COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3211-FT **Cir. Ct. No. 2007FA2072**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

MARY P. CALLEN A/K/A PATTI CALLEN,

PETITIONER-RESPONDENT,

V.

BARRY W. CALLEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Reversed in part and cause remanded with directions.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Barry Callen appeals from the family support component of a judgment of divorce. Specifically, he challenges the trial court's failure to take into account the tax consequences flowing from his self-employment, even after he had provided the relevant information in a motion for reconsideration of a bench ruling. We agree that the trial court erroneously exercised its discretion when it refused to take the information provided in the reconsideration motion into account, and therefore reverse and remand with directions that the court enter a new order consistent with this opinion.

BACKGROUND

¶2 At trial, Barry presented three worksheets calculated using the Mac Davis program to show the tax impact of various support scenarios upon the parties' disposable income. Barry's three exhibits were all calculated based on the premise that his annual income was $65,000. Patti apparently submitted an alternate Mac Davis worksheet calculating the tax consequences of a support proposal assuming Barry's income to be $85,000.[1] Barry argued to the court that Patti's Mac Davis calculations were flawed because they failed to take into account his self-employed status, which significantly altered the Social Security deductions.

¶3 The trial court issued an oral bench ruling following the hearing. After discussing a number of the statutory factors, the court stated that "[t]his is a case where the equalization of disposable income of the parties is a legitimate

[1] Neither party has provided this court with a citation to the record where Patti's Mac Davis calculation sheet is located, and we did not see it in the packet of trial exhibits. However, since both parties referred to the sheet in argument to the circuit court, we will accept their representations as to what it showed.

goal." The court determined that Barry's monthly gross income was $6,008, which would work out to $72,096 per year, while Patti's monthly gross income was $1,174, which would work out to $14,088 per year. The court then noted:

> I'm not really able to use [the Mac Davis program] to come up with a precise figure for equalizing income for a couple of reasons. For one, the income figure for Barry was not established until three minutes ago, and on the other side of the coin, … [Patti's] itemized deductions have not been factored in.

The court reasoned that simply equalizing the parties' gross income would require a monthly payment of $2,417. Making some adjustment for the missing itemized deduction information, the court set family support at $2,300 per month.

¶4 Barry promptly filed a motion for reconsideration before the trial court had even issued a final written decision. The reconsideration motion provided a calculation to equalize the parties income based upon the court's findings regarding the parties' respective incomes and also taking into account the tax consequences of Barry's self-employment.

¶5 The trial court acknowledged that the Mac Davis worksheet Barry presented in the reconsideration motion appeared to present "a precisely accurate figure" of the tax consequences for equalizing the parties' disposable income, and that Barry could not have presented that worksheet until the court had actually determined Barry's income. However, the court refused to reconsider the amount of family support it had ordered following the hearing, reasoning that Barry had not specifically asked the court at trial to use a Mac Davis calculation or presented a formula based upon what he was asserting his income level to be. The court went on to issue a final divorce judgment which included the monthly $2,300 family support payment.

STANDARD OF REVIEW

¶6 We review support awards under the erroneous exercise of discretion standard. ***Abitz v. Abitz***, 155 Wis. 2d 161, 174, 455 N.W.2d 609 (1990). To be sustained, a discretionary determination must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

DISCUSSION

¶7 There is no dispute between the parties that WIS. STAT. § 767.56(7) (2007-08)[2] requires a trial court to consider the tax consequences of a maintenance determination, and that the same requirement should apply to a family support award made under WIS. STAT. § 767.531. There is also no dispute that the trial court failed to take the tax consequences of Barry's self-employment status into account here, or that the calculations Barry provided in his reconsideration motion were accurate.

¶8 Patti argues that the trial court's award should nonetheless be upheld because: (1) this is a classic case of "income lost due to divorce," (i.e., shirking), such that it would be appropriate to base a support award based on Barry's income capacity rather than actual income; (2) fairness requires an award sufficient to allow Patti to support herself at a standard reasonably comparable to that enjoyed during the marriage, and mere equalization of the parties' income would not achieve that result; and (3) Barry did not introduce testimony regarding the tax

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

consequences of various support alternatives at trial. None of these arguments are persuasive.

¶9 First, the trial court explicitly found that Barry was *not* shirking, even though he was earning less than his capacity, because he had made a decision before the divorce to become self-employed in order to maintain the same income while working fewer hours, and because the number of hours he had been working during the pendency of the divorce had been limited by family responsibilities following his father's death. The court noted that Patti herself was earning less than her capacity, given her education level. It further commented that its award could be modified in the future to take any significantly increased income of the parties into account. Therefore, it was proper for the trial court to base the family support award on its finding that Barry's actual monthly income at the time of the divorce was $6,008.

¶10 Second, it is true that a trial court should not perform a mechanistic equalization of income without also considering whether that result would be fair under the circumstances. ***Olson v. Olson***, 186 Wis. 2d 287, 294, 520 N.W.2d 284 (Ct. App. 1994). Here, however, the record shows that the court *did* consider fairness factors such as the length of the marriage and the contributions each party had made to the education and career development of the other before concluding that an equalization of income would be appropriate. The problem is that, because the trial court failed to take the tax consequences of Barry's self-employment into account, its award actually gives Patti $583 more in disposable income than Barry each month. We do not see how fairness would require that Patti have more disposable income than Barry, particularly since the parties had agreed to equal child placement. In other words, the award does not achieve the court's own stated objective.

¶11 We next address the procedural aspect of the trial court's refusal to consider the additional information on tax consequences that Barry provided in his motion for reconsideration. We conclude this constituted an erroneous exercise of discretion in several ways. To begin with, the court's statement that Barry had not presented the court with a calculation of the tax consequences based upon what he was asserting his income level to be is not consistent with the facts of record. The transcript shows that Barry had not only introduced into evidence three worksheets showing what the tax consequences would be for various awards, but had explicitly argued to the court at least twice that any analysis of the tax consequences needed to take into account his self-employed status. Moreover, as the court itself acknowledged, Barry had no opportunity at the hearing to present a worksheet tailored to the court's factual finding about Barry's disputed income level. This is analogous to the situation in ***Olson*** where the trial court erroneously exercised its discretion by refusing to allow the parties an opportunity to present additional evidence in response to the court's calculation of tax consequences based upon a faulty factual premise. ***Olson***, 186 Wis. 2d at 296-97. We further note that Barry asked to present the additional information in his motion for reconsideration before the trial court had entered its final order, and Patti did not dispute the accuracy of Barry's calculations. Therefore, the court already knew when it entered the final judgment that its calculation of the family support award did not take into account the tax consequences as required by statute.

¶12 We therefore conclude that the family support order must be reversed and the matter remanded to allow the court to recalculate the amount of family support needed to effectuate an equalization of the parties' incomes, taking into account the undisputed tax consequences presented by Barry in his motion for

reconsideration. The court is not required to take additional evidence, but may do so in its discretion.

By the Court.—Judgment reversed in part and cause remanded with directions.

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