COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2010 **Cir. Ct. No. 2010FA338**

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

IN RE THE MARRIAGE OF:

RICHARD WARREN BARE, JR.,

PETITIONER-APPELLANT,

V.

WENDY SUE BARE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Richard Bare, Jr., appeals the maintenance portion of the judgment dissolving his marriage to Wendy Bare. We reject Richard's claim that the trial court erred in ordering maintenance based on the income he would have been earning had he not unreasonably quit his job. We affirm.

¶2 Richard and Wendy were married in 1997. They adopted one child during the marriage who was emancipated at the time of the divorce. Richard, a CPA with an MBA, was the comptroller for Wisconsin Lift Truck when he filed for divorce.[1] His July 2010 employment contract guaranteed him employment for one year, unless terminated for cause, and six months' severance pay if he were terminated after that year. It also guaranteed him quarterly $4,000 raises through October 1, 2011. His salary would have been $78,000 as of the time of trial. Wendy has a high-school diploma and was the operations manager for Richard's family's business. Wendy was terminated after Richard filed for divorce and she has been unable to find other employment.

¶3 Richard filed for divorce in March 2010. Between November 2010 and March 2011, Richard was found in contempt of the temporary orders three times. Two months before the divorce trial, Richard quit his job. His letter to his employer stated that his resignation was "effective immediately" and that he was moving to Florida to care for his mother.

¶4 Richard still was unemployed at the time of the trial. The trial court ordered Richard to pay Wendy maintenance of $2500 a month for eight years. In

[1] Wisconsin Lift Truck hired Richard when it acquired the assets of Witco Systems, Inc, a former competitor and Richard's former employer, after outbidding Richard and a partner in the purchase of Witco's assets.

determining maintenance, the court imputed to him the $78,000 annual income he would have been earning at the time of trial had he not voluntarily left his position. It also imputed to him investment income of $11,626, finding that his testimony that his mother unilaterally transferred all the investment income to herself without his knowledge was not reasonable or believable.[2] The court imputed to Wendy, who still was unemployed, an annual income of $16,120, based on a full-time job at minimum wage. The trial court also found Richard in contempt on outstanding contempt issues and remanded him to the custody of the sheriff.[3]

¶5 On appeal, Richard challenges the maintenance award on the basis that the trial court wrongly determined that voluntarily terminating his employment was unreasonable, in other words, that he was "shirking."[4] The general rule that we review a maintenance award for an erroneous exercise of discretion is subject to a shirking exception. ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). Shirking is established where the trial court finds that a party's employment decision to reduce or forgo income is voluntary and unreasonable under the circumstances. ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758. While the legal question of reasonableness ordinarily is a question of law, here we give weight to the trial court's ruling because its legal conclusion is so intertwined with the factual findings necessary to support it. ***Van Offeren***, 173 Wis. 2d at 492-93. "The burden of showing reasonableness is on the party who reduces or forgoes income."

[2] Richard does not appeal the imputation of the investment income amount.

[3] Richard represents that he purged the nearly $13,000 contempt later that day.

[4] The trial court need not expressly use the word "shirking." ***Scheuer v. Scheuer***, 2006 WI App 38, ¶9, 290 Wis. 2d 250, 711 N.W.2d 698.

Chen v. Warner, 2004 WI App 112, ¶14, 274 Wis. 2d 443, 683 N.W.2d 468, *aff'd*, 280 Wis. 2d 344.

¶6 Richard testified at trial that he quit his job because he feared being laid off, he did not know his employment contract was structured to ensure his income through February 2012 and he had to take care of his ailing mother, Judith. He also testified that it "was not the job that they had told me it would be."

¶7 Witness credibility is within the province of the trial court. ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980). The trial court said it was "hard-pressed to believe" any of Richard's testimony. It specifically found that Richard perjured himself at his deposition, before the trial court and before the family court commissioner when he testified that he had no knowledge of the whereabouts of marital funds from a 401(k) account, when he actually had cashed in the account and gambled the funds away.

¶8 Richard's claim that he quit so as not to be laid off was undercut by his employment contract. He testified that he read the contract but was not aware of its protections and guarantees. Considering that Richard holds an MBA from Notre Dame and is a CPA, the court properly found his testimony not credible.

¶9 Richard also claimed that he terminated his employment to care for Judith, since his sister cannot help because she is battling pancreatic cancer. Evidence was presented that Judith told the process server that Richard did not live with her and she had no idea of his whereabouts, and that Richard's sister testified at deposition that she had not seen him at Judith's residence and did not know where he lived. The court also looked askance at Richard's claims about feeling compelled to quit due to Judith's and his sister's poor health in view of the sister's testimony that, shortly after Richard quit work, she and Judith went on a

twelve-day cruise. "A trial court's finding of fact made on conflicting evidence should not be set aside if a judicial mind could, on due consideration of the evidence as a whole, reasonably have reached that conclusion." ***McManus v. Hinney***, 35 Wis. 2d 433, 441, 151 N.W.2d 44 (1967).

¶10 Richard also testified at trial that he quit because he was unhappy with the job, as he was not given the duties and responsibilities of a comptroller. In view of Richard's contractual employment protection and guaranteed salary with quarterly increases, we uphold the court's conclusion that Richard's voluntary termination of his employment was unreasonable under the circumstances and appeared to be an effort to avoid his support obligations.

¶11 Richard adds the argument here on appeal that quitting was an act of self-preservation. Claiming that he was "under great stress" from dealing with his father's death fourteen months earlier and "overwhelmed by a job he hated, working for an employer he despised," he asserts that it was reasonable to "[leave] his employment to get away from a situation he found untenable."

¶12 Richard draws an analogy to the situation in ***Chen***, a child-support shirking case involving the divorce of two physician parents. Unable to reduce her hours, the mother decided to stay at home with the children after exploring the feasibility of supporting them through investment income. *See* ***Chen***, 280 Wis. 2d 344, ¶10. The stock market soured and the income stream slowed to a trickle. ***Id.***, ¶11. She could not find a part-time position within commuting distance and sought child support from her ex-husband, who claimed that her initial decision to terminate her employment and later refusal to seek out-of-area work amounted to shirking. ***Id.***, ¶¶12, 19. The supreme court disagreed and concluded that the mother's decisions were reasonable under the circumstances. ***Id.***, ¶4.

¶13 Richard asserts that just as the mother in ***Chen*** "acted with good intentions" in leaving her employment to take care of the children, his good intentions "were in leaving his employment to take care of himself." Richard misreads ***Chen***. The mother's decisions were not found reasonable because they were backed by good intentions but because they comported with the initial decision of both parties that she be home with the children; that her original plan to support the children was well-researched and unforeseeably failed through no fault of her own; that being a stay-at-home parent, if it is possible, is beneficial; and the children's father easily could afford to pay child support. *See* ***id.***, ¶¶4, 8-11. Richard's motivation fits none of those kinds of considerations. Even if his voluntary reduction in income was well-intended, his decision was unreasonable in light of his maintenance obligations. *See* ***Van Offeren***, 173 Wis. 2d at 496-97.

¶14 When shirking is established, it is appropriate to consider the obligor's earning capacity instead of actual earnings. ***Van Offeren***, 173 Wis. 2d at 492. We conclude that the record supports a shirking determination. The trial court therefore properly exercised its discretion by setting a maintenance award based on Richard's earning capacity—the $78,000 salary he would have been earning but for his unreasonable decision to terminate his employment.

By the Court.—Judgment affirmed.

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