COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2723 **Cir. Ct. No. 2008FA463**

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

ROBERT L. WILSON,

PETITIONER-RESPONDENT,

V.

JANET M. COSGROVE, P/K/A JANET M. WILSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Janet Cosgrove appeals a postdivorce order. The issues concern maintenance and property division. We affirm.

¶2 Janet and Robert Wilson were married on December 17, 1977. They entered into a legal separation agreement on April 1, 2009. A judgment of legal separation was converted into a divorce judgment, effective May 3, 2010.

¶3 Robert is a cardiologist who owned an 8% interest in Appleton Cardiology Associates, Ltd. On December 31, 2010, Appleton Cardiology Associates sold its assets to ThedaCare Physicians. Robert subsequently became a ThedaCare employee. Janet was a homemaker at all relevant times.

¶4 In the legal separation agreement, the parties stipulated that Robert pay Janet maintenance for an indefinite term. Maintenance included both a set amount and a percentage amount. The set amount was $10,500 monthly, payable in installments of $4,846.15 every two weeks, equivalent to 42% of Robert's "gross annual base salary (i.e. draw) income." The percentage amount was 37.5% of "all gross bonuses he receives" while legally separated and 42% upon divorce. The legal separation agreement also stated that Robert was awarded, as part of the property division, "his 8.344966% ownership interest in Appleton Cardiology Associates …."

¶5 On February 4, 2011, and April 14, 2011, Janet filed orders to show cause, claiming entitlement to 37.5% of employer-provided fringe benefits that Robert received in 2009.[1] Janet also argued she should receive 37.5% of Robert's 2009 employer 401(k) match. Finally, she asserted she should receive a percentage amount of Robert's Schedule K-1 income from the sale of Appleton

[1] According to Janet, the fringe benefits from the employer included long-term disability insurance; long term care insurance; group long-term disability, life, accidental death and disability insurance; tax preparation fees; identity theft insurance; and "additional for taxes."

Cardiology Associates. The K-1 income allegedly consisted of ordinary business income and net long-term capital gain income, considered taxable compensation during 2010.

¶6 Robert responded that the judgment provided that he pay a percentage of all gross bonuses he received, and there was no provision that Janet was entitled to receive an additional 37.5% of the employer-provided fringe benefits. Robert also contended "there is no language in the Divorce Judgment which provides that Janet should receive 37.5%/42% of any employer match [401(k)] amounts."

¶7 Robert argued that Janet "misconstrues what the Schedule K-1 represents." He argued the K-1 "income" reflected the amounts he was required to report on his personal tax return for 2010 based upon his percentage of ownership in the S-Corporation. Robert contended he did not "receive" those amounts in 2010, as required for maintenance by the divorce judgment.

¶8 Robert asserted that a schedule entitled "Full Shareholder S-Corporation Distributions" represented distributions in 2011 from the sale of the assets of Appleton Cardiology Associates, which were distributions from the property awarded to him in the property division. Janet was thus "seeking to collect money from Robert's property division that he received in the Final Divorce Judgment."

¶9 The circuit court held a hearing on September 9, 2011. The court concluded that "there certainly is no indication in the judgment that certain types of fringe benefits … w[ere] addressed in the judgment." The court further stated with regard to fringe benefits:

> The Court has to determine – and the specific things that [counsel] has raised [are] long term care insurance, group life, any theft insurance, and contribution from the employer for a 401(k). These are not technically income, in the Court's opinion, it's not technically funds that Doctor Wilson had received, they certainly would and can be characterized as compensation in the respect that certainly Doctor Wilson was getting some monetary benefit from these parts of his work. The Court would find that they would not be technically income for purposes of maintenance.
>
> Again, the judgment talks about base salary and bonuses, and the Court reads that language to be what he is receiving salary-wise, and that's exclusive of any other benefits that may coincide with his employment status, and bonuses would be in salary that would be generated to him, and, again, exclusive of any other type of side benefits he would get, whether they be insurance, contribution from his employer or 401(k). So the Court is not going to grant [counsel's] motion on behalf of his client to count those other items as income.

¶10 The circuit court also determined that proceeds from the sale of Appleton Cardiology Associates were not income subject to the maintenance obligation. The court's oral decision was memorialized in a written order. This appeal follows.

¶11 Property division and maintenance decisions are entrusted to the circuit court's sound discretion, and are not disturbed on appeal unless the court has erroneously exercised its discretion. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain discretionary decisions if the circuit court examined relevant facts, applied a proper standard of law, and reached a conclusion a reasonable judge could reach using a demonstrated rational process. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We generally look for reasons to sustain the circuit court's decision. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). In addition, we search the record to support the court's discretionary

determinations. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶12 Janet argues the "preliminary issue" on appeal is whether there was a change of circumstances. She asserts this issue "was never really addressed by the circuit court, though it was specifically raised by Janet's counsel." Janet argues the substantial change of circumstances is that Robert received a draw and bonuses at the time of the parties' stipulation but, after the sale to ThedaCare, Robert received a fixed salary and S-Corporation distributions, including both ordinary income and capital gain income. Janet claims that arguably only the capital gain income should be excluded. She insists the circuit court erred "when it ignored the ordinary (S-Corporation) income simply because that type of income was not discussed in the judgment."[2]

¶13 Contrary to Janet's insistence, her contempt motion was not couched in terms of substantial change of circumstances. Rather, Janet's motion alleged a maintenance arrearage resulting from Robert's alleged nonpayment of maintenance as ordered in the existing divorce judgment. Although the issue of substantial change of circumstances was discussed by Janet in the circuit court, it was in response to a motion by Robert to cap his maintenance obligation in accordance with his fixed ThedaCare salary. In fact, Janet argued in the circuit court, "There has not been a substantial change in Dr. Wilson's economic circumstances and therefore the threshold question to be addressed in requesting a modification has not been met."

[2] Janet uses the phrase "abuse of discretion." In 1992, our supreme court replaced the phrase, "abuse of discretion," with the phrase "erroneous exercise of discretion." *See*, *e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

¶14 Regardless, the circuit court correctly recognized that Robert's ownership interest in Appleton Cardiology Associates was awarded to him in the property division at the time of the parties' divorce, and represented a payout of the asset itself. To require Robert to pay maintenance on the distribution from the sale of Appleton Cardiology Associates would constitute improper double counting. *See* ***Hokin v. Hokin***, 231 Wis. 2d 184, 203-04, 605 N.W.2d 219 (Ct. App. 1999). Accordingly, Janet is not entitled to receive maintenance based on assets that were awarded to Robert in the property division of the divorce.

¶15 Moreover, Janet does not attempt to characterize the origins of the ordinary income and capital gain components of the S-Corporation distributions, and her argument is otherwise undeveloped. By contrast, Robert argues that Appleton Cardiology Associates is a Subchapter S-Corporation, and he was therefore required to report as income on his personal 2010 tax returns the profit of the business based upon his minority ownership interest. Robert also asserts that he did not "receive" the distributions from Appleton Cardiology Associates until 2011. The ordinary business income and long-term capital gain reported on Robert's 2010 Schedule K-1 simply reflected Robert's percentage portion of the business income of his ownership interest. Janet does not reply to Robert's arguments in this regard and we therefore deem the issues conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶16 Janet nevertheless insists, "The general rule is that the trial court is obligated to consider *all sources of income* when establishing maintenance." *See* ***Wright v. Wright***, 2008 WI App 21, ¶39, 307 Wis. 2d 156, 747 N.W.2d 690. She asserts that the circuit court's denial of maintenance for fringe benefits is directly contrary to our holding in ***Kastelic v. Kastelic***, 119 Wis. 2d 280, 285-86, 350

N.W.2d 714 (Ct. App. 1984), which stated that in setting maintenance, income is not limited to salary but includes cash equivalents and benefits accruing from any source.

¶17 However, at the time of the postdivorce hearing in the present case, the circuit court was not establishing maintenance. Unlike ***Wright*** and ***Kastelic***, the initial maintenance determination had already been made. Janet's motion required the court to interpret the legal separation agreement, which by the parties' own stipulation controlled what was income for purposes of Robert's maintenance responsibility. Janet's reliance on ***Wright*** and ***Kastelic*** is misplaced.

¶18 Here, the parties stipulated the set amount of maintenance was to be based upon Robert's draw, which critically undercuts Janet's suggestion that set maintenance should also include fringe benefits. The parties also stipulated the percentage amount of maintenance was to be based upon "all gross bonuses Robert receives." The stipulation further stated:

> The percentage maintenance amount shall be calculated on Robert's total wage income including his individual 401(k) contribution. For example, if his total wages are $520,000.00 before the employee 401(k) deduction, then the percentage maintenance amount shall be calculated on the sum of $220,000.00 ($520,000 total wage income minus base salary of $300,000).

¶19 Significantly, the stipulation specifically included a calculation of Robert's individual 401(k) contribution in total wage income. The failure to specifically mention employer 401(k) contributions, or any other fringe benefit, shows the parties did not intend to include fringe benefits in the gross bonus calculation. We also agree with the circuit court's conclusion that "the judgment talks about base salary and bonuses … and bonuses would be in salary that would

be generated to him, and, again, exclusive of any other type of side benefits that he would get …."

¶20 The circuit court analyzed Robert's compensation in the context of the parties' stipulation and concluded the fringe benefits and S-Corporation distributions sought by Janet were not subject to the maintenance obligation. The court's decision properly interpreted the parties' stipulation and was the product of a rational mental process. The court properly exercised its discretion.

By the Court.—Order affirmed.

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