

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2012

Diane M. Fremgen
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. 2011AP324

Cir. Ct. No. 2009FA43

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

PAULA J. SMITH,

PETITIONER-RESPONDENT,

V.

DANIEL J. SMITH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Daniel Smith appeals a judgment of divorce, arguing the circuit court erroneously exercised its discretion concerning maintenance and an award of attorney fees to his former wife, Paula. We affirm.

¶2 The parties were married on October 7, 1989. A divorce was granted on April 21, 2010. By stipulation, Paula received primary placement of the parties' two minor children. It was also stipulated that Daniel would pay child support of \$500 monthly. A trial was held to determine outstanding issues of maintenance and a request for attorney fees.

¶3 The circuit court found that Daniel had been receiving undisclosed cash payments from his employer, Brookes Implement, a business owned and operated by his father. Daniel had been employed by Brookes Implement for more than thirty years. The court awarded maintenance of \$600 monthly for an indefinite period, reduced to \$400 monthly when Daniel obtained his own residence and no longer lived with his parents. The court also ordered Daniel to contribute \$1,500 towards Paula's attorney fees. The court denied a motion for reconsideration. Daniel now appeals.

¶4 We will sustain discretionary decisions if the court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). The award of maintenance rests within the sound discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We generally look for reasons to sustain the circuit court's discretionary decisions. *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). We may search the record to determine if it supports the court's discretionary decision.

Randall v. Randall, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Witness credibility is in the province of the circuit court. *In re Estate of Dejmal*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶5 Daniel challenges the circuit court’s finding that he received additional cash payments. He contends there “is no evidence in the record, other than Ms. Smith’s testimony, that Mr. Smith is receiving additional cash payments to supplement his earnings from Brookes Implement.”

¶6 Daniel’s thinly veiled challenge to the sufficiency of the evidence lacks merit and he substantially ignores the standard of review regarding credibility. We conclude an adequate basis exists in the record to support the circuit court’s maintenance determination. The court’s finding that Daniel was receiving additional cash payments is supported by testimony the court found credible, as well as evidence regarding the family’s lifestyle.

¶7 Here, Paula testified that she personally witnessed Daniel’s receipt of cash payments. She further testified that Daniel had his own bank account, and there was never a time during their marriage that Daniel was not receiving cash from the family business. Paula testified Daniel “paid for everything in cash,” and she described numerous “big expenditures” obtained with cash from the business over the years, including a fishing boat, Chevrolet Blazer, \$3,000 down payment on their residence, and roof repairs, among other things.¹

¹ It is also undisputed that Daniel received \$400 monthly to help reimburse the family for health insurance. Several years after the \$400 monthly payments started, Daniel received \$200 monthly from the business as reimbursement for medications.

¶8 As the court stated:

I found Ms. Smith’s testimony to be credible. There was no reason to disbelieve anything she said really.... I did the math at 60 hours a week, you’d be making \$7.92 an hour and after working and knowing the implement business as well as he does, it sounds like he’s very knowledgeable about it and has been doing it since he was 16 [W]hen you compare that, I think she said she was making \$13 an hour at Festival Foods and she has less training and experience than Mr. Smith, it brings into question his testimony about what his income is. I also found it credible that there was a lot of cash.... [I]f his income was this low how did he make ends meet? And it doesn’t seem to make sense without the supplemental cash payments coming.

¶9 Daniel insists “there was an explanation for these cash purchases.” However, the court found his explanations incredible. It characterized Daniel’s reported income as “nebulous,” and emphasized that Daniel’s own actions made it unable to determine Daniel’s additional compensation. Among other things, it noted that financial disclosure statements were requested three separate times “and they didn’t get it, when it was finally produced, it didn’t help a lot.” The court concluded that an appropriate method of calculating maintenance would be based on Paula’s monthly expenses. The court stated, “[S]he is entitled to at least maintain the lifestyle she had during the marriage, and that can be done through this maintenance calculation.”

¶10 Although not explicitly stated, it is also apparent from the circuit court’s decision that support and fairness were primary objectives in awarding monthly maintenance for an indefinite period. The court discussed the length of the marriage, the fact that both parties were working full-time, and the need to ensure a fair and equitable financial arrangement between the parties to maintain Paula’s lifestyle. See *LaRocque v. LaRocque*, 139 Wis. 2d 23, 31-33, 406 N.W.2d 736 (1987). The court also inferred that it was not feasible for Paula to

become self-supporting. It recognized Paula's modest income and the lack of potential for significantly greater earnings. The court further emphasized that "they don't really have any savings or retirement accounts"

¶11 Daniel suggests the circuit court erroneously exercised its discretion by basing its decision on earning capacity rather than actual earnings, without an express finding of shirking or transfer with intent to defraud. He also claims the court "penalized" him for his career choice. Daniel's argument is misplaced. The court did not base its decision on Daniel's earning capacity. The court simply did not believe he was making what was reported on his W-2. This finding had nothing to do with Daniel's career choice.

¶12 In reviewing discretionary decisions, our task is to determine whether the circuit court could reasonably come to the decision it reached. The record in this case demonstrates the court considered proper factors concerning the amount and duration of maintenance, employed a process of reasoning based upon facts of record, and reached a conclusion a reasonable judge could reach. The court's maintenance decision, as a whole, incorporates appropriate considerations and is a proper exercise of discretion.

¶13 Daniel next argues the circuit court erroneously denied his motion for reconsideration without allowing "additional clarifying evidence" of his income from his father and his sister, the bookkeeper at Brookes Implement. To prevail on a motion for reconsideration, the moving party must present either newly discovered evidence or establish a manifest error of law or fact. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. A manifest error is not shown by the disappointment of the losing party but, rather, is the

“wholesale disregard, misapplication or failure to recognize controlling precedent” by the court. *Id.*

¶14 We can discern no developed argument alleging manifest error. Moreover, Daniel concedes that the evidence sought to be introduced on reconsideration “would not necessarily be new.” Rather, Daniel contends the testimony would have been introduced to support the evidence in the record regarding his income, and “to prove false” Paula’s testimony.

¶15 We agree with the circuit court’s conclusion that the testimony from Daniel’s father and sister could have been presented at trial. Daniel knew or should have known prior to trial what Paula’s arguments would be and what she was requesting the court to rule upon. The trial was adjourned on several occasions, and Paula submitted two separate statements to the court detailing the disputed issues. These submissions specifically discussed the allegation that Daniel received cash payments on a regular basis from his employer and refused to disclose information in that regard. Daniel’s reconsideration motion merely took umbrage with the court’s rulings and lacked any legitimate justification. *See id.* The court properly exercised its discretion in denying the motion.

¶16 Finally, Daniel insists the circuit court erroneously exercised its discretion by requiring him to contribute \$1,500 towards Paula’s attorney fees. The matter of allowance of attorney fees in a divorce case is discretionary with the circuit court. *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 483-84, 377 N.W.2d 190 (Ct. App. 1985). The circuit court in a divorce action may award attorney fees based on the financial resources of the parties, because the other party has caused additional fees by overtrial, or because the other party refuses to provide information which would speed the process along. *Randall*, 235 Wis. 2d 1, ¶22.

¶17 The circuit court specifically found that this matter “has been stretched out ... in part due to his failure to cooperate.” That finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2).² The court had previously emphasized the “difficulty in discerning” Daniel’s income. It noted Daniel’s failure to comply with numerous requests for financial disclosure and the lack of usefulness of the information ultimately obtained. The record also discloses discovery abuses, disregard of court orders and other reasons Paula incurred additional attorney fees.

¶18 The court also considered Daniel’s ability to pay the requested fees and, although not specifically mentioned, the record supports Paula’s need for the award and the reasonableness of the fee request. *See Johnson v. Johnson*, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996).

¶19 Daniel insists that the attorney fees award does not allow him “sufficient income for self-support.” Daniel again ignores the standard of review regarding credibility. The court explicitly rejected as incredible the argument concerning his income. The court found that Daniel received more income than he revealed over the years. Our review of the attorney fees award leads us to conclude that it was a proper exercise of discretion.

By the Court.—Judgment affirmed.

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

² References to the Wisconsin Statutes are to the 2009-10 version unless noted.

