

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2007

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. 2006AP2625

Cir. Ct. No. 2005FA24

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

LORRAINE A. WELLS,

PETITIONER-RESPONDENT,

V.

ALLISON G. WELLS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Allison Wells challenges several aspects of the judgment divorcing him from Lorraine Wells: maintenance, child support, the

assignment of credit card debt between the former spouses, and an award of attorney's fees to Lorraine. We uphold the circuit court's discretionary decisions and affirm the judgment.

¶2 Allison and Lorraine were married for twenty-seven years; five of the parties' ten children were minors as of the divorce. Lorraine did not work outside the home, and she home-schooled the children for many years. At the conclusion of the April 2006 divorce proceedings, the circuit court determined that for child support and maintenance purposes, Allison's income was \$77,000 per year (\$6416 per month), the amount he earned in his last year of employment at Journal Communications.¹ The court ordered child support of \$2180 per month pursuant to the percentage guidelines. The court also ordered permanent maintenance from Allison to Lorraine in the amount of \$820 per month due to the length of the marriage, Lorraine's low earning capacity due to her years of being in the home, her spinal injury and ongoing responsibility for the minor children and, in particular, her added responsibility for the parties' youngest child, who is developmentally disabled.

¶3 On appeal, Allison challenges the maintenance and child support awards as a misuse of discretion because they were premised on his earning capacity. The amount of child support and maintenance is committed to the circuit court's discretion. *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996); *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Allison contends that a determination of earning capacity is appropriate only

¹ Allison was released by Journal Communications in January 2004 after corporate restructuring.

if the circuit court has determined that the payor spouse was shirking. Allison's argument is flawed: this is not a shirking case.

¶4 Our supreme court recently discussed shirking in *Chen v. Warner*, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758:

A circuit court would consider a parent's earning capacity rather than the parent's actual earnings only if it has concluded that the parent has been "shirking," to use the awkward terminology of past cases. To conclude that a parent is shirking, a circuit court is not required to find that a former spouse deliberately reduced earnings to avoid support obligations or to gain some advantage over the other party. A circuit court need find only that a party's employment decision to reduce or forgo income is voluntary and unreasonable under the circumstances.

¶5 Our reading of the circuit court's decision in this case confirms that this is not a shirking case. Rather, the circuit court established Allison's post-divorce obligations based upon its assessment of Allison's credibility and whether he had submitted appropriate, credible and usable proof of his current income. The court concluded that Allison did not do so. Therefore, the court turned to the most credible evidence of Allison's annual income: \$77,000 earned at Journal Communications.

¶6 Support for our view is found in the circuit court's findings. The court noted Allison's failure to present evidence of his income.

One of the more difficult things here is to ascertain the value of the solely-owned business of [Allison], that being the Fox Cities Furniture Warehouse business. The Court is satisfied that throughout this entire case, [Allison] has failed to cooperate with the Court's directive and the directive of his own attorneys to produce financial information and records. We had one hearing where

[Allison] indicated he couldn't get information from his accountant.²

* * * * *

As to the issue of child support and maintenance, the Court is not sure that it can really tell what [Allison's] earnings are. Again, we have the same problems here with a real lack of documentation on his part as to what he is earning. What the Court is fairly well satisfied of is that he has an earning capacity of approximately \$77,000 per year, based on what he earned working for Journal Communications.

¶7 Where the proof is lacking, the court must somehow reach a ruling based on the available credible evidence. Allison cannot complain about the circuit court's determination of his annual income as \$77,000 "when the precise information available to make that determination was in his exclusive control." See *Lellman v. Mott*, 204 Wis. 2d 166, 175, 554 N.W.2d 525 (Ct. App. 1996).

¶8 Allison argues that he presented proof of his current income for the court's use in establishing his post-divorce obligations. At the divorce hearing, Allison testified that in 2005, his furniture business's taxable profits were \$4271 and he drew \$22,996 from the business, yielding a total income of \$27,267. However, Allison also testified that he drew \$27,000 from the business in the first three months of 2005, but he could not inform the court how the drawn funds were used. A draft of Allison's 2005 tax return confirmed an annual draw of \$22,996, yet Allison could not explain how the 2005 draw dropped from a pace of \$27,000 over the first three months to a total 2005 draw of \$22,996. In addition, Allison

² The circuit court observed that most people would fire an accountant who appeared to be as unable to produce financial information as Allison described his accountant to be. The court then observed that the "accountant suited [Allison's] purposes, because [Allison] really did not want us to know what was going on, and I think that is demonstrated by the greater weight of the credible evidence in this case."

paid \$26,625 in child support in 2005, and on cross-examination at the April 2006 divorce hearing, he could not explain how he supported himself with the remaining several hundred dollars of 2005 income. Clearly, the circuit court did not find Allison's testimony about his income credible. Therefore, the court relied upon the only credible evidence: Allison's \$77,000 Journal Communications salary.

¶9 It was for the circuit court as the fact finder to evaluate the credibility of the witnesses and the evidence. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). We will not overturn the circuit court's findings unless they are clearly erroneous. *See id.* The court's findings are not clearly erroneous based on this record. A party has the burden to support his or her assertion by appropriate evidence. *State v. Sullivan*, 2006 WI App 238, ¶13 n.5, 297 Wis. 2d 430, 724 N.W.2d 908. Allison did not do so. The court properly exercised its discretion in setting child support and maintenance based upon the available credible evidence of Allison's current income.³

¶10 Allison challenges the circuit court's allocation of credit card debt. The court assigned \$40,000 in credit card debt to Allison and did not consider that debt when fashioning the discretionary property division.⁴ *See Sellers*, 201 Wis.

³ In her respondent's brief, Lorraine cites to *Heise v. Heise*, No. 2004AP788, unpublished slip op. (WI App Jan. 11, 2005), and *Herlitzke v. Herlitzke*, No. 2005AP997, unpublished slip op. (WI App Oct. 19, 2006). Both cases are unpublished, and unpublished cases may not be cited. WIS. STAT. RULE 809.23(3) (2005-06). Counsel is warned that a future infraction of this Rule of Appellate Procedure may result in a sanction. In the future, counsel must brief more carefully to be certain that the brief does not violate the Rules of Appellate Procedure.

⁴ The record indicates that Lorraine paid \$8180 in credit card bills during the pendency of the divorce proceeding, and the court did not account for that payment as part of the property division.

2d at 585. Divisible debts include obligations of either party acquired before or during the marriage. *Derr v. Derr*, 2005 WI App 63, ¶46, 280 Wis. 2d 681, 696 N.W.2d 170. Allison's attempt to prove the marital nature of the credit card debt suffered from the same infirmity as his attempt to prove his income. We quote at length from the court's ruling on the credit card debt:

[Allison] has asked the Court to take his word for it, that he has certain credit card bills that are marital credit cards. But, yet, in delving through the exhibits that were received here at trial, the Court simply has no indication here of how these credit card balances were obtained, what was purchased on these credit cards, and has no way of determining whether these debts were incurred for marital purpose.

Therefore, [Allison] can have the credit cards. If, in fact, they exist, they are his. I will not include those in determining what the marital estate is. When a person makes a claim to the Court, they have the responsibility of coming forward with evidence and proving that claim. [Allison] has failed to do so in many areas throughout the course of this divorce, and he cannot now be heard to ask the Court for any kind of succor or relief, when he is, I believe, intentionally attempting to bamboozle the Court, and to obfuscate information and facts.

Quite frankly, that is why it has taken me so long to get a decision out in this case, because I attempted to scour the record here, to find facts and evidence that support his assertions, and I was unable to find these things. Of remarkable significance, the record indicates here that the Court had allowed him to submit evidence as it concerns a bank loan, that he claimed he had, to purchase his Journal Communications stock, which, obviously, he had that loan, but he didn't bring it into Court. Just like he didn't bring a lot of other things into Court here, to assist the Court in reaching a fair result.

So, based on the way that Mr. Wells conducted himself during the course of this divorce, the Court has no choice but [to] find any assertion made by him, that is not otherwise supported by credible evidence, to, in fact, be incredible. Unless there is other evidence that supports his assertion that things were marital debts, when there is no proof of it, it simply cannot be granted any credibility by

this Court, because the Court is satisfied that Mr. Wells here is part of a “power and control issue”, which I think has been demonstrated to the Court’s satisfaction.

¶11 Allison testified that some of the charges on the credit cards were post-separation charges. However, he did not elaborate in any fashion as to the nature and amount of the charges he believed to have been for a marital purpose such that he and Lorraine should share responsibility for those charges. Allison did not offer the requisite proof. Therefore, the court did not err in concluding that Allison failed to substantiate his claim that the credit card debt was marital debt and relevant to the property division.

¶12 Allison disputes the circuit court’s decision to require him to contribute to Lorraine’s attorney’s fees. In support of its contribution decision, the circuit court found the following facts: Allison handled the family’s finances throughout the marriage, failed to comply with court orders and discovery demands,⁵ sold stock in violation of an order of the family court commissioner and did not account for the sale, made a frivolous challenge to the paternity of his children, engaged in a pattern of abuse toward Lorraine, offered incredible excuses for his failure to provide financial information, and obfuscated his finances. These

⁵ The court made the following remarks on this topic:

When people don’t produce evidence, that is helpful to the position they are asserting, when they don’t provide the documentation, there is only one reasonable inference for the Court to draw, and that is that such evidence does not exist.

So, when you fail to comply with discovery, and you obfuscate, and you confuse the issues, and you can’t get accounting documents in on time, or you can’t get stuff back from your accountants, and you come into trial unprepared, whose fault is it, Mr. Wells?

findings are not clearly erroneous. The court found that Lorraine's attorney's fees were in excess of \$20,000, and they were reasonable.

¶13 The court ordered Allison to contribute \$12,000 to Lorraine's fees, in addition to a \$1500 contribution previously ordered because Allison asked for an opportunity to submit financial information that should have been submitted at the divorce hearing. Allison complains that although the court determined that Lorraine required a contribution to her attorney's fees, the court did not determine that Allison could afford to make such a contribution.

¶14 The court did not misuse its discretion in ordering Allison to contribute to Lorraine's attorney's fees. *See Lellman*, 204 Wis. 2d at 175-76. Lorraine has limited earning capacity due to her many years in the home caring for numerous children whom she home-schooled; five of those children remain minors. In addition, Lorraine has health problems and primary responsibility for the parties' developmentally disabled youngest child. Allison's conduct during the divorce proceeding necessitated an increased expenditure by Lorraine on attorney fees. Allison has an income of \$77,000 per year. An award of attorney's fees arising from Allison's conduct was appropriate. *Id.* at 175 (award of fees appropriate "when counsel is required to expend additional time because of a party's lack of cooperation.")

By the Court.—Judgment affirmed.

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

