COURT OF APPEALS
DECISION
DATED AND RELEASED

May 2, 1996

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.

NOTICE

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No. 94-1290

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

IN RE THE MARRIAGE OF:

CANDACE M. SORENSON,

Petitioner-Appellant,

v.

HOWARD E. SORENSON,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

GARTZKE, P.J. Candace M. Sorenson appeals from those parts of the divorce judgment ordering Howard E. Sorenson to pay support for their two minor children equal to twenty-five percent of his gross income and twenty-five percent of the distributions paid to him by Houvies, Inc. of La

Crosse (Houvies), as and when received by him, and providing that neither party shall pay the other maintenance.

The issues are whether the trial court erred, as a matter of law, by not ordering Howard to pay child support based upon his share of the undistributed profits of Houvies, a Subchapter S corporation, and whether the court erroneously exercised its discretion when it denied maintenance to Candace. We hold that the court did not err when it failed to order Howard to pay support based on the undistributed profits but we direct the court to reconsider its denial of maintenance to Candace. We therefore affirm in part and reverse in part.

We review issues of law de novo. Support and maintenance are left to a trial court's discretion. When we review a trial court's discretionary ruling, we do so to determine whether that discretion was in fact exercised and not whether we would reach the same result. To confer discretion upon a trial court means that rulings may vary from court to court. A discretionary ruling must be reasonable but it may be one another judge might not reach. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). We need not agree with a discretionary ruling, so long as the trial court exercises its discretion on the basis of facts of record without violating the law and employs a logical rationale. ***Id***.

The parties married in June 1976 and divorced almost eighteen years later. At the time of their divorce, Candace was forty years old and Howard was forty-one years old. They have two minor children. When they married, Candace had already earned her bachelor's degree in physical education and biology, and Howard had a bachelor's degree in business administration. Neither has obtained additional degrees since their marriage but Candace has earned approximately nineteen credits to maintain her teaching license in Wisconsin.

After Candace obtained her degree, she taught at the Richland Center High School from 1974 to 1975, and after becoming engaged to Howard she sought employment closer to where he worked for Heileman's brewery in La Crosse. She found a position at the West Salem High School where she worked from 1975 to 1977. In that year his employer transferred Howard to St.

Louis, Missouri, where the family stayed until 1984. She taught in a St. Louis high school. In 1984 Candace left her teaching position because Howard was transferred back to La Crosse. She was unable to locate a teaching position in La Crosse. To make payments on their home in Missouri, she sought other employment and she has not taught since 1984. In October 1984 she began work at a full-time position at the La Crosse Dayton's department store. Since 1984 she has worked for Dayton's in La Crosse or at St. Paul, Minnesota, where Howard was transferred in 1987. In June 1990 Howard lost his job with Heileman's, and the family returned to La Crosse in October of that year. Due to their tight finances, Candace then worked full-time at Dayton's in La Crosse.

The trial court found that at the time of trial Howard and Candace had monthly incomes of $4,333.00 and $1,011.36, respectively. The court made no finding of fact as to their incomes from 1988 to 1990. However, the record shows that from 1988 to 1990 Candace's annual average income was $10,812. The parties disagree regarding Howard's income at Heileman's. Candace argues that his average income was $81,925 from 1988 to 1990, but we believe that the average is inflated because it includes roughly $30,000 received in 1988 for reimbursed moving expenses. Howard contends that his salary was $64,824 in 1988 and $67,756 in 1989.

In 1990, Howard and his brother, Roger Sorenson, purchased a laundry and dry cleaning business in La Crosse and incorporated it as Houvies, Inc. of La Crosse. In the spring of 1991 Dayton's went through a cut back on hours, and Candace was forced into a twenty-four hour per week position which she has held ever since. She is currently paid $9.80 per hour at Dayton's plus benefits including partially paid health and dental coverage, life insurance and a retirement plan. Other facts will be stated when pertinent throughout this opinion.

Howard and his brother, Roger, are Houvies's only shareholders. Because it is a Subchapter S corporation, Howard and Roger report their shares of the undistributed profits on their income tax returns. Thus, Howard's share is taxed to him even when he and his brother choose not to pay out all of Houvies's profits.

A Subchapter S corporation is not taxed on its income. Its profits pass through and are taxed to the shareholders. For that reason, Candace asserts that the undistributed as well as the distributed earnings of a Subchapter S corporation should be taken into account when applying the percentage standards established by the department of health and social services in WIS. ADM. CODE § HSS 80, Child Support Percentage of Income Standard.[1]

The child support obligation for two children is twenty-five percent of the support payer's "base." WISCONSIN ADM. CODE § HSS 80.03(1)(b). The "base" is calculated by adding together the payer's gross income adjusted for child support and the payer's imputed income for child support and dividing it by twelve. ***Id***. WISCONSIN ADM. CODE § HSS 80.02(12) defines "gross income" as

> all income as defined under 26 CFR 1.61-1 that is derived from any source and realized in any form, whether money, property or services, and whether reported as total income on the payer's federal tax return or exempt from being taxed under federal law.

26 C.F.R. 1.61-1 provides, "Gross income includes income realized in any form, whether in money, property or services." Candace concludes that WIS. ADM. CODE § HSS 80.02(3) requires that all undistributed profits are to be characterized as income for purposes of WIS. ADM. CODE § HSS 80 just as they are for federal tax purposes. We disagree.

WISCONSIN ADM. CODE § HSS 80.02(12) shows on its face that it applies to income "derived from any source *and realized* in any form ...." (Emphasis added.) "Realize" means "to convert into actual money (realized assets)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1890 (1993). As long as the undistributed profits are left in a Subchapter S corporation, they are not "realized." They remain subject to the claims of the corporation's creditors, for example. They have not been reduced to cash and they are not in the hands of the shareholders. Consequently, no error of law occurred when the trial

[1] After the judgment was entered in this action, WIS. ADM. CODE § HSS 80 was modified. All references in this opinion are to § HSS 80 as in effect in 1993.

court failed to order Howard to pay a percentage based on his undistributed share of Houvies's profits.

However, courts are alert to the possibility that shareholders of closely-held or family corporations can manipulate the business to cheat their children out of support. In ***Lendman v. Lendman***, 157 Wis.2d 606, 460 N.W.2d 781 (Ct. App. 1990), we said of a non-Subchapter S corporation:

> We acknowledge that automatic exclusion of corporate income from the court's consideration for purposes of determining maintenance would encourage obligors to hide behind a corporate shield to avoid the payment of maintenance. We further acknowledge that just because the corporation's income is not taxed to the obligor, that fact does not end the inquiry. The term "retained earnings" is, after all, another name for "earned surplus" which is defined as that resulting from the profitable operations of the company ....
>
> We do not agree, however, that in every case where there are retained earnings income is always available for maintenance. Retained profit must sometimes necessarily remain with the corporation instead of being immediately distributed .... Depending on the individual case, retained earnings might be a necessary adjunct of a well-managed corporation or a pretext for a one-man band shareholder to keep profits from being considered by the family court for maintenance. We decline to write a bright-line rule regarding retained earnings in favor of a case-by-case analysis to be conducted by the trial court in its discretion.

Id. at 614-15, 460 N.W.2d at 784-85.

In ***Evjen v. Evjen***, 171 Wis.2d 677, 685, 492 N.W.2d 361, 364 (Ct. App. 1992), we said:

> [A] family court is authorized to pierce the corporate shield if it is convinced that the obligor's intent is to avoid financial obligations arising from the dissolution of the marital relationship. Depending upon the case, it is the obligation of the family court to determine if corporate income or profits are a necessary part of a well-managed corporation or an excuse for the sole shareholder to keep income or profits from being considered when the family court is setting financial obligations.

We added that "when obligors have manipulated the corporate structure to camouflage or bury the obligors' true income status ... we have urged the family court to `utilize its creative talents to monitor and control such deceptive tactics.'" ***Id.***, *quoting* ***Schinner v. Schinner***, 143 Wis.2d 81, 105, 420 N.W.2d 381, 390 (Ct. App. 1988).

For purposes of determining child support under WIS. ADM. CODE § HSS 80, it is therefore within the discretion of the trial court to decide whether to order a payer obligor to pay a percentage of retained profit in the obligor's Subchapter S corporation. When determining whether a trial court has erroneously exercised its discretion, we look for evidence in the record that it employed a logical rationale based on facts of record without making an error of law. ***Hartung***, 102 Wis.2d at 66, 306 N.W.2d at 20.

Here the trial court's ruling was largely dependent upon its choice between the conflicting testimony by accountants regarding the necessity for maintaining a financial "cushion" in Houvies. Roger Sorenson, a certified public accountant, testified that when he and Howard formed the corporation, the original plan was five years would pass before they as shareholders would receive a distribution. He testified that Houvies has working capital of approximately $17,000.[2] A second accountant testified that it was prudent not to distribute retained earnings to avoid causing undercapitalization. A third accountant, testifying for Candace, disputed the conclusions of Howard's accountants.

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[2] He defined working capital as the current liabilities of the company less its current assets. The current liabilities of the company include $75,000 owed to the two shareholders, Roger and Howard.

The trial court chose to accept the testimony of Roger Sorenson and the accountant who testified for Howard because, the court said, their testimony was "more compelling" than that of Candace's witness, and it appeared to the court that Howard's experts based their opinions on "hard facts" while Candace's expert did not. The court added that at arriving at its conclusion, it took into account Roger's testimony that he has had no return on his investment, that there are unexpected and significant costs in the form of replacement and repair of equipment and a need for upgrading equipment for pollution control purposes, a substantial debt is still owed to the previous owner and a $37,500 corporate note will be payable to Candace on demand as part of the property division.

The credibility of witnesses is of course within the sole province of the trial court. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). However, the trial court explained why it accepted the testimony of Howard's accountants rather than Candace's. We will not overturn the court's choice, and because it is the basis for the trial court's ruling regarding access to Houvies' undistributed profits when fixing support, we accept the ruling as a proper exercise of judicial discretion.

Candace nevertheless contends that unless all of the undistributed Subchapter S profits are available for support, she and the children are left to the mercy of Howard and his brother, since they have absolute power to decide if, when, and how much of Houvies' profits will be distributed to Howard. Candace asserts that "the simple solution" to the dilemma is to include all of the income Howard reports on his tax return as income for child support purposes.

The trial court did not completely leave Candace and the children to the mercy of Howard and his brother. The judgment provides that as long as an obligation exists to pay child support, Howard and Candace shall exchange personal income tax returns and Howard shall provide her with a copy of his business tax return by April 20 of each year. Subchapter S corporate tax returns disclose distributed and undistributed profits. Houvies's total distributions made to Howard can be determined by reviewing Houvies's and his tax returns.

Candace asserts that it is difficult to determine from the tax returns when profits are actually paid out. But except to advocate that all undistributed

income taxable to Howard be used to determine child support, Candace offers no other suggestion.

When we adjured the trial courts to utilize their "creative talents to monitor and control" tactics available to parties to a divorce having interests in small corporations, ***Schinner***, 143 Wis.2d at 105, 420 N.W.2d at 390, we expected the parties themselves to assist the court. The parties are better able than the court to ferret out unfair tactics and to suggest solutions to the court. If the parties and their experts are unable to make such suggestions, the courts cannot be criticized for failing to invent ingenious solutions.

Candace's proposal that the trial court adopt the "simple solution" of requiring all of Howard's share of undistributed profits to be taken into account when determining child support is no suggestion for an ingenious arrangement. On the contrary, the import of Howard's experts' testimony is that to take twenty-five percent of Howard's share of undistributed profits may endanger the corporation's financial "cushion" or "shock absorber" which the court came to believe Houvies needs.

Candace asserts that the trial court failed to give proper consideration to the support and fairness objectives when it denied her any maintenance. As Candace points out, when reviewing a maintenance award, the "touchstone of analysis" is the statutory factors enumerated in § 767.26, STATS. ***Kennedy v. Kennedy***, 145 Wis.2d 219, 222, 426 N.W.2d 85, 86 (Ct. App. 1988), citing ***LaRocque v. LaRocque***, 139 Wis.2d 23, 32, 406 N.W.2d 736, 740 (1987). The ***LaRocque*** court stressed that the statutory factors are designed to further two objectives: "to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial agreement between the parties in each individual case (the fairness objective)." ***Hefty v. Hefty***, 172 Wis.2d 124, 135-36, 493 N.W.2d 33, 37 (1992), *quoting* ***LaRocque***, 139 Wis.2d at 33, 406 N.W.2d at 740.

We reject Candace's contention that the trial court did little more than to state that it was "aware" of the factors listed in § 767.26, STATS. We are not critical of the court for having stated it was "aware of the statutory factors which must be considered" when determining whether maintenance should be awarded, and, if so, for how long. The court need not tick off each factor so

long as it shows that it took the relevant factors into account. ***Trattles v. Trattles***, 126 Wis.2d 219, 229, 376 N.W.2d 379, 384 (Ct. App. 1985).

Regarding the support factor, the trial court relied upon Howard's expert witness who testified in his opinion Candace could be re-employed as a teacher in the same geographical area within a couple of years. At that point she could expect to earn approximately $24,000 per year and then, in the view of the trial court, be able to maintain herself at a standard reasonably comparable to that maintained during the marriage. The court believed that her $4,307 monthly budget is inflated, and a 1993 tax analysis showed that Howard's disposable income was $1,927 per month. The trial court concluded that even without maintenance, and assuming that she works only twenty-four hours per week at Dayton's, Candace's spendable monthly income (including support) will exceed Howard's.

Candace argues the trial court failed to consider her nonmonetary contributions to the marriage and Howard's career. She asserts that during their seventeen-year marriage, she moved four times to accommodate his career, and she maintained the household and provided child care.

To achieve fairness, maintenance may be used to compensate a spouse who has subordinated his or her education or career to devote time and energy to the welfare, career or education of the other spouse, or to manage the affairs of the marital partnership. ***LaRocque v. LaRocque***, 139 Wis.2d at 37, 406 N.W.2d at 741-42. The trial court's decision is silent with respect to Candace's nonmonetary contributions to the marriage. Instead, the court cites ***Gerth v. Gerth***, 159 Wis.2d 678, 683, 465 N.W.2d 507, 510 (Ct. App. 1990), that it is not fair to require a party to pay maintenance to the other when the first party's income barely covers that party's own expenses and the second party has sufficient resources to meet his or her needs. The court concluded that under the circumstances it is not fair that Howard be required to work sixty-five to seventy hours per week and to pay Candace maintenance when she is required only to work twenty-four hours a week. In ***Gerth***, however, the trial court found that the wife had suffered no loss of earnings or earning capacity due to the marriage. 159 Wis.2d at 682, 465 N.W.2d at 509. Here, Candace has sustained at least a reduced earning capacity as a teacher.

The trial court properly took into account Howard's workload. While trial courts may not speculate on the future workload of a spouse when making an initial award of maintenance, ***Hubert v. Hubert***, 159 Wis.2d 803, 822, 465 N.W.2d 252, 259 (Ct. App. 1990), a trial court may consider the spouse's present workload. *See* ***Gerth***, 159 Wis.2d at 682-83, 465 N.W.2d at 509-10, (courts must view fairness in light of both payor and payee; parties may have different income levels if those levels were unaffected by the marriage and obtained through their own natural abilities and hard work). The trial court erred, not because it considered Howard's workload, but because it did so without also considering Candace's noneconomic contributions to the marriage. As in ***Hubert***, 159 Wis.2d at 822, 461 N.W.2d at 259, in trying to be fair to Roger, the court failed to be fair to Candace. On remand, the court shall reconsider her noneconomic contributions.

Moreover, the trial court, by taking into account child support and assuming that Candace works only twenty-four hours per week at Dayton's, concluded that even without maintenance her spendable monthly income will exceed Howard's. Support is paid for the benefit of the children, not the custodial parent, and the percentage support standards, WIS. ADM. CODE § HSS 80, assume that the custodial parent is supporting the children in the same amount the payor spouse must pay. ***Kjelstrup v. Kjelstrup***, 181 Wis.2d 973, 976-77, 512 N.W.2d 264, 266 (Ct. App. 1994). Remand is necessary for the trial court to review its conclusions regarding Candace's spendable monthly income without child support.

Finally, while we give deference to the highly discretionary decision whether to grant maintenance, since a remand is necessary for a review of Candace's spendable income, we direct the court to review her predicted ability to obtain a teaching position. While Howard's expert testified that in his opinion Candace could be re-employed as a teacher in the same geographical area within a couple of years and could then earn approximately $24,000 per year, Candace understandably views those predictions with some skepticism, considering her age and past unsuccessful efforts to obtain a new teaching position. Howard's expert was unable to testify to how many school systems within the La Crosse area are offering jobs in physical education or life sciences and whether the La Crosse School District or any nearby school district had hired teachers during the year of the trial. Maintenance is determined on the basis of the facts as of the date of trial, but events since the trial may bear on the accuracy of the predictions made at that time.

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

Not recommended for publication in the official reports.