COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1313 **Cir. Ct. No. 2007FA429**

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

IN RE THE MARRIAGE OF:

CHRISTY LYNN THISTLE,

PETITIONER-RESPONDENT,

V.

BRADLEY DEAN THISTLE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Bradley Thistle appeals the denial of maintenance payments and the calculation of child support payments in his judgment of divorce from Christy Thistle. At the time of the divorce, Christy was a human resources professional with an annual income of over $95,000 per year, while Bradley was earning approximately $12,000 per year as a self-employed handyman.[1] On appeal, Bradley alleges several errors in the court's maintenance decision. First, he contends the court erred in finding he was shirking in his employment efforts, and misused its discretion by imputing to him an annual salary of $24,960. Second, he argues the court erred in imputing to him as income an additional $9,360 annually in rent forgiven in a rent-for-work arrangement with his father. Third, Bradley maintains that the court's denial of his request for maintenance payments did not meet his support needs and was unfair under the circumstances.

¶2 We conclude the court properly established Bradley's earning capacity by imputing his income at $12 per hour for full-time work ($24,960 annually) based on a reasonable finding that Bradley was shirking, and on other evidence of his earning capacity. However, we conclude that the court erred by imputing as income an additional $9,360 annually in rent that Bradley owes his father because there is no evidence in the record that the rent-for-work arrangement was on-going. Because we have concluded that the trial court's maintenance decision was based in part on an erroneous calculation of Bradley's

[1] Christy proceeds pro se on appeal. In a letter to this court dated March 21, 2011, Christy informs us that she lost her job in a company restructuring earlier that month and, as a result, the trial court has issued an order modifying child support. We construe this letter as a motion to supplement the record, and we deny the motion. Our review is confined to the record before the trial court when the judgment was issued. In the remanded proceeding, Christy is free to file a motion bringing her new circumstances to the attention of the trial court.

imputed income, we remand for the court to reassess Bradley's request for maintenance using the corrected income figure in light of the support and fairness objectives of maintenance. Finally, we direct the court on remand to recalculate child support based on Bradley's corrected earning capacity. We therefore affirm in part, reverse in part and remand with directions.[2]

BACKGROUND

¶3 The following facts are taken from the trial court's January 2010 oral decision and the trial evidence. Bradley Thistle and Christy Thistle were married in 1994. At the time of the divorce trial in November 2009, Christy was forty years old and Bradley was thirty-nine years old. The couple had three children born during the marriage, the last in 2001. Bradley has a high school diploma and did not receive any additional formal education during the marriage. Christy entered the marriage with a two-year associate's degree, and returned to school for two years during the marriage to complete a four-year degree. Bradley worked as a laborer and maintenance person for Maysteel in West Bend, earning $19 per hour after nine and one-quarter years. Bradley left Maysteel in 2004 when Christy took a job in central Wisconsin and the family moved to Rudolph.

¶4 Bradley did not find full-time work upon moving to Rudolph, and the couple agreed in 2005 that Bradley would pursue his own business, a construction handyman service. Bradley's income from the business was $2,482 in 2007, $7,247 in 2008, and $8,714 through October 2009. At the January 2010

[2] Bradley makes other claims of trial court error with respect to maintenance. However, because we remand for the court to reconsider its decision denying Bradley maintenance in light of our conclusion that the court erroneously set Bradley's earning capacity, we do not consider those arguments here.

hearing, Bradley projected his total income for 2009 would be approximately $12,000, and his income for 2010 would be $20,000. Bradley also applied for ten jobs in 2008, but submitted no applications in 2009. Christy earned an annual salary of $92,500 in 2009 as a human resources manager at Golden County Foods, and received an additional $3,600 in rental income, for a total annual income of $96,100.

¶5 Christy petitioned for divorce in 2007. A trial was held in November 2009, focusing primarily on the disputed issues of property division and child support, and Bradley's request for maintenance. Only Bradley and Christy testified. At the conclusion of the trial, the parties filed letter briefs which, by stipulation, were limited to the issues of maintenance and Bradley's earning capacity.

¶6 The court issued an oral ruling in January 2010 and made findings related to Bradley's earning capacity, property division, child support, and maintenance. With respect to Bradley's earning capacity, the court found that Bradley's employment efforts constituted shirking. Based in large part on this finding and based on evidence of Bradley's prior earnings and his skills and work experience, the court imputed income to Bradley at an hourly wage of $12 for full-time work, for an annual income of $24,960. The court also imputed as income $780 per month or $9,360 annually in rent forgiven in exchange for remodeling services Bradley performed on the house he was renting from his father. By adding the imputed salary and in-kind rent income, the court set Bradley's annual earning capacity at $34,320.

¶7 In the property division, the court assigned $15,928 of the couple's approximately $70,500 in consumer debts to Bradley, and assigned the remainder

to Christy. The court found that if it had divided the debt equally, Bradley would have been unable to pay and would likely be forced into bankruptcy, shifting the remaining debt onto Christy and perhaps forcing her into bankruptcy as well.

¶8 Turning to child support, the court calculated that Christy would pay a little over $1,000 per month in shared child support to Bradley based on Christy's actual income and Bradley's imputed income. The court also denied maintenance to both parties. Christy waived maintenance and the court denied maintenance to Bradley on grounds that Bradley would be able to support himself based on his earning capacity and child support from Christy and in consideration of the unequal division of the marital debts to Christy. The court also considered the factors provided in WIS. STAT. § 767.56,[3] which sets forth factors a circuit court is to consider when deciding maintenance. Additional facts are provided in the discussion section.

[3] Bradley makes two additional arguments related to property division that we dispose of summarily. First, he argues the court erred in deciding Christy would be entitled to maintenance if she declared bankruptcy because she expressly waived maintenance. We agree. The record shows that Christy expressly waived her right to seek maintenance in the divorce petition, and in testimony at the final hearing. Second, Bradley contends the court erred in failing to consider in the property division Christy's testimony that she was attempting to negotiate lower debts with creditors. Because Bradley points to no evidence that Christy was successful in actually lowering these obligations, we reject this argument.

Bradley makes a third argument concerning the allocation of the marital debts. Bradley argues that the "use of a negative property division in lieu of maintenance" does not meet the support objective of maintenance. In other words, Bradley maintains that crediting him with debt relief does not assist him in paying his rent, utilities, food, and other necessary expenses. The court assigned the majority of the marital consumer debt to Christy based on concerns that Bradley would likely not be able to pay the debts, which would lead him into bankruptcy. Because we reverse and remand on other grounds for the court to reconsider its decision denying Bradley maintenance, we do not consider this argument.

DISCUSSION

¶9 Whether to grant or deny maintenance is a discretionary decision that we will not overturn unless the trial court has erroneously exercised its discretion. *See* ***Van Wyk v. Van Wyk***, 86 Wis. 2d 100, 108, 271 N.W.2d 860 (1978). A determination of the amount and duration of maintenance and the calculation of child support also rests within the trial court's discretion and will not be overturned absent a misuse of discretion. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987); ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. "[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We will affirm a circuit court's discretionary decision as long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). We accept all findings of fact of the trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2009-10).[4]

¶10 The court considers the factors in WIS. STAT. § 767.56[5] in deciding whether to award maintenance, and, if necessary, the amount and duration of

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[5] WISCONSIN STAT. § 767.56 provides as follows:

> Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(1)(g) or (j), the court may grant an order requiring

(continued)

maintenance payments. ***Hokin v. Hokin***, 231 Wis. 2d 184, 200-01, 605 N.W.2d 219 (Ct. App. 1999). The purpose of the factors in § 767.56 is to further the two primary objectives of maintenance: "to support the recipient spouse in accordance with the needs and earning capacities of the parties" and "to ensure a fair and

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> maintenance payments to either party for a limited or indefinite length of time after considering:
>
> **(1)** The length of the marriage.
>
> **(2)** The age and physical and emotional health of the parties.
>
> **(3)** The division of property made under s. 767.61.
>
> **(4)** The educational level of each party at the time of marriage and at the time the action is commenced.
>
> **(5)** The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> **(6)** The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> **(7)** The tax consequences to each party.
>
> **(8)** Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> **(9)** The contribution by one party to the education, training or increased earning power of the other.
>
> **(10)** Such other factors as the court may in each individual case determine to be relevant.

equitable financial arrangement between the parties." ***King v. King***, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999) (citation omitted). "The support objective is fulfilled when the trial court considers the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal, if the goal is feasible." ***Ladwig v. Ladwig***, 2010 WI App 78, ¶17, 325 Wis. 2d 497, 785 N.W.2d 664. "A circuit court errs if it misapplies or fails to apply these factors, or if it fails to 'give full play' to maintenance's dual objectives." ***Hacker v. Hacker***, 2005 WI App 211, ¶11, 287 Wis. 2d 180, 704 N.W.2d 371 (citation omitted).

Earning Capacity—Imputation of Annual Salary

¶11 Bradley challenges the court's determination of his earning capacity, which imputed to him an annual salary of $24,960 ($12 per hour for full-time work) rather than basing it on his actual earnings from his handyman business, which were approximately $12,000 in 2009. The court imputed income to Bradley based on its finding that Bradley's efforts at employment constituted shirking, evidence that Bradley had earned $19 per hour at a previous job, and Bradley's own testimony that he had the capacity to earn $12 to $19 per hour.

¶12 In determining whether to award maintenance, and the amount and duration of maintenance if necessary, a court must consider the requesting party's earning capacity under WIS. STAT. § 767.56(5). A trial court takes the requesting party's actual income to be his or her earning capacity unless it determines that he or she has been shirking. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). A party is shirking when his or her employment decision is both voluntary and unreasonable under the circumstances. ***Id.*** A well-

intended employment decision may nonetheless be unreasonable. ***Id.*** Whether a person's employment decisions are unreasonable presents a question of law. *See* ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 492, 496 N.W.2d 660 (Ct. App. 1992). Although we ordinarily review questions of law de novo, we afford some deference to the trial court's determination of the reasonableness of a person's employment decisions because they are so intertwined with its factual findings. ***Id.*** at 492-93.

¶13 Bradley contends that the court erred by establishing his earning capacity on imputed earnings rather than on his actual earnings from his home improvement business. First, Bradley argues that there is nothing in the record to support the court's determination that Bradley had the earning capacity of $12 per hour for full-time employment, or $24,960 per year. Second, Bradley contends that his efforts at finding employment and building his business were reasonable and therefore no grounds existed to support the court's finding that he was shirking. We address and reject these arguments in turn.

¶14 We conclude that there was sufficient evidence in the record to support the court's determination that Bradley was capable of earning $12 per hour in a full-time position. Bradley testified that he was earning $19 per hour when he left his job with Maysteel, and that he was capable of earning at least, if not more than, $10 to $12 per hour. Bradley also admitted that he expected that there were jobs in the $10 to $12 an hour range that he could perform.

¶15 Turning next to Bradley's challenge of the court's shirking finding, Bradley points to evidence that he and Christy agreed that he would be a stay-at-home dad after they moved to Rudolph. According to Bradley, the parties then agreed in 2007 that he would start his own handyman business, which he did. He

maintains that the undisputed facts show that after his attempts to seek employment were unsuccessful, he then turned his full attention to growing his handyman business. However, the court rejected Bradley's testimony that he and Christy had agreed he would be a stay-at-home dad when they moved to Rudolph in 2004, and instead credited Christy's testimony that the couple agreed that Bradley would look for a job when they moved. As the finder of fact, the trial court is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶16 In finding that Bradley was shirking, the court focused primarily on its assessment of Bradley's employment efforts from 2005 to 2009. Bradley testified that until 2007 he was just "getting his feet wet" with his handyman business, and then reported business earnings of only $2,482 in 2007. Bradley admitted during his testimony that he made no attempt to build his handyman business by advertising or by joining service clubs, relying only on word of mouth. Although there is evidence that Bradley applied for ten jobs in 2008 and looked for work by posting his resume on Internet job sites, the court could reasonably infer from these facts that Bradley was not serious about improving his employment outlook. This view is further supported by the fact that Bradley did not look for any jobs in 2009 despite earning only $7,247 in 2008, and $8,714 through October 2009 from his handyman business.

¶17 Bradley argues that his decision to give up a $19 per hour job in 2004 was involuntary—and therefore not shirking—because he did so to relocate for Christy's advancement. Assuming for the sake of argument that this decision was involuntary, the court did not focus on this decision in its shirking analysis. Rather, the focus was on Bradley's apparent choice to forgo looking for

employment in light of the small earnings from his business and Bradley's failure to take reasonable steps to promote his business. The court reasonably found, based on this evidence, that the decision to start the business was voluntary and that Bradley's decision to not seek employment or market his business was unreasonable.

¶18 Bradley also argues that the decision for him to start a handyman business was a joint decision, which permitted him to care for the children during this time on sick days, holidays and when Christy was traveling on business. It is true that the evidence shows that he and Christy decided that he should start his business after he was unsuccessful in seeking employment. However, the court rejected Bradley's attempt to portray himself as the children's primary caretaker, finding that all the children were in school or daycare, and thus there was no need for a stay-at-home parent.[6]

¶19 Having rejected the above-stated arguments, we conclude the court did not err in imputing to Bradley an annual salary of $24,960.

Earning Capacity—Imputing Forgiven Rent as Income

¶20 Bradley next challenges the court's imputation of rent forgiven by his father in exchange for home remodeling services as income. At the time of the divorce trial, Bradley was living in a home owned by his father. Bradley testified

[6] Bradley also argues the court's shirking finding was based in part on computer print-outs from Internet job sites provided by Christy listing available jobs for which Bradley was qualified, which Bradley argues were hearsay. However, even assuming that the print-outs were improperly admitted, there is nothing in the trial court's ruling to indicate that the court relied on the print-outs in determining Bradley's earning capacity. Rather, the court relied on other evidence such as Bradley's testimony that he could perform jobs paying between $10 and $12 hour in determining Bradley had the capacity to earn $12 per hour.

that his father had charged him $780 per month for rent, but Bradley had never paid him rent. Instead, his father had accepted payment in the form of Bradley's home remodeling services. In calculating Bradley's imputed income, the court included an additional $780 per month ($9,360 annually) for rent forgiven in this work-for-rent arrangement.

¶21 Bradley contends that the court erred in imputing as income the forgiven rent because there was no evidence that the rent-for-services arrangement with his father was on-going at the time of trial and would continue into the future. Based on our review of the record, we agree.

¶22 Bradley testified that his father had accepted payment in the form of home remodeling services for $6,240 in rent from May to December 2008. Bradley then testified, however, that he was "behind on [his] rent" as of the November 2009 trial. The only reasonable inference from this testimony, if believed, is that the arrangement had ceased, at least for the time being, and no additional evidence was offered to show otherwise. Moreover, no evidence was presented to show that Bradley's father would have remodeling work for Bradley to perform in the future. Accordingly, we conclude that the court's implicit finding that the work-for-rent arrangement between Bradley and his father continued to exist and would continue in the future is clearly erroneous and therefore the court erroneously imputed to Bradley $780 per month ($9,360 annually) in rental income. Thus, Bradley's corrected earning capacity is $24,960 based on the court's imputation of his annual salary.

Support and Fairness Objectives of Maintenance

¶23 Because we have concluded that the trial court's maintenance decision was based in part on an erroneous calculation of Bradley's imputed

income, we remand for the court to reassess Bradley's request for maintenance using the corrected earning capacity figure in light of the support and fairness objectives of maintenance. We note that, as part of its oral ruling, the trial court concluded, based on a finding that Bradley's earning capacity was $34,320, that Bradley was able to support himself. However, because we have concluded that Bradley's earning capacity is actually $24,960, not $34,320, the court will need to reassess whether this amount is adequate to meet Bradley's support needs. Further, we note that the court found that Bradley was shirking in his employment efforts, and that this finding may be relevant to the court's evaluation of his maintenance request under the fairness objective.

Child Support

¶24 Finally, because the trial court set the amount of child support Christy is to pay Bradley based on an erroneous determination of Bradley's earning capacity, we direct the court on remand to recalculate the amount of those payments.

CONCLUSION

¶25 In sum, we conclude that the trial court properly imputed earned income to Bradley at $24,960 per year, but that the court erred by imputing rental income to Bradley. Because the court erred in determining Bradley's earning capacity, we remand for the court to reconsider its decision to deny maintenance to Bradley, and to recalculate child support. We therefore affirm in part, reverse in part and remand with directions.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.