

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2001

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. 00-0881

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

ANN L. KEEN N/K/A ANN L. KEEN-BERG,

PETITIONER-RESPONDENT,

v.

MARC A. KEEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
JOHN H. LUSSOW, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Marc Keen appeals from an order adjusting his child support arrearage over three years and requiring him to contribute \$9,000 to attorney's fees Ann Keen-Berg incurred in litigating the arrearage dispute. Marc

alleges several circuit court errors during the proceedings. We reject his contentions and affirm.

¶2 Marc and Ann divorced in 1994. Until August 1997, Marc was required to pay twenty-five percent of his income to Ann as child support for the parties' three children. Thereafter, by stipulation, he paid twenty-nine percent and agreed to provide Ann with complete copies of personal and corporate income tax returns.

¶3 For a number of years, Marc worked for a corporation at an annual salary approaching \$70,000 per year. In April 1997, he became the sole employee of Keen Automation Services, Inc. (KAS), a corporation founded and owned by his second wife, Judi Keen. The sole business of the corporation is selling Marc's services to Caterpillar Company at a charge of \$85 per hour.

¶4 In 1997 KAS reported gross income of \$142,480, of which \$36,834 was paid to Marc as salary and \$81,543 was paid to Judi as corporate income, with the remainder used to pay miscellaneous expenses. In 1998 KAS reported gross income of \$217,211, with payments of \$52,000 to Marc and \$141,986 to Judi. Judi's estimated gross income for KAS in 1999 was \$227,000. Marc received \$60,000 in salary for that year. The child support Marc paid in 1997, 1998 and 1999 was based on his reported salary figures.

¶5 In early 1999, Ann filed an order to show cause, seeking a determination that some or all of the KAS income in excess of Marc's salary should be attributed to him for child support purposes. At the subsequent hearing, there was testimony that Judi kept the books but performed no other significant work for KAS. Its only employee since its inception has been Marc. Although his job was identical before Judi formed KAS and hired him, his former employer

paid him a higher salary than KAS has paid him and also paid him substantially better benefits.¹

¶6 Judi testified that KAS was wholly her idea. She also testified to a variety of jobs over her working career, some including supervisory and management duties. However, the circuit court cut short her recitation, in response to Ann's objection as to relevance, and instead took notice of "her varied background in many different endeavors ... I'll give her credit for knowing how to keep books."

¶7 Based on the testimony and financial records received in evidence, the circuit court found that the corporation was a sham, serving no purpose other than to divert a substantial part of Marc's income. The court rejected Marc's contention that Judi's involvement was necessary and valuable, noting that Marc actually operated as an independent contractor and could pay Judi or some other person for the services she provided. The court valued those services at \$3,000 per year. After deducting additional expenses of \$6,000 per year, the court found the balance of the gross corporate income to be Marc's earned income for child support purposes, and adjusted the 1997-99 arrearages accordingly. The court further ordered Marc to compensate Ann for \$9,000 in attorney's fees, after concluding that Marc's conduct was "egregious" and his decision to litigate the matter put her to an unnecessary expense.

¶8 Marc's position in the circuit court and on appeal is that Judi created KAS to legitimately profit from Marc's work and to reduce his stress level, with

¹ Part of the higher salary from his former employer came from overtime. Marc reports that he works fewer hours for KAS.

no evidence of any other purpose. Although Judi admitted to profiting greatly from Marc's labor while doing little herself, Marc points out that his former employer did the same. Marc's issues on appeal are whether the circuit court erred by: (1) finding that Marc's employer-employee relationship with KAS was a sham; (2) limiting evidence concerning Judi's employment history and business skills; (3) attributing all but \$3,000 of Judi's income to Marc; (4) failing to treat Ann's motion as a modification action; (5) requiring Marc to pay Ann's attorney's fees; and (6) awarding excessive attorney's fees.

¶9 In a proceeding under WIS. STAT. ch. 767 (1999-2000)² the circuit court may determine if the corporation is being used to "bury income under the corporate structure to dodge the payment of financial obligations." *Evjen v. Evjen*, 171 Wis. 2d 677, 685, 492 N.W.2d 361 (Ct. App. 1992). Circuit courts are urged to monitor and control deceptive corporate arrangements which affect financial arrangements arising from the dissolution of a marriage. *Id.*

¶10 The circuit court reasonably inferred, from undisputed facts, that Marc and Judi used KAS to reduce Marc's income for child support purposes. Under the corporate arrangement, KAS sells Marc's services to Caterpillar for \$85 per hour. However, he reports earned income that averages substantially less than \$30 per hour and which is also less than Marc earned working for his previous employer. Meanwhile, Judi claims the remaining income derived from Marc's services as corporate dividends, although her contribution to the business is minimal compared with Marc's, and easily replaceable at low cost. The corporate arrangement, as opposed to the alternative where Marc works as an independent

² All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

contractor, undeniably served to reduce his income for child support purposes, thus allowing him and Judi to retain a greater portion of his earnings. As the circuit court noted, the corporate structure provides no other discernable benefit to Marc and Judi. Under those circumstances, the circuit court's inference was not only reasonable but virtually unavoidable.

¶11 Additionally, we conclude the circuit court properly limited testimony regarding Judi's past employment. Marc contends that a full recitation of Judi's experience was necessary to establish her value to the business. He does not, however, adequately explain why. KAS operates as an extraordinarily simple business. It is nothing more than one man selling his services to one company. It did not require one of great experience to conceive of the arrangement, manage it, or keep its accounts. The issue is waived in any event because Marc failed to make an offer of proof when the court excluded further testimony on Judi's past employment. WISCONSIN STAT. § 901.03(1)(b).

¶12 The evidence also supports the circuit court's finding that all but \$3,000 per year of Judi's income is attributable to work Marc performs for Caterpillar. An expert accounting witness testified that Marc could hire bookkeepers or accountants to perform Judi's work for the business at a cost of \$3,000 per year. The circuit court's decision to believe that testimony and to accord it greater weight than the testimony and evidence Marc presented is not subject to review. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988).

¶13 Furthermore, we conclude that Marc mischaracterizes the circuit court's order as one which modifies his support obligation. Ann brought this action to enforce the support order that required Marc to pay twenty-nine percent

of his income in child support. In this proceeding, the circuit court merely determined the correct amount of Marc's imputed income. The child support order was not modified because Marc's obligation remained at twenty-nine percent.

¶14 We also conclude that the circuit court properly ordered Marc to pay Ann's attorney's fees. The award of attorney's fees is within the circuit court's discretion and is subject to reversal only if the circuit court erroneously exercises that discretion. *Ably v. Ably*, 155 Wis. 2d 286, 293, 455 N.W.2d 632 (Ct. App. 1990). In a family court proceeding, the circuit court may award attorney's fees against a party who causes needless litigation. *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985). Here, the circuit court reasonably determined that Marc had no plausible basis for excluding the corporate income from his income for purposes of paying child support and therefore that he needlessly opposed this action. Marc failed to show any legitimate purpose for the existence of KAS and presented no evidence the circuit court found credible as to why Judi should have received more than a very small portion of his earnings. In short, Marc did not present a plausible explanation of the corporate arrangement and therefore had no defense to the action.

¶15 And finally, we decline to review Marc's challenge to the reasonableness of the attorney's fee award. Marc did not raise the issue in the circuit court. As a general rule, we do not review issues raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Marc presents no compelling reason why we should grant an exception to that rule in this case.

By the Court.—Order affirmed.

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

