach, *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).

¶7 Sandra first contends the circuit court erred in granting Marc a \$2,971.51 credit for withdrawals she made from the parties' joint account to make mortgage payments. Pursuant to a temporary order, Marc had been depositing his entire paycheck into a joint checking account from which Sandra was to pay the parties' bills. She testified that she withdrew money from a mutual fund held in the parties' joint names when the mortgage went into arrears after Marc stopped working overtime and quit his second job.

¶8 The court agreed with Marc that the withdrawals should be deemed an advance to Sandra on the property division and found that, as Sandra did not go back to court to explain the shortfall and seek relief, she was in violation of the court order. It was not obligated to accept Sandra's explanations. Witness credibility is the province of the fact finder. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶9 In a similar vein, Sandra contends the circuit court erred in granting Marc a \$1,256.28 credit for additional income she earned during the pendency of the divorce. Sandra earned \$200 a month more when her part-time aide position became fulltime, a change she did not disclose. Noting her lack of candor in light of her duty to apprise Marc and the court of the change in her income, the court ordered that she reimburse Marc. In reviewing discretionary decisions, our task is to determine whether a court reasonably could come to the conclusion it reached. *Grace*, 195 Wis. 2d at 157. Here, the decision as a whole incorporates appropriate considerations and is not an erroneous exercise of discretion.

¶10 Finally, Sandra argues that the court erred in granting Marc a property division credit in the amount of \$8,000. On this point we agree with Sandra because the award was not based upon evidence of record.

¶11 In resolving the property division at the November 14, 2013 hearing, the court ordered Marc's counsel to redraft the court-ordered balance sheet to include the financial figures contained in the February 26, 2013 order and the June 25, 2013 decision on divorce.

¶12 According to a November 22, 2013 letter from Sandra's counsel to the circuit court, Marc submitted the proposed redraft on November 19, 2013, which included the \$8,000 credit to Marc. The letter expressed Sandra's objection to its inclusion because that figure was not mentioned in either the February 26 or the June 25 document and was not found in any record of any prior proceeding. The court's Findings of Fact, Conclusions of Law and Judgment nonetheless include the \$8,000 entry. We reverse and remand on this point because we cannot tell what transpired.

¶13 Despite Sandra's November 22 letter in the record, Marc argues that Sandra did not object to his proposed order under the "five-day rule" and thereby waived the right to object to the inclusion of the \$8,000 figure. Noting that the order resulting from the November 14, 2013 hearing was entered on December 16, 2013, Marc directs us to his appellate brief appendix, specifically to a letter dated December 19, 2013, that he allegedly sent to the court with an adjusted balance sheet and his proposed Findings of Fact, Conclusions of Law, and Judgment of Divorce. Suspiciously, the letter bears no file stamp and is not in the record. The appendix is not the record. *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Marc's November 19 submission

to which Sandra's November 22 letter refers also is not in the record. Neither party suggests that the \$8,000 was addressed at the November 14 hearing.

¶14 We cannot make a determination without an appropriate record and without the circuit court's findings of fact and conclusions of law. We therefore remand the cause to the circuit court to decide the issue of whether Marc was entitled to a property division credit of \$8,000.

By the Court.—Judgment affirmed in part, reversed in part and cause remanded with directions.

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

