Page v. Page

758 N.W.2d 225 (2008) | Cited 0 times | Court of Appeals of Wisconsin | September 24, 2008

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 Greg H. Page appeals from an order providing for sixteen years of maintenance to Crystal J. Page, Greg's former spouse. We disagree that the length and amount of the maintenance award represented an erroneous exercise of the trial court's discretion. We affirm.

¶2 In November 2005, Greg and Crystal divorced after an eighteen-year marriage. Their two children still were minors. The court ordered Greg to pay $1800 family support and held open child support and maintenance. Over the next two years, the court held four review hearings at which it adjusted family support, child support and maintenance due to Greg's temporary job loss, Crystal's moves to and from Florida, changes in child-placement arrangements, the older child's educational status and Crystal's medical conditions, which included depression, Bell's palsy, back surgery in 2005 and a laminectomy and spinal fusion in 2006. A June 27, 2006 interim order stated that before the court could make a final determination, "it would be helpful" to have an opinion from Crystal's doctor regarding her long-term restrictions and ability to work and a vocational expert or a report from the Department of Vocational Rehabilitation.

¶3 At the time of the final review, only the youngest child, Tyler, was still a minor and lived with Crystal. Unemployed since her back surgery, Crystal provided a December 18, 2006 letter from her treating physician, Dr. Dennis Maiman, opining that she has permanent lifting and activity restrictions and will have permanent back and leg pain. Crystal also advised that she retained an attorney to pursue a twice-denied social security disability claim and spoke to a DVR counselor and applied for retraining. Greg asked that maintenance be terminated based on Crystal's failure to become employed or retrained.

¶4 The trial court ordered child support to cease and be held open until Tyler turned eighteen.[1] As to maintenance, the court deemed Crystal's physical condition to be the overriding factor. The court noted her "current disabling problem" of residual pain and activity limitations since her 2005 surgery, with no suggestion that she was malingering. The court found that, at forty-six, Crystal would have sixteen to nineteen years' earning capacity if she were employed. It also found that she has not worked in the two years since her surgery and, despite an established past earning capacity, there was no reliable information from which to predict her future earnings. The court ordered Greg to pay monthly maintenance of $2,150 which would increase to $2,250 upon expiration of the child support "hold-open" for a term of sixteen years. The court ordered a dollar-for-dollar reduction in maintenance for any SSI or SSDI Crystal receives or for her income or W-2 earnings in excess of

$15,000 annually. Greg appeals.

¶5 Greg challenges both the amount and the duration of maintenance the trial court set. Those determinations are entrusted to the sound discretion of the trial court, and we will not disturb them unless the court erroneously exercises its discretion. Hacker v. Hacker, 2005 WI App 211, ¶10, 287 Wis. 2d 180, 704 N.W.2d 371. A valid exercise of discretion must be the product of a rational mental process by which the facts of record and the law relied upon are stated and considered together to achieve a reasoned and reasonable determination. Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Where the record shows that the court considered the facts, applied the proper law and reasoned its way to a conclusion a reasonable judge could reach, we will affirm the decision even if it is not one which we ourselves would have made. See id. Because the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions. Burkes v. Hales, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (citation omitted).

¶6 Review of a maintenance award begins with a consideration of WIS. STAT. § 767.56 (2005-06)[2] which authorizes the circuit court to grant maintenance for a limited or an indefinite period of time after considering nine specific factors plus any other factors the court deems relevant. See Hacker, 287 Wis. 2d 180, ¶11. These factors are designed to further two distinct but related objectives in the award of maintenance, support and fairness. LaRocque v. LaRocque, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987).

¶7 Here, the court expressly considered each maintenance factor, and deemed Crystal's physical condition to be the overriding one. It observed that Crystal's "current disabling condition" might favorably resolve in the future, her social security claim still was uncertain and job retraining remained a possibility.

¶8 Greg contends, however, that the court relied on hearsay medical reports to set the maintenance award. At the September 2006 review hearing, Crystal testified about an August 2006 letter report from Dr. Maiman stating that she "continues to suffer from severe back pain with markedly decreased range of motion and back spasm," and that she could work part time, "if at all," at a sedentary job with numerous activity restrictions. Greg did not object during her testimony or when the report was admitted. He cannot now contest it. See Covelli v. Covelli, 2006 WI App 121, ¶17, 293 Wis. 2d 707, 718 N.W.2d 260.

¶9 Greg did object at the March 2007 hearing that two medical "reports" Crystal sought to admit into evidence were hearsay, and the court excluded them. It admitted, however, a December 2006 report from Dr. Maiman opining that Crystal's back and leg pain and activity restrictions were permanent. Greg contends that the court's comment that Crystal's medical condition presents an "unresolved situation" shows that the court improperly allowed the excluded reports to influence its decision. Read in full context, however, the court's comment reflects that Crystal still was awaiting resolution of her social security disability claim, attempting to be weaned from her narcotics, and hoping to find

employment.

¶10 Greg also contends that Crystal failed to produce evidence to substantiate her claim of continuing disability. Whether a party has met the burden of proof is a question of law. Brandt v. Brandt, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988). Dr. Maiman refused to testify in person or by telephone. His December 2006 letter report, however, establishes permanent activity restrictions and permanent pain. In addition, Crystal testified, and Greg does not dispute, that her twelve-year history of back problems worsened to the point of immobility in 2005, when she underwent her first surgery. Crystal also testified that she continues to take narcotic analgesics. Crystal is a competent witness to testify to her medical condition. See Heiting v. Heiting, 64 Wis. 2d 110, 118, 218 N.W.2d 334 (1974); see also Gehin v. Wisconsin Group Ins. Bd., 2005 WI 16, ¶113, 278 Wis. 2d 111, 692 N.W.2d 572 (Butler, J., concurring).

¶11 Greg also asserts Crystal failed to provide current information regarding her supplemental social security or social security disability claims. Crystal testified that she applied for benefits before December 2005 and was denied on more than one occasion. The trial court acknowledged that the denials may mean that Crystal is not disabled under social security law. Crystal also testified that she had engaged an attorney to appeal and is awaiting another hearing. The court reasonably may have concluded that Crystal's persistent pain despite the passage of more time may yield a different result. More importantly, however, to the extent that Greg is arguing that the family court is bound by a social security administration denial, we reject that premise. A denial of SSI or social security disability benefits does not prohibit the court from independently finding that physical problems adversely affect a party's ability to work.

¶12 Greg next complains that Crystal has not sought employment within her limitations and that she only began applying for employment in January 2007. Greg supports his argument in part with Crystal's testimony from earlier review hearings. But she also testified that Dr. Maiman expressly told her she was not ready to work. Greg also misreads other testimony. Crystal did not say she began her job search in January 2007, but that she began keeping track of it then. Crystal testified that she has applied for "[a]nything I think I can do ... office, airlines, receptionist, order entry, retail [and] customer service." The court specifically found no suggestion of malingering. Weighing witness credibility is for the trier of fact. Raz v. Brown, 213 Wis. 2d 296, 306, 570 N.W.2d 605 (Ct. App. 1997).

¶13 Lastly, Greg argues that the trial court misused its discretion by modifying the maintenance award without a showing of a substantial change in circumstances. See Rohde-Giovanni v. Baumgart, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. This was not a "modification," however. Rather, it was the first final order of maintenance after a series of temporary orders.

¶14 Considerable testimony and evidence was presented over the several review hearings. The trial court's oral comments and written decision reflect that it considered the facts, applied the relevant law and fashioned a resolution aimed at fairness to both parties. That is what a proper exercise of

discretion is.

By the Court.--Order affirmed.

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

1. Child support would be held open until Tyler turned nineteen if he still had not completed his high school degree or its equivalent.

2. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.