

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 15, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3389

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

In re the Marriage of:

**DONNA SHIRLEY,
f/k/a DONNA MALLORY,**

Joint-Petitioner-Respondent,

v.

WILLIAM J. MALLORY,

Joint-Petitioner-Appellant.

APPEAL from an order of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed.*

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

PER CURIAM. William J. Mallory appeals from a trial court order requiring him to pay interest and penalties for taxes due on family support he paid his former wife, Donna Shirley, for 1991 through 1994 and declining to award him a credit on allegedly overpaid family support. We conclude that the trial court did not err and affirm.

Resolution of this appeal requires discussion of the parties' conduct regarding family support. Mallory and Shirley divorced in 1985. Under the divorce judgment, Mallory was required to pay family support which would increase annually based upon a cost of living index established by the Federal Bureau of Labor Statistics. In 1986, the parties stipulated that Mallory would pay all of Shirley's state and federal income taxes attributable to family support. These tax payments were deemed additional family support which would be deducted by Mallory and included in Shirley's income. In 1988, family support increased and the court required Mallory to pay family support by wage assignment to the clerk of circuit court.

In 1990, family support increased and was enforced by wage assignment. That year the parties were before the court to resolve tax-related matters. Mallory was held responsible for interest and penalties attributable to his failure to make timely quarterly estimated family support tax payments on Shirley's behalf. Shirley was held responsible for late filing fees because she had not filed her tax returns on time.

In May 1993, the parties stipulated, without benefit of counsel or involvement of the court, that family support would no longer be paid by wage assignment through the clerk of courts.

The parties returned to court in June 1995 to address whether Mallory was responsible under the 1986 stipulation for the taxes attributable to family support for the years 1991 through 1994 and whether an order should be entered to increase Mallory's monthly family support payment to include an amount for Shirley's taxes.

In its June 1995 ruling, the trial court observed that the parties repeatedly neglected to follow its orders and that matters became more muddled each time the parties ignored the outcome of earlier proceedings. The trial court then made the following findings of fact. The taxes on Shirley's income, the bulk of which was family support, were not paid for 1991 through 1994. The court found that Shirley did not present sufficient evidence of the amounts she received from Mallory.¹ Therefore, it relied upon financial

¹ The court chastised Shirley for proceeding without the benefit of legal or accounting advice,

information provided by Mallory. Mallory's accountant calculated the amount of family support Shirley received in the years at issue and the tax attributable to family support. The court found that Mallory unilaterally calculated his family support payment without employing a specific formula. The court recalculated Mallory's support payments based upon the amount required in the 1990 court order (\$3930 per month) and increased each subsequent year's support by the cost of living adjustment contemplated in the 1985 judgment of divorce.

Mallory claimed that he overpaid family support and that the overpayments satisfied the taxes for 1991 through 1994 as required by the 1986 stipulation. The trial court found that there was no written documentation of this claimed overpayment. The court noted that although Mallory paid estimated federal tax in 1992 on Shirley's family support (which amounts were in excess of the actual tax owed), he did not pay any Wisconsin estimates for that year and paid no estimates or tax for the years 1991, 1993 and 1994. At the same time, Shirley did not undertake to have tax returns prepared, believing that it was Mallory's obligation to do so.

The court found that Mallory owed the taxes for the years in question and assigned him responsibility for the interest and penalties on those taxes. The court noted that Mallory did nothing until 1995 to address his tax liability and, at a minimum, he could have paid estimated taxes as he did in 1992 which would have reduced the penalties and interest on unpaid tax. The court enforced the family support and tax-related provisions of the judgment of divorce and the 1986 stipulation and found that whatever confusion arose regarding the parties' obligations was of their own making.

Before we address Mallory's appellate issues, we note that the trial court's decision on these issues is influenced by the facts and the law and by its familiarity with the parties' repeated failure to comply with its orders and their decision to alter their financial relationship without the benefit of counsel or a court order. A trial court has certain advantages over an appellate court in assessing the conduct of the parties. See *State v. Hagen*, 181 Wis.2d 934, 949, 512

(..continued)

which the court believed she could afford, in what the court characterized as an extremely complex tax and accounting situation.

N.W.2d 180, 185 (Ct. App. 1994); *see also State v. Bunch*, 191 Wis.2d 501, 509-10, 529 N.W.2d 923, 926 (Ct. App. 1995). Therefore, we take the trial court's observations into account in addressing the appellate issues.

Postdivorce support issues are within the discretion of the trial court. *See Poindexter v. Poindexter*, 142 Wis.2d 517, 531, 419 N.W.2d 223, 229 (1988). We will uphold a trial court's discretionary decision if the trial court examined the relevant facts, applied the proper legal standard and reached a conclusion that a reasonable judge could reach using a demonstrated rational process. *Phone Partners, Ltd. v. C.F. Communications*, 196 Wis.2d 702, 710, 542 N.W.2d 159, 162 (Ct. App. 1995). However, because the issue on appeal is whether the trial court erroneously determined that the parties did not meet their respective burdens that excess family support payments were either gifts (Shirley's contention) or taxes (Mallory's contention), we are presented with a question of law which we review de novo. *See Brandt v. Brandt*, 145 Wis.2d 394, 409, 427 N.W.2d 126, 131 (Ct. App. 1988) (whether a party has met his or her burden of proof is a question of law). Although we review de novo, we are nevertheless assisted by the trial court's ruling. *See State v. Timmerman*, 198 Wis.2d 309, 316, 542 N.W.2d 221, 224 (Ct. App. 1995).

On appeal, Mallory argues that he should not be held liable for the penalties and interest on Shirley's family support taxes for the years 1991 through 1994 because Shirley never prepared a tax return. The trial court rejected this claim, as do we. Pursuant to the judgment of divorce and the 1986 stipulation, Mallory was responsible for paying the taxes on the family support he paid to Shirley. It was within Mallory's knowledge how much he paid her from 1991 through 1994 and nothing prevented Mallory from paying the taxes on that income by forwarding the correct amounts to either the taxing authorities or to Shirley. Accordingly, we conclude that the trial court did not misuse its discretion in assigning to Mallory the penalties and interest upon taxes for the years 1991 through 1994.

We also affirm the trial court's rejection of Mallory's claim that because he overpaid family support, he effectively paid the taxes required by the 1986 stipulation. The court stated, "I am not even going to try to determine what these parties said to each other in phone conversations, etc. The written documentation is controlling. What problems this causes for the parties is of their own making." It is plain that the trial court rejected the parties' testimony

regarding side agreements dealing with responsibility for preparing Shirley's tax returns and which of Mallory's payments were gifts and which were family support.

We agree with the trial court that neither party met his or her burden. The court's rulings that Mallory did not prove he overpaid family support or that the overpayments were intended for taxes were not clearly erroneous.² Therefore, Mallory did not meet his burden of producing evidence in support of his contention.

Although the trial court never made any express credibility finding on Shirley's claim that the excess payments to her were gifts rather than family support, it clearly rejected the claim as inadequately documented. As with Mallory's asserted overpayment, the court was faced with a self-serving assertion by Shirley. In light of all the circumstances of this case, we conclude that the parties did not meet their respective burdens.

Mallory argues that the court's previous orders did not establish a method for paying income taxes associated with family support. While this is true, the 1986 stipulation required Mallory to pay those taxes and the burden was upon him, as the party writing the support checks, to take steps to timely meet his tax obligations.

Under all the circumstances of this case and in light of the trial court's extensive knowledge of the orders it entered and the parties' conduct in light of them, the court's rejection of Mallory's claimed overpayment and allocation of penalties and interest on the family support taxes to Mallory was not a misuse of the court's discretion.

By the Court. – Order affirmed.

² The trial court recognized that Mallory paid estimated federal taxes in 1992. However, it deemed the proof lacking as to the purpose of Mallory's claimed "overpayment." On this record, we cannot say that the trial court erred in so ruling.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.