COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1599 **Cir. Ct. No. 2003FA163**

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

IN RE THE MARRIAGE OF:

BRUCE A. FINDLEY,

PETITIONER-RESPONDENT,

V.

ELLEN V. FINDLEY, N/K/A ELLEN V. GIBBONS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Bruce A. Findley did not make a timely property division payment of $162,500, in accordance with the divorce judgment. His former wife, Ellen V. Gibbons, brought an order to show cause why he should not be held in contempt, but the family court found that his once lucrative business had gone belly-up through no fault of his own, that he did not have the ability to pay and that the circumstances did not show a willful intent to avoid payment. Gibbons appeals, arguing that, instead of pouring funds into the business in an attempt to keep the business afloat, Findley should have thought about his former wife first, should have closed the business down while he still had the assets, and his failure to do so was "unreasonable" and amounted to "shirking." But Gibbons is wrong on the law. This is not a case governed by the shirking analysis that takes place in support and maintenance cases. This is a property division case and the touchstone questions are whether there was ability to pay and whether nonpayment was willful with intent to avoid payment. We uphold the family court's determinations.

¶2 The first thing this court noticed when reading Gibbon's brief-in-chief is that nowhere was the standard of review cited. This was disconcerting because the standard of review drives the result in contempt cases. In his response brief, Findley properly stated the standard of review. A circuit court's use of its contempt power is an exercise of judicial discretion. ***Monicken v. Monicken***, 226 Wis. 2d 119, 124-25, 593 N.W.2d 509 (Ct. App. 1999). A circuit court properly exercises its discretion when it "considers the facts of record and reasons its way to a rational, legally sound conclusion." ***Prosser v. Cook***, 185 Wis. 2d 745, 753,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

519 N.W.2d 649 (Ct. App. 1994) (citation omitted). We defer to the family court because the family court is in the better position to make these fact-based discretionary calls. *See* ***Estate of Schultz v. Schultz***, 194 Wis. 2d 799, 807, 535 N.W.2d 116 (Ct. App. 1995). In fact, we not only defer, we actually look for reasons to sustain the circuit court. ***Roberts v. Roberts***, 173 Wis. 2d 406, 409, 496 N.W.2d 210 (Ct. App. 1992). Underlying the discretionary determinations, there may be questions of fact and conclusions of law. ***Monicken***, 226 Wis. 2d at 125. We uphold factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). Questions of law we review de novo. ***Monicken***, 226 Wis. 2d at 125.

¶3 After Findley's responsive brief noted Gibbons' failure to cite the standard of review in her brief-in-chief, Gibbons addressed it in her reply brief. Her theory goes something like this: Yes, a circuit court's exercise of contempt power is an exercise of its judicial discretion, and yes, findings of fact are subject to the clearly erroneous rule. But, this contempt case has elements of shirking, so the issue is really whether Findley's pouring funds into his business in an attempt to save it was "reasonable" considering that his primary duty was to pay his former wife. Therefore, her theory continues, the family court failed to address the facts under this aspect of the law. Thus, she concludes, the family court misused its discretion.

¶4 Let us start by examining what "shirking" is. Shirking exists "where the obligor intentionally avoids the duty to support or where the obligor unreasonably diminishes or terminates his or her income in light of the support obligation." ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). This issue arises when the obligor spouse terminates his employment to start a business, ***id.*** at 497; retires early or rejects job offers,

Wallen v. Wallen, 139 Wis. 2d 217, 225-26, 407 N.W.2d 293; chooses underemployment, ***Sellers v. Sellers***, 201 Wis. 2d 578, 586-87, 549 N.W.2d 481 (Ct. App. 1996); or is terminated from employment due to his or her voluntary misconduct, ***Scheuer v. Scheuer***, 2006 WI App 38, ¶12, 290 Wis. 2d 250, 711 N.W.2d 698. If support or maintenance payments are affected by lower income, the payee spouse may claim that the choice or behavior of the obligor spouse was unreasonable. ***Van Offeren***, 173 Wis. 2d at 496. Gibbons cites no cases where the obligor was accused of shirking because he or she tried to save a business instead of letting it go under.

¶5 But the lack of such cases aside, the major problem with using "shirking" law in this case is that the missed payment was part of the property division payment. It was not for maintenance. Gibbons waived maintenance. Nonetheless, Gibbons underscores the following language in the marital settlement agreement, incorporated by reference in the divorce judgment, to make her case. There, the agreement stated that Findley was to pay her $950,000 cash in stated increments. The end of the section including this part of the agreement stated that the payments "are in the nature of support for wife and, as such, are non-dischargeable in bankruptcy."

¶6 Using this language as the bait, she attempts to convince this court that this is really a spousal support case, not a property division case. But we reject her argument for two reasons. First, she never argued to the family court that this was a spousal support case rather than a property division case and was therefore governed by shirking law. She raises this for the first time on appeal and we do not address arguments made for the first time on appeal. Our job is to

review judicial conclusions based on the arguments that *were* made.[2] Second, we agree with Findley that the language was for the purpose of addressing any future attempt at bankruptcy and was intended to help a bankruptcy judge decide nondischargeability. This is a property division case. Shirking law does not apply.

¶7 The law that *does* apply is the law we alluded to at the beginning. The questions are two-fold: (1) whether the person is able to pay; and (2) whether the refusal to pay is willful and with intent to avoid payment. ***Benn v. Benn***, 230 Wis. 2d 301, 310, 602 N.W.2d 65 (Ct. App. 1999). The family court duly noted that these were the two issues before the court. So, there is no law question involved here. We have reviewed the record and it supports the family court's determination that Findley's nonpayment was not intentional and was driven instead by his inability to pay due to his business failing. His company lost its main customer. Findley spent his income, his trust distributions and leveraged himself as far as he could because he had faith that he could save his company. Nonetheless, he was unsuccessful and now has debts in the millions of dollars. We uphold the family court's decision that Findley was unable to make his

[2] We have scoured the transcripts from the motion hearings and the parties' subsequent proposed findings of facts and conclude that Gibbons did not raise this issue below with sufficient specificity. To be sure, Gibbons did cite ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). And Findley did clarify for the court that ***Van Offeren*** was a shirking case in a spousal support action. However, Gibbons cited ***Van Offeren*** only in relation to which party had the burden of proof. She did not articulate the shirking analysis in ***Van Offeren*** or any other case. And she did not argue that the judgment was for spousal support rather than to divide property, which we conclude must be the case for shirking to apply. Therefore, it would be unfair to expect the circuit court to discern that Gibbons also wanted to use the shirking argument from ***Van Offeren*** to resolve her motion. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476. Gibbons did not preserve her right to appeal upon the theory of shirking. *See* ***id.***

payment because his business failed and that his nonpayment was not willful and not with intent to avoid payment.

By the court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.