COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2735 **Cir. Ct. No. 1997FA51**

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

IN RE THE MARRIAGE OF:

ROGER WILLIAM KLIMPKE,

PETITIONER-APPELLANT,

V.

JEAN MARIE KLIMPKE N/K/A JEAN MARIE KRAUSE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Roger Klimpke appeals a post-divorce order that reduced his maintenance by less than he had requested. He challenges: (1) the

circuit court's determination that his ex-wife, Jean Krause, was not shirking on her income; (2) the percentage of income allocated to each party; (3) the inclusion in Klimpke's income of partial payments from a pension fund that had previously been divided in the divorce; and (4) the amount of weight given to Klimpke's ability to pay in the court's balancing of the equities. For the reasons discussed below, we affirm the decision of the circuit court.

BACKGROUND

¶2 Klimpke moved to reduce his $600 monthly maintenance obligation because medical issues that had arisen after the divorce led him to take early retirement from the postal service at age 62. The circuit court found that Klimpke's monthly income had decreased from $4,826 to $1,980 upon his retirement, and that he had developed a number of health issues requiring medication. This income total included partial payments Klimpke was drawing from his pension fund, to which Klimpke had continued to make contributions.

¶3 Meanwhile, the circuit court found that Krause's monthly income had decreased from $2,455 to $989 when she stopped working in November, 2010 (when Krause was 62), because of her health and to provide home care for her mother. The court noted that Krause's decision to care for her mother, while not a legal obligation, was not unreasonable. The court also found that Krause had limited her potential retirement income by cashing in a $30,000 IRA and failing to make additional contributions to her own retirement plan following the divorce.

¶4 The court decided to reduce Klimpke's monthly maintenance obligation to $500 in order to equalize the parties' actual, reduced incomes. The court left open the possibility that additional adjustments could be made once it

was determined what the final QDRO payments from Klimpke's postal retirement plan would be.

STANDARD OF REVIEW

¶5 Maintenance determinations lie within the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Therefore, we will affirm maintenance awards when they represent a rational decision based on the application of the correct legal standards to the facts of record. ***Id.*** The voluntariness of a decision to reduce income is a question of fact that we will uphold unless it is clearly erroneous, while the reasonableness of such a decision is a question of law to which we will accord some degree of deference because it is intertwined with factual determinations. *See* ***Chen v. Warner***, 2004 WI App 112, ¶¶12-13, 274 Wis. 2d 443, 683 N.W.2d 468.

DISCUSSION

¶6 Klimpke first argues that the circuit court should have imputed additional income to Krause based upon her wages before she stopped working. Courts use earning capacity, rather than actual earnings, to determine the amount of maintenance payments when a party has been found to be shirking. ***Id.***, ¶11. The term "shirking" refers to a voluntary and unreasonable employment decision which reduces income. ***Id.***

¶7 Here, there is no dispute that Krause's decision to stop working was voluntary. We agree with the circuit court, however, that it was also reasonable. Klimpke appears to be under the mistaken impression that it is always unreasonable to voluntarily reduce income for any reason other than an actual inability to work. But that is not the law. As the circuit court observed, people's

circumstances change as they age, and it is normal to make some choices that will affect income in response. In sum, we are satisfied that the record adequately supported the court's determination that Krause's decision to stop working was a normal and reasonable response to her health and a parent in need of care, and not motivated by a desire to "shirk" any responsibility she had to provide for herself.

¶8 Klimpke's second argument is that the circuit court erred in awarding Krause more than half of the parties' combined income. That argument fails, however, because it is premised on the mistaken theory that the circuit court was required to impute additional income to Krause.

¶9 Klimpke's third argument is that the court erred in including all of his partial pension payments in his income. He contends that the court should only have included any amount attributable to the additional contributions he made after the divorce, and that Krause did not present any evidence of what that amount was. However, Klimpke simply ignores the fact that the QDRO had not yet been implemented. It was therefore reasonable for the circuit court to assume that all of the partial pension payments came from Klimpke's post-judgment contributions. If the final pension payments would show that that was not the case, the court indicated a willingness to revisit the issue. We are satisfied that the court's treatment of this issue was reasonable given the incomplete information before it.

¶10 Finally, Klimpke contends that the circuit court failed to properly weigh the fact that his budgeted expenses exceed his income against the fact that Krause's budgeted expenses are being used to support her mother as well as herself. We will assume for purposes of argument that it would not be fair for Klimpke to have to pay for the support of Krause's mother. We are not

convinced, however, that that is what the record before the circuit court showed. For instance, there is no reason to believe that Krause's rent of $550 per month would be any different if her mother were not living with her, or that her claimed expense of $400 a month for food—the same amount Klimpke claimed in his budget—would not be a reasonable budget amount if she were living alone. Since there was no factual basis to conclude that any significant portion of Krause's budget was attributable to her care of her mother, the court did not erroneously exercise its discretion by accepting Krause's budget as the amount necessary for her own standard of living. Moreover, while Klimpke's submitted budget exceeded his current income, it would be fair to assume that that situation would be ameliorated once Klimpke began receiving the rest of his pension pursuant to the QDRO order. In sum, we will not reweigh the factors reasonably balanced by the circuit court in the exercise of its discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).