COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP299-FT **Cir. Ct. No. 2005FA38**

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

IN RE THE MARRIAGE OF:

DEAN W. TAUTGES,

PETITIONER-APPELLANT,

V.

TINA M. TAUTGES N/K/A TINA M. WEIGEL,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Dean Tautges appeals a postdivorce order increasing maintenance. Tautges challenges findings of shirking and contempt, and an award of attorney fees to his ex-wife Tina Weigel.[1] We affirm.

¶2 The parties were divorced on May 20, 2008, after twenty-two years of marriage. At the time of the divorce, Tautges earned $43,200 annually as a truck driver. Weigel was disabled. The parties had three children, but only one was a minor at the time of the divorce. The circuit court ordered Tautges to pay $612 monthly child support, and $900 monthly maintenance that would increase to $1,400 monthly for an indefinite duration, effective June 1, 2009, when the support obligation ceased.

¶3 Tautges appealed, and we affirmed the divorce judgment. *See* ***Tautges v. Weigel***, No. 2008AP1959-FT, unpublished slip op. (WI App Feb. 17, 2009). Seven months after our decision on appeal, Tautges moved to decrease maintenance, alleging his monthly earnings had decreased from $3,600 to $2,500. The parties subsequently stipulated that maintenance would be decreased to $900 monthly and any arrearage incurred prior to January 2010 would be forgiven.

¶4 On January 4, 2011, Tautges again moved to decrease maintenance, alleging his monthly earnings had decreased from $2,500 to $1,650. Weigel responded by filing a motion for increased maintenance based on Tautges's earning capacity, contempt for his failure to pay maintenance as previously agreed, and attorney fees.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 Following a hearing, the circuit court issued an oral decision on November 18, 2011. The court denied Tautges's request for a reduction in maintenance, and found his testimony "inconsistent and not credible." The court also concluded Weigel had established a substantial change of circumstances and set maintenance back to $1,400 monthly.

¶6 The court specifically found that Tautges "has been shirking on his maintenance obligations so that it is appropriate to consider [his] earning capacity as it pertains to a substantial change in financial circumstances." The court stated that Tautges "has not earned so little since 1989 yet he is not out looking for other employment." Instead, the court found that Tautges "just passively accepts whatever hours and pay Kaatz trucking will give him." The court found Tautges "is voluntarily refusing to pursue higher paying full-time employment."

¶7 The court also found Tautges in contempt for failing to pay the previously agreed upon $900 monthly maintenance. The court found that Tautges "has avoided and fought his maintenance obligation for years, even after Ms. Weigel agreed to a $500 a month reduction." The court observed that even after that reduction, Tautges still failed to pay, "now only paying about $675 a month since November of 2010, an amount Ms. Weigel cannot survive on." The court found that Tautges, "by his choice, willfully and intentionally accepted minimal pay voluntarily and unreasonably to avoid his maintenance obligations." The court further ordered Tautges to pay $6,457.50 in attorney fees, together with $700 toward Weigel's vocational expert's fees. Tautges now appeals.

¶8 On appeal, Tautges insists, "It is undisputed from this record that Tautges's reductions in income were not voluntary because they were unilaterally imposed on him by his employer, and he had nothing to do with them." Tautges

concedes evidence in the record establishes he could make $60,000 yearly, but contends this would require him to become an over-the-road truck driver. Tautges alleges he became a delivery driver an entire year before the date of divorce, and to require him to go back over-the-road when he was not doing so at the time of the divorce was error.

¶9 Vocational expert Michael Guckenberg testified that Tautges was effectively working part-time and earning approximately one-third of his earning capacity. Guckenberg also testified that employment opportunities were available to Tautges that would not entail over-the-road truck driving. Guckenberg testified:

> Well, there are regional positions, local drivers, shuttle drivers, drop and hitch, not to mention if he wanted to go into a factory, the paper mill, I know this year in – not in Brokaw – in Weston had 18 – excuse me – 14 positions open. They were offering starting wage of $16.95 an hour.

¶10 In its oral decision, the circuit court reiterated Guckenberg's testimony that Tautges was a highly qualified and experienced truck driver. The court stated:

> He has a good driving record and 20 years experience. Mr. Guckenberg stated that Mr. Tautges would have a good reference from a 15-year long-term employer; namely, Roehl Transport. When he left Roehl, he was making about $60,000 a year. Mr. Guckenberg stated Mr. Tautges works in an occupation where there is a high demand with many varied options available as to hours, pay, and location, and whether, as an over-the-road truck driver or driving in a different capacity locally or in the region. Thus, Mr. Guckenberg stated to a reasonable degree of vocational probability that the earning capacity of Mr. Tautges is $60,000 a year at this time.

¶11 Tautges did not dispute this earning capacity, nor indicate that he was not capable of earning this income. Rather, the reason Tautges gave for not seeking full-time employment consistent with his earning capacity was a desire to

spend more time with his family. However, as the court recognized, his children are grown or estranged from him, and his current wife works long hours on the farm she owns, during which he does not see her.

¶12 Tautges insists that he was improperly denied the right to pursue what he honestly believes to be in his best interests, even though he may be working for a lesser financial return. However, his argument is largely premised upon his own testimony, which the circuit court found not credible. The circuit court is the final arbiter of witnesses' credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶13 The evidence supports the circuit court's determination that Tautges was not diligently seeking employment to meet his support obligation to his ex-wife. It found that Tautges failed to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his ex-wife. *See* ***Edwards v. Edwards***, 97 Wis. 2d 111, 119, 293 N.W.2d 160 (1980) (citing ***Balaam v. Balaam***, 52 Wis. 2d 20, 28, 187 N.W.2d 867 (1971)). As a result, the court appropriately based the maintenance award on earning capacity rather than actual earnings. It properly imputed income to Tautges based upon shirking.

¶14 Shirking occurs when the reduction of actual earnings was "voluntary and unreasonable under the circumstances." ***Scheuer v. Scheuer***, 2006 WI App 38, ¶9, 290 Wis. 2d 250, 711 N.W.2d 698. Ordinarily, the question of reasonableness is a question of law, but because the circuit court's legal conclusion is so intertwined with the factual findings necessary to support it, we give weight to the circuit court's ruling. Therefore, we review a shirking determination as a question of law, but one to which we pay appropriate deference. ***Chen v. Warner***, 2005 WI 55, ¶43, 280 Wis. 2d 344, 695 N.W.2d 758.

¶15 The circuit court found the record of shirking in this case "quite compelling." It noted Tautges's income had dropped almost fifty percent, and he "has not earned so little since 1989, yet he is not out looking for other employment, despite his impressive credentials and earning capacity."

¶16 The circuit court reasoned that if it agreed with Tautges's analysis, an employer could cut his pay by another fifty percent, and then another fifty percent, and Tautges could simply continue to say the wage reduction was involuntary due to a deterioration of business through no fault of his own. The court appropriately concluded, "That makes no sense."

¶17 The court stated:

> [I]t is not reasonable for an able-bodied 46-year-old man, who has employable skills, substantial work experience, and a calculated earning capacity of $60,000, to take the position where he is now going to earn $20,000, or less ….
>
> The unreasonableness of that position is highlighted by [Tautges's] position that … he should not be expected to look into higher paying employment ….
>
> Whether he likes it or not, petitioner Dean Tautges has support obligations created by his marriage of 22 years to his disabled ex-wife.

¶18 Tautges also argues the circuit court improperly found him in contempt for failing to pay the previously agreed upon $900 monthly maintenance. Tautges insists "there is no evidence that Tautges had the ability to pay $900.00 per month in maintenance." Tautges misrepresents the record. As discussed previously, Guckenberg testified that employment opportunities were available to Tautges that would not entail over-the-road truck driving. The court also noted Tautges's history of arrearages and seeking reduced maintenance, and properly found that Tautges "has avoided and fought his maintenance obligation for years,

even after Ms. Weigel agreed to a $500 a month reduction. He was not satisfied and pushed for more." The record supports the court's findings that Tautges "by his choice, willfully and intentionally accepted minimal pay voluntarily and unreasonably to avoid his maintenance obligations." The court's contempt finding was justified.

¶19 Finally, Tautges argues the circuit court erred in awarding attorney fees of $6,457.50, and ordering Tautges to pay for Weigel's vocational expert fees of $700. The circuit court in a divorce action may award attorney fees to one party based on the financial resources of the parties, because the other party has caused additional fees by overtrial, or because the party refuses to provide information that would speed the process along. *See* ***Randall v. Randall***, 2000 WI App 98, ¶22, 235 Wis. 2d 1, 612 N.W.2d 737. An award of attorney fees is discretionary. *See* ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 499, 496 N.W.2d 660 (Ct. App. 1992).

¶20 Here, the circuit court properly exercised its discretion by awarding fees and costs based on the resources available to the parties, and as a contempt sanction. The court considered the parties' financial resources, and there can be no dispute that Tautges is in a better position to pay attorney fees than Weigel. Contrary to Tautges's perception, the court properly imputed income beyond the $1,650 monthly his employer was currently paying him.

¶21 Remarkably, Tautges argues it was inequitable to require him to pay fees and suggests Weigel is not disabled and has the ability to pay. Our decision affirming the divorce judgment included the finding that Weigel was unable to work due to her disability. *See* ***Tautges***, unpublished slip op. at ¶¶6-10. Weigel's

disability and inability to work are the law of the case and will not be further considered.

¶22 In conclusion, the record sustains the circuit court order. The circuit court gave lengthy explanations supporting its determinations and its oral decision was a textbook example of reasoning based upon extensive factual findings and appropriate legal conclusions.

By the Court.—Order affirmed.

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