

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

VICKI L. THOMAS,

PETITIONER-APPELLANT,

v.

FREDERICK W. THOMAS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
LOUISE M. TESMER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Vicki L. Thomas appeals from a post-divorce order denying her motion seeking modification of the support order entered following her divorce from Frederick W. Thomas in 1992. Vicki claims: (1) the trial court

erred when it refused to include non-salary benefits provided to Frederick by his sole proprietorship; (2) the trial court erred when it concluded that the appreciation Frederick realized on stock awarded to him as a part of the divorce settlement did not constitute income; and (3) the trial court should have ordered Frederick to pay interest on child support not paid in a timely manner. Because the trial court did not err in denying Vicki's motion seeking modification of the support order, we affirm.

I. BACKGROUND

¶2 Vicki and Frederick were divorced in 1992. At the time, the couple had two minor children: Brett, born March 21, 1982, and Emilie, born June 17, 1985. Frederick was employed as an insurance agent by the Ebert Agency. He earned \$4,734 a month and was provided with non-salary benefits, including a car allowance, company paid health and life insurance, corporate donations, and reimbursement for out-of-pocket health insurance expenses. The parties agreed that Frederick would pay 25% of his gross salary toward child support. The parties also split their property equally, and assigned values to each substantial asset, such as the marital home, which was awarded to Vicki, and the Ebert stock, which was awarded to Frederick.

¶3 In 1994, Frederick left the Ebert Agency and started his own insurance company. In order to do so, Frederick bought his "book" (a list of his clients and a right to do business with them without competition from Ebert for three years) for \$128,984.50. In partial payment, Ebert bought back Frederick's stock for \$45,713.50. At the time of divorce, this stock had been valued at \$42,039.40.

¶4 As a result of this change in position, Frederick's new salary was substantially less than when he was employed at Ebert. He received \$24,000 annually in salary; however, the company also provided him with non-salary perks including life, health, and disability insurance, payment of uncovered expenses, car ownership and use expenses, and church donations. Vicki found out about Frederick's job change when her monthly child support check was cut in half. Vicki moved the court for modification of child support based on the change in circumstances.

¶5 The case was heard by an assistant family court commissioner, who ruled in Frederick's favor on the issues involved in this appeal. Vicki appealed to the circuit court for a *de novo* review. The circuit court affirmed the commission's decision. Vicki now appeals.

II. DISCUSSION

A. *Non-salary Benefits.*

¶6 Vicki first contends that Frederick's non-salary benefits ought to be included in his gross income calculation for child support purposes. She claims that WIS. ADM. CODE DWD § 40.02(13)(i) and case law require these benefits to be included in the child support calculation. Vicki also argues that failure to include the fringe benefits in the gross income calculation results in Frederick being able to avoid his child support obligation. We are not persuaded.

¶7 The parties present opposing standards of review. Vicki contends this issue presents a question of law because it requires the application of the facts to an interpretation of a rule of law. *See Weis v. Weis*, 215 Wis. 2d 135, 138, 572 N.W.2d 123 (Ct. App. 1997). Frederick points out that child support decisions are

left to the discretion of the trial court. *See Edwards v. Edwards*, 97 Wis. 2d 111, 116, 293 N.W.2d 160 (1980). Both parties are partially correct. The interpretation of the administrative regulations involved do present a question of law; however, as long as the trial court applied the proper law to the pertinent facts and reached a rationale conclusion, we will not reverse the decision because such conduct constitutes a proper exercise of discretion.

¶8 WISCONSIN ADM. CODE DWD § 40.02 addresses what should be considered gross income for child support purposes. It defines gross income as “[a]ll income considered federal gross income under C.F.R. 1.61-1.” The federal regulation provides that gross income includes income from whatever source, unless excluded by law. *See Grohmann v. Grohmann*, 189 Wis. 2d 532, 537, 525 N.W.2d 261 (1995). Federal law dictates that certain non-salary type benefits are not considered gross income for taxing purposes. *See* 26 U.S.C. § 106. These include employer-provided coverage under a health insurance plan, disability insurance, life insurance, business-related automobile expenses, and employer-reimbursed uncovered medical expenses. *See id.*; 26 U.S.C. § 79(a); 26 U.S.C. § 132(a)(3); CCH FEDERAL TAX GUIDE, Vol. 1 ¶¶ 4131, 4664.

¶9 The trial court in this case found that after Frederick left Ebert and formed his own company, he structured his salary and fringe benefits in a method similar to that which he had enjoyed at Ebert. The trial court found that the current fringe benefits were worth essentially what they had been worth when he was an employee of Ebert. The trial court found that Vicki, in the original property settlement, had not attempted to include the Ebert fringe benefits in Frederick’s gross income, and that Frederick’s subsequent salary structure was not intended to avoid paying child support. Taking these facts together with the

pertinent law, the trial court's decision that the fringe benefits should not be included in a gross income calculation was not an erroneous exercise of discretion.

¶10 Vicki's reliance on *Lendman v. Lendman*, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990), and *Wall v. Wall*, 215 Wis. 2d 595, 573 N.W.2d 862 (Ct. App. 1997) is misplaced. *Lendman* prohibits payors from hiding income through the use of corporate manipulation. *See id.* at 614. The trial court specifically found that Frederick was not manipulating his income here to avoid paying child support. That finding is not clearly erroneous; it is supported by the record. Similarly, *Wall* provides that whether a benefit constitutes gross income may be influenced by whether the payor has control over the item. *See id.* at 597. Here, as a sole proprietor, Frederick did have control over how to structure what he received as a salary and what he received as fringe benefits. The trial court found, however, that Frederick did not manipulate the system so that he could pay less child support. When he set up his own company, Frederick retained the same non-salary benefits provided for at Ebert. Therefore, we are not persuaded by Vicki's contention that these fringe benefits must now be included as gross income for child support purposes.¹

¹ In reply, Vicki argues that WIS. ADM. CODE DWD § 40.02(13)(i) provides that in addition to taxable income, gross income for child support calculations also includes "all other income, whether taxable or not." We cannot conclude that this regulation requires inclusion of the fringe benefits discussed here. To do so would render an absurd result. If "all income" should be included for calculation purposes, then application of WIS. ADM. CODE DWD § 40.02(13)(a) would be meaningless. Current case law in this area is consistent in determining what income should be included in the child support calculation. The case law excludes corporate-paid fringe benefits at issue here, unless the payor somehow manipulates the system to reduce the support obligation. *See, e.g., Weis v. Weis*, 215 Wis. 2d 135, 143-44, 572 N.W.2d 123 (Ct. App. 1997).

B. Stock Appreciation.

¶11 Vicki next argues that the Ebert stock appreciation should have been considered income to Frederick; accordingly, she should have received 25% of the appreciation value. We do not agree.

¶12 The trial court found that at the time of the divorce, Vicki and Frederick divided the assets and placed a current value on each item. The value of the Ebert stock at the time of the divorce was \$42,039.40. Two years later, when Frederick sold the stock back to the company, it had increased in value by approximately \$3,700. The trial court found that this increase was *de minimus*, that the stock had not been undervalued at the time of the divorce, and its sale did not produce a stream of income. Based on these findings, the trial court ruled that the appreciation of the stock could not be counted as income for child support purposes. See *Maley v. Maley*, 186 Wis. 2d 125, 519 N.W.2d 717 (Ct. App. 1994).

¶13 The trial court's decision was not erroneous. "An asset and its income stream may not be counted both as an asset in the property division and as part of the payor's income from which support is paid." *Id.* at 128. The stock was awarded to Frederick and valued appropriately at the time of the divorce. It should not be double counted. Certainly, Vicki will retain any appreciation in the value of property she was awarded in the divorce settlement and, if she sells, this property will not be subject to paying Frederick 50% of any increase in value.

¶14 Vicki cites two cases in support of her argument, *Olski v. Olski*, 197 Wis. 2d 237, 540 N.W.2d 412 (1995), and *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997). Both cases involve an asset generating a stream of income and, therefore, are inapplicable to the facts here.

C. Interest.

¶15 Vicki next asks this court to order Frederick to pay interest on the delinquent child support payments that he ultimately made to her, and to pay interest on the additional payments ordered by the court commissioner. We cannot do so. This issue is not currently before us because neither the court commissioner nor the trial court has ruled on it.

D. Sanction Request.

¶16 Frederick requests that we sanction Vicki for citing an unpublished decision. We decline to do so. The manner in which Vicki presented the unpublished decision was not improper.

By the Court.—Order affirmed.

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

