

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 30, 2009**

David R. Schanker  
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. 2008AP1673**

**Cir. Ct. No. 2007FA140**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**MICHELLE LYNN CUTLER,**

**PETITIONER-RESPONDENT,**

**v.**

**DAVID CHARLES CUTLER,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Pierce County:  
ROBERT W. WING, Judge. *Affirmed.*

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

¶1 PER CURIAM. David Cutler appeals a judgment of divorce, arguing the circuit court erroneously exercised its discretion with regard to maintenance and property division. We affirm.

¶2 David and Michelle Cutler were married for eighteen years and have three minor children. The parties agreed to joint custody with shared placement, and Michelle pays child support of \$1,259 monthly plus an annual lump sum payment for bonuses received the prior year. At the commencement of this action, both parties were approximately forty-five years old. David was employed with Wausau Signature Agency as an account manager with an annual salary of approximately \$55,600. Michelle was employed with Comcast Corporation as a senior director of customer service with a base salary of approximately \$135,000. The parties accumulated few assets during the marriage and stipulated to property values.

¶3 A trial was held on contested issues. David requested maintenance, an interest in Michelle's stock option plan, and an equalization payment. Michelle requested that the parties would share certain variable expenses. David argued an equalization payment of \$3,253.86 was appropriate and Michelle requested \$325. The court denied David's request for maintenance and concluded "above water" stock options vested prior to the date of divorce would be included in the property division. The court also rejected Michelle's request to share the variable expenses. The property division was essentially equal except that Michelle took on all of the unsecured debt in the amount of approximately \$49,257, except for a boat loan in the amount of \$589. Michelle was ordered to make an equalization payment of \$1,305.50. David now appeals the denial of maintenance and the determination that only the vested stock options should be included in the property division.

¶4 The award of maintenance and the division of property rest 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 will sustain discretionary decisions if the circuit 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). It need not be a lengthy process. While reasons must be stated, they need not be exhaustive. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2). The circuit court is also the ultimate arbiter of witnesses' credibility. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶5 We turn first to the issue of maintenance. David argues the circuit court failed to consider all of the statutory factors under WIS. STAT. § 767.56. We are satisfied the court adequately considered relevant statutory factors. The court noted this was a “fairly substantial [marriage] of eighteen years.” The court also referenced David’s substantial income and emphasized that Michelle’s income only exceeded David’s for approximately the last seven years of the eighteen-year marriage. The court rejected David’s contention that he contributed to Michelle’s earning capacity and that he sacrificed his own career, finding specifically that David “has exaggerated his contributions to Ms. Cutler’s career advancement.” The court found not credible David’s claim that he was primarily responsible for childcare and homecare duties because of Michelle’s career. The court concluded Michelle “performed the vast amount of childcare and homecare duties even though she was working full time.” The court also considered that David will have few debts because Michelle is responsible for most of the marital debt.

Michelle will also pay substantial child support, which will not be taxable to David.

¶6 While the reasons for the court's ultimate maintenance determination may not have been exhaustive, they need not have been. *Burkes*, 165 Wis. 2d at 590-91. The court's decision indicates it undertook an examination of the facts and reasoned its way to a conclusion a reasonable judge could reach. David may disagree with the court's findings and conclusions but the court's decision, as a whole, incorporates appropriate considerations and is not an erroneous exercise of discretion.

¶7 David insists the disparity of income warrants an award of maintenance. He claims he is not self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. David contends he has no cash savings and is unable to support himself on his current salary. David currently resides in a residential condominium but asserts that he was "accustomed to living in a comfortable single family home with a yard." David also suggests he is entitled to a new car. We are unpersuaded. The parties' financial disclosure statements demonstrated that neither had cash savings. Both parties' expenses exceeded income. David has failed to demonstrate why he cannot, with no appreciable debt and a household income exceeding \$70,000, live in a manner comparable to that enjoyed during the marriage and own a home and reliable transportation.

¶8 Finally, David argues the circuit court erred by determining that only Michelle’s fully vested stock options<sup>1</sup> should be included in the property division. At the time of the trial, some of the options were vested while others remained unvested. The unvested options were to vest based on future conduct as well as past efforts and were contingent upon Michelle remaining an employee of Comcast through the vesting date. Many of the options were “underwater,” meaning the stock’s current price was less than the exercise price. The circuit court ruled that only the “above water” options that were vested before the date of the divorce would be included in the property division.

¶9 Generally, marital assets are valued as of the date of divorce. *Maritato v. Maritato*, 2004 WI App 138, ¶29, 275 Wis. 2d 252, 685 N.W.2d 379. The “underwater” options had no value at the time of the divorce. If the option vests after the divorce, the value which appreciates is earned after the divorce. *See id.*, ¶33. Thus, the appreciation is generally not divisible, although it would not be an erroneous exercise of discretion to include the options in the property division if the options were close to vesting and the employee spouse was likely to continue working. *See id.* David insists “the stock options would vest shortly after the divorce, within three to four years.” However, the record established that although Michelle had no present intention of leaving Comcast, she also has no employment contract with Comcast. Therefore, either she or Comcast could terminate her employment relationship at any time prior to vesting.

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<sup>1</sup> Michelle held stock options, restricted stock and stock appreciation rights awarded through her employment with Comcast Corporation. References are collectively to “stock options” unless otherwise indicated.

¶10 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). “[W]e 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. Here, an adequate basis exists in the record to support the court’s discretionary determination to include only the “above water” vested options.

¶11 In conclusion, we note that when David’s counsel filed the reply brief, he certified the brief “conforms to the rules contained in [RULE] 809.19(8)(b) and (c), Stats., for a brief produced using a proportional serif font .... **The length of this brief is 3,707 words.**” (Emphasis in original.) However, a reply brief shall not exceed 3,000 words if a proportional serif font is used. *See* WIS. STAT. RULE 809.19(8)(c)2. David’s reply brief is 707 words, or 24%, over the maximum allowable length. Consequently, we conclude that counsel filed a false certification, which is a serious infraction of the rules and also violates SCR 20:3.3(a) (2006). *See State v. Bons*, 2007 WI App 124, ¶24, 301 Wis. 2d 227, 731 N.W.2d 367. Filing a false certification is grounds for imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate. WIS. STAT. RULE 809.83(2). While we choose not to impose a sanction for this infraction, we caution counsel to file accurate certifications in the future.

*By the Court.*—Judgment affirmed.

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



