COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP873 **Cir. Ct. No. 2007FA007279**

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

IN RE THE MARRIAGE OF:

VERLAINE L. SAINIO,

PETITIONER-RESPONDENT,

V.

JEFFREY W. SAINIO,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 BRENNAN, J. Jeffrey W. Sainio appeals from a circuit court order directing him to pay $2000 a month in maintenance to Verlaine L. Sainio until

February 1, 2019, or upon the death of either party. Jeffrey contends that his former wife is not entitled to maintenance because: (1) her motion to modify maintenance was untimely; (2) the circuit court erred in concluding that maintenance was warranted; and (3) the circuit court erred in setting forth the amount and duration of the award. Because we conclude that Verlaine's motion for maintenance was timely filed, and because the circuit court did not erroneously exercise its discretion, we affirm.

BACKGROUND

¶2 Jeffrey and Verlaine were married on July 16, 1995. In December 2007, Verlaine filed a petition for divorce. Jeffrey and Verlaine then entered into a Marital Settlement Agreement ("MSA"). As relevant to Jeffrey's appeal, the MSA contained the following language regarding maintenance:

> **I. MAINTENANCE**
>
> A. Maintenance to Wife is held open for the time periods and for the limited purposes of this paragraph as follows:
>
> 1. Maintenance to Wife shall be held open for a period of twenty years from the date of divorce, and maintenance shall be granted to Wife in an amount and for a period to be determined by the court if Husband takes or fails to take any actions, directly or indirectly, which adversely affect Wife's earnings from her business known as Sewing by Verlaine. As background, the parties acknowledge that Wife's earnings from her business are entirely dependent on a product, known as a "Kite," which was developed and co-invented by Husband for sale to his employer, Quad/Graphics, Inc. The "Kite" is purchased by companies using printing presses to feed the rolls of paper into the press in an efficient and safe manner. Husband has applied for a provisional patent for the "Kite," which patent lists Husband and Wife as co-inventors. Husband is also instrumental in marketing the "Kite" for sale to Quad/Graphics and potentially to other printing companies. The parties understand and agree that Wife's rights under this limited maintenance hold-open are separate from and

> in addition to the terms and remedies accorded her in a Non-Competition Agreement that the parties have entered or will enter into related to the "Kite."
>
> 2. Maintenance to Wife shall be held open for a period of six years from the date of divorce as a safety net and may be awarded to Wife if she is unable to support herself either because (a) her self employed sewing business does not generate income for her to be self supporting; or, (b) because her health conditions preclude her from earning sufficient income to be self-supporting.
>
> ….
>
> C. Except for the above purposes, maintenance to both parties shall be waived and denied pursuant to § 767.59, stats. If maintenance payments are set in the future, they shall terminate upon the death of either party or the Payee's remarriage. The parties understand that if maintenance is requested within the foregoing hold-open periods, such maintenance payments may extend beyond the hold-open ending date.

The circuit court found the MSA to be "fair and reasonable" and it was incorporated into the judgment of divorce. The divorce judgment was entered on June 5, 2008.[1]

¶3 On December 6, 2012, Verlaine filed a motion to modify maintenance, along with a supporting affidavit. The affidavit cited to Section I.A.2 of the MSA, that is, the provision holding maintenance "open for a period of six years from the date of divorce … if [Verlaine] is unable to support herself either because (a) her self employed sewing business does not generate sufficient income for her to be self supporting; or, (b) because her health conditions preclude her from earning sufficient income to be self supporting." In her motion, Verlaine claimed both that her sewing business did not generate enough income to allow

[1] The Honorable Mary Kuhnmuench entered the judgment of divorce.

her to be self-supporting and that her health conditions also prevented her from generating a sufficient income to support herself.

¶4 In response to Verlaine's motion, on two different occasions, Jeffrey filed affirmative defenses claiming that Verlaine's motion was untimely and that she was malingering.

¶5 Verlaine's motion was first heard by a family court commissioner who denied her request for maintenance. Verlaine moved for *de novo* review, and the circuit court held an evidentiary hearing on two separate dates. At the close of the final hearing, the circuit court found that Verlaine's motion was timely and that she was entitled to maintenance of $2000 per month from March 1, 2014, until February 1, 2019. The circuit court entered a written order memorializing its findings.[2] Jeffrey appeals.

DISCUSSION

¶6 Jeffrey contends on appeal that the circuit court erred when it concluded that Verlaine's motion to modify maintenance was timely. In the alternative, he argues that, even if we determine that the motion was timely filed, the circuit court erroneously exercised its discretion in determining that Verlaine was entitled to maintenance, and in determining the amount and duration of maintenance. We address each issue in turn.

[2] The Honorable William Sosnay presided over the hearing on Verlaine's motion to modify maintenance and entered the order awarding maintenance.

I. Verlaine's motion for maintenance was timely.

¶7 Jeffrey first argues that the circuit court erred when it found that Verlaine's motion to modify maintenance was timely. His argument is two-fold. First, he contends that the court erred in applying the twenty-year hold open period set forth in Section I.A.1 of the MSA because Verlaine never invoked that section of the MSA in her motion and because the circuit court applied the twenty-year hold open period *sua sponte* without providing Jeffrey an opportunity to challenge its application. Second, Jeffrey argues that Verlaine agreed to shorten the six-year hold open period set forth in Section I.A.2 to four years and that her motion to modify was not timely brought within that four-year period. Because, for the reasons which follow, we conclude that the six-year hold open period applies, we need not address Jeffrey's argument that the circuit court erred in applying the twenty-year hold open period.

¶8 Whether the circuit court properly found that Verlaine's motion to modify maintenance was timely is a question of law that we review *de novo*. *See* ***Lippstreu v. Lippstreu***, 125 Wis. 2d 415, 416, 373 N.W.2d 53 (Ct. App. 1985).

¶9 Jeffrey's argument that Verlaine agreed to shorten the six-year hold open period to four years is based upon the following facts. In May 2010, Jeffrey sent Verlaine a $3500 check with a cover letter that stated as follows:

> Dear Ms. Sainio,
>
> In regard to your recent mail message, my previous offer is still on the table. That agreement, edited for circumstances, is below:
>
> Amendment to Marital Settlement Agreement (MSA) between Jeffrey W. Sainio and Verlaine L. Sainio[.]
>
> ….

> In consideration of the sum of $3500, Verlaine agrees to … a decrease of two years from the period in any previous agreement with regard to sections I(A)2 and I(B) of the MSA.
>
> By signing and depositing the attached check, Verlaine agrees to the terms of this agreement.

(Formatting altered.) The $3500 check enclosed with the letter included a restrictive endorsement above the payee signature line, which stated that by signing the check Verlaine agreed to the amendment to the MSA. Verlaine signed the check and cashed it, but before doing so, she crossed out the restrictive endorsement. She testified that her banker told her that she was not entering into a contract if she crossed out the language purportedly modifying the MSA.

¶10 Jeffrey argues that by cashing the check, Verlaine agreed to reduce the hold open periods set forth in both Sections I.A.1 and I.A.2 by two years. He contends that when Verlaine crossed out the restrictive endorsement on the back of the check, she made an unauthorized change to the check, and violated WIS. STAT. § 403.407 (2013-14).[3] We need not consider whether Verlaine agreed to the two-

[3] WISCONSIN STAT. § 403.407 states:

> (1) "Alteration" means an unauthorized change in an instrument that purports to modify in any respect the obligation of a party or an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.
>
> (2) Except as provided in sub. (3), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.

(continued)

year reduction to the hold open period when she cashed the check, because regardless, Jeffrey failed to move to amend the divorce judgment accordingly. As such, the terms of the judgment stand.

¶11 The MSA agreed to by Jeffrey and Verlaine was an "agreement regarding the division of property entered into between spouses after divorce proceedings ha[d] commenced." *See* ***Van Boxtel v. Van Boxtel***, 2001 WI 40, ¶14, 242 Wis. 2d 474, 625 N.W.2d 284. As such, the MSA "is a stipulation under [WIS. STAT.] § 767.10(1) … subject to the approval of the court." *See* ***id.*** "A stipulation under § 767.10(1) is not a contract, which would be binding on the parties once entered into, but … [is] only a recommendation to the court." ***Hottenroth v. Hetsko***, 2006 WI App 249, ¶25, 298 Wis. 2d 200, 727 N.W.2d 38. A circuit court is not obligated to accept the parties' stipulation; rather, the court "has a duty to decide whether [the] recommendation is a fair and reasonable resolution of the issues and, thus, a recommendation the court wants to adopt." ***Id.*** When a court adopts a stipulation as part of a divorce judgment, "it 'does so on its own responsibility, and the provisions become its own judgment.'" ***Id.*** (citation omitted).

¶12 Here, the circuit court considered the terms agreed to by the parties in the MSA and determined that they were "fair and reasonable"; thereafter, the

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> (3) A payer bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument according to its original terms, or, in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

All references to the Wisconsin Statutes are to the 2013-14 version.

court incorporated those terms into the divorce judgment. That judgment is the final determination in this matter absent an amendment, and no party moved to amend the judgment in this case.

¶13 In short, the MSA was not a contract that the parties were free to renegotiate without court approval. *See* ***id.*** ("A stipulation under [WIS. STAT.] § 767.10(1) is not a contract."). The six-year hold open period agreed to by the parties in the MSA and adopted by the circuit court in the divorce judgment applies. Jeffrey does not argue that Verlaine's motion to modify maintenance was untimely under that provision of the MSA. As such, we affirm the circuit court's decision finding Verlaine's motion timely.

II. The circuit court correctly determined that the terms of the MSA permitted the court to award Verlaine maintenance.

¶14 Next, Jeffrey contends that the circuit court erred when it determined that Verlaine was entitled to maintenance. Section I.A.2 of the MSA permits the circuit court to award maintenance only if: (1) Verlaine is unable to support herself because her sewing business does not generate sufficient income to her to become self-supporting; or (2) her health conditions preclude her from earning sufficient income to be self-supporting. Jeffrey argues that the circuit court erred as a matter of law in concluding that: (1) Verlaine was not self-supporting; and (2) Verlaine's health amounted to a substantial change in circumstances. We address each in turn.

A. The circuit court properly concluded that the term "self-supporting" in the MSA means "self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage."

¶15 A party seeking modification of maintenance must demonstrate there has been a substantial change in financial circumstances. ***Rohde-Giovanni v.***

Baumgart, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. The substantial change in circumstances test is the same, regardless of whether maintenance was stipulated to or contested during the divorce proceedings. ***Id.***, ¶2. The objectives of support and fairness must both be considered when considering modification. ***Id.***

¶16 Here, the circuit court found that there was "a substantial change of circumstances since the judgment of divorce. Specifically, the economic changes that occurred since the parties' divorce, the majority of which were out of the petitioner's control." Jeffrey does not challenge the circuit court's substantial change of circumstances finding, but rather, he argues the court applied the wrong definition of "self-supporting" from the parties' MSA.

¶17 Jeffrey argues that the term "self-supporting," although undefined in the MSA, means that Verlaine is only entitled to maintenance if her monthly income is insufficient to pay her current monthly expenses. Jeffrey believes that the following evidence shows that Verlaine was self-supporting, as defined by him, and therefore, not entitled to maintenance:

- Verlaine's financial disclosure statement showing monthly expenses of $2632, totaling $31,584 annually.
- A Mac Davis calculation made using Divorce Financial Solutions' Tax Calc Software, submitted by Verlaine at the hearing, in which Verlaine conceded an income of $17,000 per year and an additional $15,316 in social security disability benefits.
- Verlaine's testimony that she received $500 a month in rental income, amounting to an additional $6000 per year, an amount that Jeffrey argues was excluded from Verlaine's Mac Davis calculation.

Relying on that evidence, Jeffrey contends that Verlaine's annual income, when adjusted to account for her rental income, is sufficient to meet her current monthly

expenses, and that therefore the circuit court erred in concluding that Verlaine was not self-supporting.

¶18 Jeffrey's argument requires us to interpret the terms set forth in the MSA as adopted by the circuit court in the divorce judgment. "A stipulation incorporated into a divorce judgment is in the nature of a contract." ***Keller v. Keller***, 214 Wis. 2d 32, 37, 571 N.W.2d 182 (Ct. App. 1997). Interpretation of a contract is a question of law that we review independently. *See* ***Demerath v. Nestle Co.***, 121 Wis. 2d 194, 197, 358 N.W.2d 541 (Ct. App. 1984).

¶19 "When we interpret contracts, we do so to determine and give effect to the intentions of the parties. We presume their intentions are expressed in the language of the contract." ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶21, 342 Wis. 2d 29, 816 N.W.2d 853 (internal citation omitted). Where the language is unambiguous, we presume the parties' intent is evidenced by the words they chose and we apply that plain language as the expression of the parties' intent. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. We derive the parties' intent from the unambiguous contract language, not from how one party may interpret it. ***Campion v. Montgomery Elevator Co.***, 172 Wis. 2d 405, 416, 493 N.W.2d 244 (Ct. App. 1992).

¶20 Section I.A.2 of the MSA states that Verlaine "may be awarded" maintenance "if she is unable to support herself either because (a) her self employed sewing business does not generate sufficient income for her to be self supporting; or, (b) because her health conditions preclude her from earning sufficient income to be self supporting." When considering whether Verlaine was "self-supporting," the circuit court explicitly noted that maintenance "may be

awarded to the wife if she is unable to support herself." The circuit court then went on to find that Verlaine was not able to support herself, noting that it was "focusing on … what type of lifestyle the parties had during the marriage and just before the divorce." We agree with the circuit court that the evidence demonstrates that Verlaine is not self-supporting.

¶21 The problem with Jeffrey's argument is that he asks us to accept his definition of the term "self-supporting," that is, that Verlaine is able to generate sufficient income to support her current monthly expenses. However, the term "self-supporting" is not defined in the MSA, and when considering maintenance, courts in Wisconsin generally rely on the term self-supporting as it is set forth in the maintenance statute. *See* WIS. STAT. § 767.56(1c)(f). Section 767.56(1c)(f) requires courts determining maintenance to consider, among a host of other factors, "[t]he feasibility that the party seeking maintenance can become self-supporting *at a standard of living reasonably comparable to that enjoyed during the marriage* …" (Emphasis added.)

¶22 Using the term "self-supporting" as it is used in the maintenance statute, the circuit court considered whether Verlaine was self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and concluded that she was not. Jeffrey has not set forth any evidence demonstrating that the circuit court erred in interpreting the term "self-supporting" in the MSA as it is typically understood in Wisconsin when discussing issues of maintenance, nor has Jeffrey argued that Verlaine's financial disclosures reveal that she is able to live in a manner reasonably comparable to that enjoyed during the marriage. Because the term "self-supporting" is not defined in the MSA, it is only logical to rely on the plain meaning of that term as it is typically used when considering issues of maintenance in Wisconsin. If the parties had intended a different

definition to be applied, they could have defined the term "self-supporting" in the MSA. They did not.

B. Whether Verlaine's health amounted to a substantial change in circumstances is irrelevant to the circuit court's maintenance decision.

¶23 Jeffrey also argues that the circuit court erred in awarding Verlaine maintenance because he believes Verlaine failed to show that her poor health amounted to a substantial change in circumstances warranting a change in the maintenance award. However, Jeffrey misperceives the circuit court's order. While the circuit court found that Verlaine was receiving social security and has "medical issues," it did not base the appropriateness of the maintenance award on a substantial change in her medical health. Rather, the circuit court concluded that Verlaine was not "self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage," which triggered a maintenance award under I.A.2 of the MSA. As such, whether the circuit court erred in concluding that Verlaine's health resulted in a substantial change in circumstances is irrelevant. The failure of Verlaine's business is enough to warrant a maintenance order. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts should decide cases on the narrowest possible grounds).

III. The circuit court did not erroneously exercise its discretion when setting the amount and duration of maintenance.

¶24 Finally, Jeffrey contends that the circuit court erroneously exercised its discretion in setting both the amount and the duration of the maintenance award. For the reasons that follow, we disagree.

¶25 The determination of maintenance is a decision entrusted to the discretion of the circuit court and will not be disturbed on review unless there has been an erroneous exercise of discretion. ***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.'" ***Id.*** (brackets and citation omitted). "A circuit court's discretionary decision is upheld 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.'" ***Id.*** (citation omitted). If a circuit court fails to adequately set forth its reasoning in reaching a discretionary decision, we will search the record for reasons to sustain that decision. ***Long v. Long***, 196 Wis. 2d 691, 698, 539 N.W.2d 462 (Ct. App. 1995).

¶26 When considering a maintenance award, a circuit court must examine the list of statutory factors set forth in WIS. STAT. § 767.56.[4] ***Ladwig v.***

[4] WISCONSIN STAT. § 767.56 states, in relevant part:

> **Maintenance. (1c)** FACTORS TO CONSIDER FOR GRANTING. 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 maintenance payments to either party for a limited or indefinite length of time, subject to sub. (2c), after considering all of the following:
>
> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.
>
> (c) The division of property made under s. 767.61.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) 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

(continued)

Ladwig, 2010 WI App 78, ¶17, 325 Wis. 2d 497, 785 N.W.2d 664. On review, the question is whether the circuit court's application of the factors achieves both the support and fairness objectives of maintenance. ***Forester v. Forester***, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993). The first objective is to support the recipient spouse in accordance with the needs and earning capacities of the parties. "The goal of the support objective of maintenance is to provide the recipient spouse with support at pre-divorce standards." ***Fowler v. Fowler***, 158 Wis. 2d 508, 520, 463 N.W.2d 370 (Ct. App. 1990). The fairness objective "is 'to ensure a fair and equitable financial arrangement between the parties in each individual case.'" ***King v. King***, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999) (citation omitted).

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education or training to enable the party to find appropriate employment.

(f) 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.

(g) The tax consequences to each party.

(h) 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.

(i) The contribution by one party to the education, training or increased earning power of the other.

(j) Such other factors as the court may in each individual case determine to be relevant.

¶27 Here, the circuit court acknowledged that it needed to take the WIS. STAT. § 767.56 factors into consideration when setting the maintenance award, and then examined the significance of each factor thusly:

- *Length of the marriage*. The circuit court noted that the marriage was thirteen years and that while that was "not on the long end of long-term marriage," the court still believed that the marriage qualified as "long-term."[5]

- *Age and physical and emotional health of the parties*. The circuit court acknowledged that Verlaine was sixty-three years old and had health issues. The court noted that Verlaine did not produce any testimony at trial to back up her medical claims, but took judicial notice of the fact that "she's under social security disability and has been for some time." The circuit court expressly stated that it "really doesn't place a great deal of emphasis" on Verlaine's testimony that "she can be up for an hour and a half at a time." To the contrary, the court found that Jeffrey was sixty years old, in good health, was very bright, and was able to support himself full time.

- *The division of property made under WIS. STAT. § 767.61*. The circuit court also took into account the division of property at the time of the divorce, but expressly stated that it was only "one of many factors that the court has to take into account" and "that's not the total consideration."

- *Education and earning capacity.* The circuit court acknowledged that it needed to take into consideration "the earning capacity of the party seeking maintenance, including [Verlaine's] educational, background, training, employment, work experience, [and] length of absence from the job market." The court noted that Verlaine had a high school diploma and had taken some computer classes, while Jeffrey had a bachelor's degree and was a member of the patent bar. Having considered all of those things, the court found that they all "lean in favor of her receiving maintenance."

- *Feasibility of becoming self-supporting.* The circuit court found that "it doesn't appear likely that [Verlaine] is going to become self-supporting in

[5] Jeffrey argues that "[a]lthough the [circuit] court referred to the marriage as a 13-year marriage, it was a 12-year marriage. The parties were married on July 16, 1995 and divorced on May 27, 2008." The parties were married for over twelve years and ten months. We discern no error in the circuit court's finding that the parties were married for thirteen years.

the near future … focusing on … what type of lifestyle the parties had during the marriage and just before the divorce."

- *Tax consequences.* The circuit court took into consideration the fact that if Jeffrey "has to pay maintenance, he will receive a tax benefit" and that Verlaine "will have to pay some form of tax on any maintenance she does receive."

- *Any mutual agreement made by the parties after the marriage.* The circuit court noted that the parties signed an MSA that was adopted into the divorce judgment.

- *Contribution by one party to the education, training or increased earning power of the other.* The circuit court concluded that there was no evidence in the record that "either of the parties contributed to the education or training of the other."

The circuit court also noted that Verlaine's primary source of income was social security disability, in the amount of $20,578 a year, and that Jeffrey made $110,701 in 2012 and $82,321.68 in 2013. After taking all of these factors into consideration, the circuit court awarded maintenance to Verlaine in the amount of $2000 a month, commencing on March 1, 2014, and to continue for five years.

¶28 Jeffrey argues that the circuit court erroneously exercised its discretion in four respects: (1) Jeffrey believes that the circuit court's maintenance award was unfair because the circuit court allegedly awarded Verlaine 55% of the parties' spendable income; (2) Jeffrey believes that the circuit court failed to find that Verlaine was shirking; (3) Jeffrey contends that the circuit court allegedly failed to impute investment income to Verlaine; and (4) Jeffrey believes there is no basis in the record for the duration of the award. For the reasons which follow, we disagree.

¶29 First, Jeffrey argues that the circuit court's maintenance award fails to contemplate the fairness objective because Jeffrey believes that the circuit court

should have considered only his 2013 income ($82,321.68), as opposed to his substantially larger 2012 income ($110,701), and failed to credit Verlaine with $6000 in rental income. Using his 2013 income and crediting Verlaine with her rental income, Jeffrey argues that the circuit court's maintenance award gives Verlaine 55% of the parties' spendable income, and is therefore unfair. However, Jeffrey provides no legal citation for his assertion that the circuit court was required to consider only his income from the most recent year. In its findings of fact, the circuit court acknowledged *both* Jeffrey's 2012 and 2013 income, and noted that Verlaine's primary source of income was her social security disability check. The circuit court was free to consider Jeffrey's income over the past two years, rather than simply his income in the past year. Jeffrey has not argued that the maintenance award is unfair when his salary over the past two years is taken into consideration. The circuit court also took into consideration the many other WIS. STAT. § 767.56 factors when ordering maintenance, and we can discern no reason to overturn its decision based on those factors.[6]

¶30 Second, Jeffrey argues that the circuit court should have imputed an additional $36,000 to Verlaine because Jeffrey believes that the evidence shows that Verlaine was shirking. *See* ***Chen v. Warner***, 2005 WI 55, ¶20, 280 Wis. 2d 344, 695 N.W.2d 758 (Shirking occurs when a party's decision to reduce or forego employment income is voluntary and unreasonable.). Jeffrey argues that the only evidence in the record demonstrated that Verlaine's self-employed sewing business failed because in June 2009 she failed to fill a purchase order for her

[6] On appeal, both parties submitted DFS Tax Calculation Spreadsheets that they ask us to consider. However, many of these spreadsheets were not presented to the circuit court and were not included in the record. We do not consider documents that are not included in the record. *See* ***State v. Lass***, 194 Wis. 2d 591, 604, 535 N.W.2d 904 (Ct. App. 1995).

largest customer. However, the circuit court explicitly found that while Verlaine was partially to blame for the failure of her business, Jeffrey and the economy were also to blame. Because the circuit court attributed the failure of Verlaine's business to both parties, as well as factors outside of their control, it did not erroneously exercise its discretion when it failed to attribute income to Verlaine for allegedly shirking.

¶31 Third, Jeffrey argues that the circuit court failed to take into consideration investment income that Verlaine had received as part of the property division during the divorce. At the time of the divorce, Verlaine was awarded an interest equal to 50% plus $13,000 from Jeffrey's accrued benefits in a personal enrichment plan, valued at $1,000,956 at the time of the divorce. Verlaine testified at trial that only $60,000 of her portion of the enrichment plan remained at the time of the motion for maintenance because she had very high expenses for a few years and gave $120,000 to her son to renovate his home, in which Verlaine also lives. Jeffrey contends that Verlaine made unwise financial decisions with her money after the divorce, noting that he did not withdraw his portion of the personal enrichment plan and that it is now valued at well over $600,000. He believes that the circuit court failed to take this fact into consideration and is forcing him to subsidize Verlaine's poor money management.

¶32 The circuit court discussed Verlaine's withdrawal from the personal enrichment plan with the parties at length during the trial. In its findings, the circuit court explicitly noted that it took "into account under subsection [c] the division of property made under § 767.61. In fairness, I do take that into account here. However, that's not the total consideration. It's one of many factors that the court has to take into account." In other words, the circuit court, after looking at all of the factors, including the distribution of the personal enrichment plan at the

time of the divorce, concluded that $2000 a month in maintenance was warranted. As part of its exercise of discretion, the circuit court was free to find Verlaine's testimony regarding the use of her share of the enrichment plan credible and to not fault her for that use. Jeffrey's argument amounts to little more than an assertion that he wishes that the circuit court had exercised its discretion differently.

¶33 Finally, Jeffrey argues that there is no basis in the record for the circuit court's decision to impose maintenance for five years, stating that the circuit court "gave no reasons for the five-year period" other than the fact that the parties' thirteen-year marriage qualified as "long-term." We disagree with Jeffrey's summary of the circuit court's findings. The circuit court based its decision to order maintenance for five years, not just based upon the length of the parties' marriage, but upon all of the WIS. STAT. § 757.56 factors it considered, including the parties' health, ages, education, and earning capacities. Like the amount of the maintenance award, the length of the award was based upon the proper factors and amounted to a proper exercise of the circuit court's discretion. As such, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.