COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 98-0592
98-2020

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

NO. 98-0592

IN RE THE MARRIAGE OF:

JEANNE M. LINDSKOG,

PETITIONER-APPELLANT,

V.

RONALD P. LINDSKOG,

RESPONDENT-RESPONDENT.

NO. 98-2020

IN RE THE FINDING OF CONTEMPT
IN RE THE MARRIAGE OF:

JEANNE M. LINDSKOG,

PETITIONER-APPELLANT,

V.

RONALD P. LINDSKOG,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. In these consolidated appeals, Jeanne M. Lindskog appeals from the judgment divorcing her from Ronald P. Lindskog and from an order holding her in contempt for failing to make the equalization payment required by the judgment of divorce. We affirm the circuit court.

On appeal, Jeanne challenges the circuit court's determination of Ronald's income for child support purposes and the four-year maintenance award. Jeanne contends the circuit court erred when it declined to hold that Ronald was shirking when he dissolved a family business approximately a month before trial and that the income from the family business should be imputed to Ronald for purposes of setting child support and maintenance. She challenges the manner in which the court addressed Ronald's pension which led to a $41,402 equalization payment from Jeanne to Ronald. Because Jeanne did not make the equalization payment as required, the court found Jeanne in contempt and fashioned a remedy to achieve payment of the equalization payment. Jeanne also challenges the contempt ruling. We will state additional facts as we address the appellate issues.

Jeanne and Ronald were married in 1974; Jeanne petitioned for divorce in 1996. At the time of trial Ronald was fifty-four years old; Jeanne is ten years younger. Ronald has been employed full time as an Oak Lawn, Illinois police officer since 1969 and earns $58,176 per year. During most of the marriage, Ronald operated Copper Home Improvements, Inc., which rehabilitated foreclosed properties in the Chicago area for private investors who then sold them. During the marriage, Copper Home generated additional income for the family.

For most of the marriage, Jeanne worked full time in the home. Jeanne completed her undergraduate education and earned a master's degree during the marriage. In September 1996, she began full-time employment as a high school counselor earning $32,569 per year. At the time of the divorce, the couple had three minor children and one child in college. The youngest child was within four years of reaching her majority.

At trial, Ronald testified that Copper Home was in decline due to changes in federal government foreclosure policies which decreased the number of units available to private investors for rehabilitation and sale. He also testified that he has health concerns and that he had planned to retire when Jeanne obtained full-time employment and live on his pension, Jeanne's income and part-time work.

In the judgment of divorce, the circuit court concluded that Ronald's decision to cease operating Copper Home did not amount to shirking his support obligations. The court noted that Ronald "is on the cusp of retirement," had maintained three jobs during most of the marriage and that he had reasons for reducing his employment to his full-time job as a police officer. Under the circumstances, the court declined to order Ronald to find other work to increase his income.

The circuit court may consider earning capacity as opposed to actual income when a spouse is shirking his or her support obligations. *See* ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 492, 496 N.W.2d 660, 663 (Ct. App. 1992). The court may find a spouse is shirking if it finds that the spouse's employment decision was both voluntary and unreasonable under the circumstances. *See* ***id***. at 496, 496 N.W.2d at 665. The issue of whether a spouse's employment decision is unreasonable presents a question of law. *See* ***id.*** at 492, 496 N.W.2d at 663.

However, because the trial court's legal conclusion is intertwined with factual findings supporting that conclusion, we will give the trial court appropriate deference. *See* ***id.*** at 492-93, 496 N.W.2d at 663-64.

There is support in the record for the circuit court's refusal to conclude that Ronald was shirking his support obligations when he ceased operating Copper Home shortly before trial. The court found that Ronald's reasons for terminating Copper Home were reasonable under the facts of the case. Additionally, we note that with Jeanne's income of $32,569 and Ronald's income of $58,176, the parties' combined income approaches the income generated by Ronald as a police officer and when operating Copper Home. Results in divorce cases are "intensively fact specific for each case …. [T]he great burden of reaching a just and fair judgment rests on the trial judge." ***Sellers v. Sellers,*** 201 Wis.2d 578, 594-95, 549 N.W.2d 481, 487-88 (Ct. App. 1996).

Jeanne next challenges the court's treatment of Ronald's police department pension. For reasons not relevant to this appeal, Ronald's pension is not subject to division under a qualified domestic relations order (QDRO).[1] Ronald began working as a police officer in 1969 and married Jeanne in 1974. The court divided the pension based on pre- and post-marriage contribution years which made 23/28 of the pension subject to property division. The pension was valued at $467,757 with 23/28, or $384,229, subject to division. One-half of that amount, $192,114, was awarded to Jeanne in the property division, with payments

[1] "A qualified domestic relations order (QDRO) authorizes the direct invasion of a participant's pension for the benefit of the nonparticipant spouse. A QDRO permits payment of benefits of a qualified private retirement plan to one other than the employee, at the employee's earliest retirement date." ***Kennedy v. Kennedy***, 145 Wis.2d 219, 221 n.2, 426 N.W.2d 85, 86 (Ct. App. 1988).

to Jeanne commencing upon Ronald's retirement. Because of this treatment, Jeanne was required to make an equalization payment of $41,402 within ninety days of the entry of the judgment of divorce.

Jeanne argues that the court erroneously exercised its discretion in addressing the pension plan. Property division, including the disposition of pensions, is within the circuit court's discretion. *See* ***Friebel v. Friebel,*** 181 Wis.2d 285, 293, 510 N.W.2d 767, 770 (Ct. App. 1993); *see also* ***Steinke v. Steinke,*** 126 Wis.2d 372, 383-85, 376 N.W.2d 839, 845 (1985). We will not reverse a discretionary decision if the record discloses that discretion was exercised and we can perceive a reasonable basis for the decision. *See* ***Prahl v. Brosamle,*** 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987).

The court's approach to the pension was not outside its authority under § 767.255, STATS., the statute governing property division. While the pre-marriage portion of a pension is not exempt from the marital estate for purposes of property division, *see* ***Rodak v. Rodak,*** 150 Wis.2d 624, 630, 442 N.W.2d 489, 492 (Ct. App. 1989), the circuit court may nevertheless exercise its discretion in dividing the pension by considering the factors relevant to the case, *see* § 767.255(3)(m), and the economic circumstances of each party, *see* § 767.255(3)(j).[2]

Jeanne proposed an alternative disposition for the pension: awarding the entire pension to Ronald and offsetting that value by awarding Jeanne more property, including both residences and a sizable equalization payment from

[2] We do not view the circuit court's treatment of the pension as indicative that the court holds the mistaken view that pension earned pre-marriage is excluded per se from the marital estate.

Ronald. However, this treatment would have left Ronald without a residence and with severe financial hardship. Additionally, the court took steps to protect Jeanne by requiring Ronald to procure a $200,000 life insurance policy with Jeanne as the beneficiary. There were insufficient assets in the marital estate to permit division of the present value of the pension at the time of the divorce without causing undue financial hardship to Ronald by stripping him of all assets and requiring an equalization payment to Jeanne to account for the present value of the pension.[3] *See* ***Holbrook v. Holbrook,*** 103 Wis.2d 327, 340, 309 N.W.2d 343, 349 (Ct. App. 1981). Under the facts of this case, the court's treatment of the pension was a reasonable exercise of its discretion. *See* ***id.*** at 338-39, 309 N.W.2d at 348-49.

Jeanne challenges the fact that she must make an equalization payment, not the calculation of the amount of the payment. Because we have upheld the circuit court's treatment of the pension, we necessarily uphold the consequence of that disposition—Jeanne's obligation to make an equalization payment to Ronald.

Jeanne challenges the four-year maintenance award; she had requested six years of support. In awarding maintenance, the court considered the length of the marriage, that Ronald has health problems and is on the verge of retiring, and that he earns a "decent" income as a police officer. The court noted that Jeanne "is beginning a career in public education which has the potential of providing her with excellent retirement and salary benefits with time." Jeanne's health is excellent and she earned her undergraduate and master's degrees during

[3] To the extent that we have not addressed any of the numerous arguments raised on appeal relating to the pension, the arguments are deemed rejected. *See* ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

the marriage. The court noted the substantial change in the parties' circumstances as a result of the divorce and that Jeanne would need a period of maintenance based on the evidence of the family's lifestyle. The court awarded maintenance for four years after considering the parties' ages, employment, need, health and adjustment to the post-marriage lifestyle.

The determination of the amount and duration of maintenance rests within the sound discretion of the trial court and will not be upset absent an erroneous exercise of discretion. *See* ***Wikel v. Wikel,*** 168 Wis.2d 278, 282, 483 N.W.2d 292, 293 (Ct. App. 1992). Discretion is properly exercised when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. *See* ***id.***

Jeanne argues that the maintenance term is too short given the length of the parties' marriage and because Ronald could postpone his retirement, thereby depriving Jeanne of payments from his pension. Ronald testified that he intends to work until the youngest child graduates from high school so that he can make his child support payments. The court characterized Ronald as on "the cusp" of retirement. Based upon the evidence at trial, Ronald's retirement is likely to occur near in time to the cessation of maintenance. Jeanne begins receiving her share of Ronald's pension payments once he retires. We conclude that the court considered the appropriate factors in establishing the term of maintenance.

Jeanne asks this court to direct the circuit court to award her attorney's fees. This issue is inadequately briefed and we do not address it. *See* ***Vesely v. Security First Nat'l Bank,*** 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985).

Jeanne did not pay the equalization payment from the proceeds of the refinancing of her home, and Ronald moved the court to compel her to comply with the judgment of divorce. At the hearing on the motion, Jeanne advised that she did not have any money to pay Ronald because the funds remaining after she paid off her mortgage had been spent for other purposes, including paying off her car, purchasing a car for her college-age daughter, paying tuition expenses for herself and her daughter, buying a new computer, and paying credit card debt, a debt to her mother, attorney's fees and other litigation expenses. Jeanne testified that she felt morally obligated to pay the debts and make the car and computer purchases to take care of the children.

The court found Jeanne in willful contempt of the court's requirement that she make the equalization payment within ninety days of entry of the judgment of divorce. The court found that Jeanne incurred debt in violation of a pre-judgment order and devoted the refinancing funds to obligations she did not necessarily have, such as purchasing a car for her adult daughter, instead of paying Ronald, whose payment was specifically ordered by the judgment of divorce. The court fashioned the following means to compel Jeanne's compliance with the judgment of divorce: Jeanne was required to give Ronald a mortgage in the amount of $41,402 to secure payment of the equalization payment and to pay Ronald $570.90 semi-monthly with a credit for Ronald's maintenance payments. The court suspended Ronald's maintenance payments pending payment of the equalization amount to him.

On appeal, Jeanne argues that she did not willfully fail to pay Ronald and is unable to comply with the court's plan for achieving payment of the equalization payment. "[A] person may be held in contempt of court for the failure to pay money only where the failure is willful and not the result of inability

to pay." ***Besaw v. Besaw***, 89 Wis.2d 509, 516, 279 N.W.2d 192, 195 (1979). Jeanne had the ability, i.e., the financial wherewithal, to pay Ronald when she received the proceeds from the refinancing. We conclude that the court's finding that Jeanne consciously and willfully chose to use her funds to satisfy other perceived obligations is not clearly erroneous. *See* § 805.17(2), STATS. That she chose to apply the proceeds to other perceived obligations was "willful and contemptuous" and has resulted in her alleged inability to make the equalization payment. "[W]here the inability is willfully brought about by defendant himself, with intent to avoid payment, the refusal to pay becomes contumacious, and the inability so resulting will not purge the defendant of contempt." ***Schroeder v. Schroeder,*** 100 Wis.2d 625, 640, 302 N.W.2d 475, 483 (1981) (quoted source omitted). The court's decision to give Ronald a mortgage on Jeanne's house for the amount of the equalization payment and to require Jeanne to make semi-monthly payments to Ronald (with a credit for maintenance) is a means of enforcing the judgment of divorce. Jeanne previously chose to deprive herself of the opportunity to comply with the judgment of divorce. Therefore, Jeanne's complaints that she is unable to meet the court's order for semi-monthly payments to Ronald are not persuasive.

On appeal, Jeanne focuses solely on the fact that she paid pre-existing debt and does not acknowledge that some of the funds were used to purchase her daughter's vehicle and a computer. Jeanne's argument is at odds with the record, as is her argument that the court did not clearly direct that Ronald should be paid before other creditors. The judgment of divorce required payment to Ronald within ninety days of entry of the judgment of divorce. This provision is unambiguous and Jeanne consciously chose to disregard it. While Jeanne was entitled to make "moral judgments" about how she would spend the refinancing

proceeds, it is beyond dispute that she intentionally chose to use her available funds for matters other than the court-ordered payment to Ronald. Jeanne's motivation does not undo her intentional disregard of the court's requirement.

By the Court.—Judgment and order affirmed.

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