

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 31, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 2005AP1731**

**Cir. Ct. No. 2000FA283**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**BRENDA LEE LENZNER,**

**PETITIONER-RESPONDENT,**

**V.**

**TIMOTHY JOHN LENZNER,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Manitowoc County:  
FRED H. HAZLEWOOD, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Timothy Lenzner has appealed from an order modifying child support. His sole challenge is to the trial court's determination

that his annual income for purposes of child support is \$83,140.67. We affirm the trial court's order.

¶2 Timothy is self-employed at ACR Universal, a small trucking business. ACR is an S corporation, and Timothy is the sole shareholder. ACR is Timothy's sole source of income.

¶3 Timothy was paid a salary of \$27,126 by ACR in 2003. ACR's tax return for 2003 also showed undistributed ordinary income of \$46,349. In determining Timothy's income for child support purposes, the trial court included his \$27,125.67 in salary, the \$46,349 in undistributed income for ACR, and \$9,666 paid by ACR to Timothy's wife in 2003.

¶4 In determining a parent's income available for child support, a court is required to consider the parent's annual gross income or, if applicable, the parent's annual income modified for business expenses. WISCONSIN ADMIN. CODE § DWD 40.03(1)(Dec. 2003).<sup>1</sup>

¶5 WISCONSIN ADMIN. CODE § DWD 40.03(2) provides:

DETERMINING INCOME MODIFIED FOR BUSINESS EXPENSES. In determining a parent's monthly income available for child support under sub. (1), the court may adjust a parent's gross income as follows:

(a) Adding wages paid to dependent household members.

(b) Adding undistributed income that meets the criteria in s. DWD 40.02(13)(a)9 and that the court determines is not reasonably necessary for the growth of the business. The parent shall have the burden of proof to show that any

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<sup>1</sup> All references to the Wisconsin Administrative Code are to the December 2003 version.

undistributed income is reasonably necessary for the growth of the business.

(c) Reducing gross income by the business expenses that the court determines are reasonably necessary for the production of that income or operation of the business and that may differ from the determination of allowable business expenses for tax purposes.

¶6 WISCONSIN ADMIN. CODE § DWD 40.02(13)(a)9 defines gross income to include:

Undistributed income of a corporation, ... in which the parent has an ownership interest sufficient to individually exercise control or to access the earnings of the business.... In this paragraph:

a. “Undistributed income” means federal taxable income of the closely held corporation, ... plus depreciation claimed on the entity’s federal income tax return less a reasonable allowance for economic depreciation.

b. A “reasonable allowance for economic depreciation” means the amount of depreciation on assets computed using the straight line method and useful lives as determined under federal income tax laws and regulations.

¶7 WISCONSIN ADMIN. CODE § DWD 40.02(16) further states:

“Income modified for business expenses” means the amount of income after adding wages paid to dependent household members, adding undistributed income that the court determines is not reasonably necessary for the growth of the business, and subtracting business expenses that the court determines are reasonably necessary for the production of that income or operation of the business and that may differ from the determination of allowable business expenses for tax purposes.

¶8 Timothy concedes that he has an ownership interest in ACR sufficient to individually exercise control over it or to access its earnings. He also concedes that, in determining his income, the trial court correctly considered the \$27,126 in salary paid to him by ACR. However, he contends that in determining

his income, the trial court should have included only \$8,681 of ACR's undistributed income and should not have included the compensation paid by ACR to his wife.

¶9 Initially, we reject Timothy's argument that we must review the trial court's determination of his income under a de novo standard of review. In support of this argument, Timothy contends that the 2003 ACR tax return, his 2003 personal income tax return, and the testimony of his accountant were undisputed. He contends that when facts are undisputed, the application of principles of law to the facts presents a question of law that must be reviewed de novo.

¶10 The defect in Timothy's argument is that relevant facts regarding ACR's undistributed income and expenses were disputed in the trial court, including whether ACR's undistributed income was reasonably necessary for the growth of the business, the amount of depreciation and expenses that should reasonably be allowed, and how much Timothy's current wife works for ACR. Moreover, the burden was on Timothy to prove that the undistributed income was reasonably necessary for the growth of the business. The trial court implicitly concluded that he did not meet this burden and that he was not a credible witness.

¶11 A trial court's determination as to a party's income is a finding of fact that we will not disturb unless it is clearly erroneous. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989). The weight and credibility to be given to the testimony of the witnesses is uniquely within the province of the trial court. *Siker v. Siker*, 225 Wis. 2d 522, 528, 593 N.W.2d 830 (Ct. App. 1999). A trial court may reject even uncontroverted testimony of a witness, or may choose to believe some assertions and disbelieve others. *State v.*

*Kimbrough*, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. The trial court is in a far better position than an appellate court to make such determinations because the trial court has the opportunity to observe the witnesses and their demeanor on the witness stand. *Lessor v. Wangelin*, 221 Wis. 2d 659, 667-68, 586 N.W.2d 1 (Ct. App. 1998). The trial court also has a superior view of the total circumstances of the witnesses' testimony. *State v. Owens*, 148 Wis. 2d 922, 929, 436 N.W.2d 869 (1989).

¶12 Contrary to Timothy's contention on appeal, the trial court was not required to accept the tax returns proffered in evidence as conclusive evidence of Timothy's income for child support purposes. It also was not required to accept the testimony of Timothy's accountant as conclusive, particularly in light of the accountant's testimony that he had no personal knowledge regarding Timothy's business.<sup>2</sup>

¶13 We first address Timothy's claim that the trial court should not have included the compensation paid by ACR to his wife in determining his income. Timothy testified that his wife worked 635 hours for ACR in 2003. However, his wife, who works fulltime at an unrelated job, did not testify. The only documentary support for Timothy's claim was a sheet prepared by him for the hearing in this case, listing the total hours allegedly worked by his wife at various

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<sup>2</sup> The accountant's testimony indicated that all of his information about the business came from Timothy. He testified that Timothy provided him with a check register, and he extrapolated information regarding expenses from that. Although he testified that he believed the expenses were reasonable, he admitted that he did not even know how many miles were driven by the ACR trucks in a year. He also testified that he never asked Timothy what his wife did for ACR.

jobs, like grounds keeping, truck washing, and running errands, for a total of 635 hours.

¶14 While acknowledging that a spouse may properly be compensated for working in a child support payer's business, the trial court found that the record provided no basis to verify Timothy's allegations regarding the work performed by his wife. The trial court stated that if a child support payer controls the stream of income from a business and wants to compensate his spouse for services performed for that business, it was incumbent upon the person to "be in a position to verify it. The record in this case simply doesn't verify any of this stuff."

¶15 The trial court thus found that Timothy failed to prove that his wife worked 635 hours for ACR in 2003. Because credibility determinations are for the trial court, no basis exists to disturb the trial court's decision adding the \$9,666 paid to Timothy's wife to his income under WIS. ADMIN. CODE § DWD 40.03(2)(a).

¶16 For similar reasons, no basis exists to disturb the trial court's decision to include the \$46,349 of undistributed ACR income in Timothy's income for child support purposes. As previously noted, the burden was on Timothy to prove that the undistributed income was reasonably necessary for the growth of ACR. However, the trial court found that Timothy's records were "lousy," a finding supported by Timothy's testimony at the evidentiary hearing. His testimony as to the expenses of the business and the amount he worked was vague, inconsistent, and confusing.

¶17 Despite the deficiencies in Timothy's records and testimony, with the exception of the compensation paid to Timothy's wife the trial court accepted

the deductions and expenses claimed on the ACR tax return, along with the \$23,134 of depreciation claimed on the return. This resulted in an undistributed income to ACR of \$46,349 on gross receipts of \$360,393. Based upon the inadequacies of Timothy's proof, the trial court was not required to find that this remaining \$46,349 was necessary for the production of ACR's income or for the growth or operation of the business. It was not required to reduce the undistributed income by additional depreciation or by other principal payments made by Timothy.

¶18 Because Timothy failed to meet his burden of proving that the \$46,349 of undistributed ACR income was necessary for the production of ACR's income or for the growth or operation of the business, it was properly included with his salary and the compensation paid by ACR to his wife in calculating his income for child support purposes. *See* WIS. ADMIN. CODE § DWD 40.03(2). The trial court's order is therefore affirmed.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

