

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2380

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

RICHARD P. CLINE,

PETITIONER-APPELLANT,

v.

**KRISTINE H. ZYNDA,
F/K/A KRISTINE H. CLINE,**

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed.*

Before Nettesheim, Snyder and Langhoff,¹ JJ.

¹ Circuit Judge Gary Langhoff is sitting by special assignment pursuant to the Judicial Exchange Program.

PER CURIAM. Richard P. Cline appeals from a judgment of divorce from Kristine H. Zynda, f/k/a/ Kristine Cline. Cline did not attend the divorce trial, and the court refused to grant his motion for a continuance. Cline argues on appeal that the court's refusal to grant his motion was an erroneous exercise of discretion. Because we conclude that the circuit court properly exercised its discretion to deny the motion, we affirm.

Cline filed an action for divorce from Zynda in July 1997. Trial was set for March 18, 1998. On March 17, Cline's counsel filed a motion for adjournment, alleging that Cline, an alcoholic, had allegedly suffered a relapse and had checked himself into a hospital to seek treatment for his alcoholism that day.

On the day of trial, Cline's counsel appeared. Counsel stated that he had not been able to discuss the trial with his client in the two weeks before the trial because of his client's drinking and that Cline had checked himself into a hospital for treatment of his alcoholism the day before. Counsel asked for a continuance. The clerk told the court that the calendar clerk had received a call from the hospital saying that Cline would be calling in shortly. The court agreed to wait for Cline to call before beginning the trial. The court waited nearly two hours, but Cline did not call.

Cline's counsel again asked for a continuance. Zynda's counsel told the court that Cline had failed to appear at two of four previous hearings for the same reasons. Zynda's counsel argued that Cline's voluntary admission to a hospital on the eve of trial was merely an attempt to avoid the proceeding. Zynda's counsel further argued that his client wanted the matter resolved and would suffer financially and emotionally from a delay.

The court found that there was not sufficient evidence to warrant adjourning the trial and denied the motion for a continuance. Cline's counsel asked to be allowed to withdraw, and the court granted the motion. The court then held the trial. Cline subsequently moved for reconsideration.

The evidence at the hearing indicated that Cline had been discharged from the hospital at 1:30 p.m. on March 18, the day of the trial, and had left the hospital in his own car. Cline had not come to or contacted the court on that day. The court proceedings had adjourned at about 3:00 p.m. Based on this evidence, the court found that Cline had not established that he was unavailable for trial on March 18 and denied the motion for reconsideration.

Cline now appeals from the judgment of divorce, arguing that the court erroneously exercised its discretion and he was denied due process when the court denied his motion for a continuance, and that the trial court erroneously exercised its discretion when it made the property determinations without his evidence. The decision whether to grant a continuance is a matter within the discretion of the trial court. *See Brezinski v. Barkholtz*, 71 Wis.2d 317, 320, 237 N.W.2d 919, 921 (1976). We will sustain a discretionary act of the circuit court if that court examined the relevant facts, applied a proper standard of law and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

Cline argues that the trial court erroneously exercised its discretion when it denied his request for a continuance. He asserts that the court's finding that there was insufficient evidence to warrant an adjournment was clearly erroneous. We disagree.

The record supports the circuit court's ruling. The court found that this was not the first time that Cline had missed court proceedings. Further, the evidence offered on the motion for reconsideration established that Cline could have attended court, or at the very least contacted the court on the trial date. He did neither. Therefore, the issue presented is not whether voluntary intoxication is a justification for missing a court date, but rather Cline's credibility. Based on the record, it was not clearly erroneous for the court to deny the motion for a continuance.²

Cline also argues that the property distribution was not equitable because he did not have the opportunity to present any evidence. Because we have concluded that the court appropriately denied Cline's request for a continuance, however, his argument that he was not allowed to present any evidence also must fail. We consider whether the circuit court properly divided the property based on the evidence before it.

The amount and duration of maintenance awards rest within the sound discretion of the trial court and will not be disturbed absent an erroneous exercise of that discretion. See *Haugen v. Haugen*, 117 Wis.2d 200, 215, 343 N.W.2d 796, 804 (1984). An erroneous exercise of discretion occurs when "the trial court has failed to consider the proper factors, has based the award upon a factual error, or when the award itself was, under the circumstances, either

² Zynda argues that this case is distinguishable from the case of *Sherman v. Heiser*, 85 Wis.2d 246, 270 N.W.2d 397 (1978). We commend counsel for bringing to the court's attention a case which does not support her client's position. However, we conclude that any potential arguments under this case have been waived because Cline did not raise them before the circuit court at trial or during the motion for reconsideration. See *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980) (no issue or claimed error of the trial court may be reviewed on appeal unless it was raised first before the trial court). Therefore, we will not consider whether this case can be distinguished from *Sherman*.

excessive or inadequate.” *DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 582-83, 445 N.W.2d 676, 679 (Ct. App. 1989).

In this case, the court based its award on the evidence before it. Cline argues that the court’s decision was erroneous because there was no evidence of his income, employment or ability to pay. Cline did not present any evidence because he did not come to the trial. Because the evidence actually presented at the trial supports the court’s determination, we affirm.

By the Court.—Judgment affirmed.

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

