COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 17, 1995

NOTICE

No. 94-3423-FT

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

In re the Marriage of:

SANDRA J. SORCE,

Petitioner-Respondent,

v.

ISADORE H. SORCE,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: GARY A. GERLACH, Judge. *Affirmed*.

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

PER CURIAM. This is an appeal from a divorce judgment. Appellant Isadore H. Sorce contends: (1) that the trial court erred when it calculated child support based on his "earning capacity," rather than on his stated actual income; and, (2) that the trial court erred when it ordered him to contribute to the attorney fees Sandra Sorce incurred at trial. Pursuant to this

court's order dated February 6, 1995, this case was submitted to the court on the expedited appeals calendar. We conclude that neither of the trial court rulings Isadore challenges represents an erroneous exercise of discretion. We therefore affirm the circuit court's judgment.

At the time Sandra commenced divorce proceedings, she and Isadore had four minor children. They entered a marital settlement agreement for, among other things, joint legal custody of the children, with Sandra receiving primary physical placement of the children. Sandra and Isadore also agreed to each be responsible for their own attorney fees.

Sandra and Isadore were, however, unable to agree on the amount of child support that Isadore would pay, and the trial court held a hearing on that issue. It is undisputed that, at the time of the hearing, Isadore was certified by the State of Wisconsin to teach physical education, but that he was not employed in that capacity. Isadore had recently been employed as a carpet cleaner, and then had begun his own carpet-cleaning business. Shortly before the hearing on child support, Isadore became employed as a roofing foreman. Approximately one week after he took that job, he was injured. At the time of the hearing on child support, Isadore was receiving worker's compensation benefits.

At the hearing in August 1994, Isadore claimed that he expected to receive $2,107 in gross monthly income upon his return to his roofing job. He offered to pay $650, or approximately 31% of that income, in child support. The 31% was consistent with the child support guidelines promulgated by the Department of Health and Social Services pursuant to § 46.25(9), STATS. Isadore testified that his only income at the time of the hearing was from worker's compensation, and that his only income after he had recovered from his injuries would be from his employment as a roofing foreman.

On cross-examination, however, Isadore admitted that he had been teaching a course at Milwaukee Area Technical College. His wages from MATC were $1,607 in 1993, and he testified that he expected his 1994 wages from MATC to remain the same. In addition, Isadore had testified on direct examination that he had "shut-down" his carpet-cleaning business. He admitted on cross-examination, however, that he had received payments of

$2,672 for carpet cleaning work in May 1994, and $2,506 in June 1994, with $525 remaining due on his June billings. He also admitted that he was still renting a carpet cleaning machine, and that he maintained a telephone answering system at the phone number listed for his carpet-cleaning business. He also admitted that he performed occasional construction work, that he had given potential customers estimates for general home repair work, and that he had scheduled construction work for dates after the hearing on child support. He admitted that he had begun one construction job that he had not yet finished, and indicated that he would be paid for that job at a later date.

Isadore also admitted that he had done carpet cleaning as part of a "barter" arrangement, and that he had received goods and services in return. Isadore also conceded that, in the past, he had arranged for some of his customers to make payments to his minor children, who then turned the money over to him. He conceded that those transactions did not appear in his business records.

Isadore testified over two days, although the hearing had originally been scheduled for one day. On the first day of his testimony, Isadore failed to provide the court with business records. Counsel for Sandra complained that throughout the divorce proceedings, Isadore had failed to produce business records in spite of her requests. At the end of the first day of trial, the trial court ordered Isadore to bring to the next day's hearing "every scrap of paper relating to every business you have engaged in in the last two years." The trial court further specified that the documents were to include "bank accounts, checking accounts, personal memos, any documents relating to ... all of your business activities."

After completion of the testimony, the trial court held that the 31% child-support guidelines applied. It stated that it found Isadore to be a "not very credible witness." It noted that, while Isadore was a "hard-working individual who is capable of doing many things," he apparently didn't want to "play by the rules," and consequently under-reported his income. The court noted that Isadore had kept secret from Sandra the amounts received from his carpet-cleaning business. Rather than accepting Isadore's claim of $25,000 gross income, the trial court imputed to Isadore an annual earning capacity of $30,000.

In doing so, it stated that, given Isadore's testimony, "[i]t's impossible to know exactly what combination [of jobs] he's going to end up doing." The trial court noted that Isadore had a teaching certificate that would allow him to earn $23,000 for nine months of work, if he could find a teaching job. It further noted that Isadore conceded he would be earning at least $25,000 as a roofing foreman, that he was teaching at MATC, and that he was continuing to earn money from carpet cleaning and from construction jobs. The trial court stated that it did not expect Isadore to work seventy hours per week, but it noted that, given Isadore's talents and work history, any income lower than $30,000 "is a choice that he's making which I would find to be unreasonable." The trial court set support at $775 per month, or 31% of an imputed gross income of $30,000 per year.

The trial court also awarded Sandra a $650 contribution to her attorney fees. Sandra requested a contribution from Isadore even though Sandra had agreed in the marital settlement agreement that she and Isadore would each be responsible for their own fees. Sandra made her request for a contribution to fees after the second day of trial was required. Sandra pointed out that the trial was necessary because Isadore had failed to provide complete financial information at the time the settlement was being negotiated, and only provided documentation of his finances after he had been ordered to do so by the trial court after the first day of trial. The trial court ordered Isadore to contribute $650 toward Sandra's attorney fees because of Isadore's "unreasonable refusal to be forthright regarding his income."

I. CHILD SUPPORT

This court reviews trial court decisions relating to child support for an erroneous exercise of discretion. ***Schwantes v. Schwantes***, 121 Wis.2d 607, 630-31, 360 N.W.2d 69, 80 (Ct. App. 1984). We sustain discretionary determinations if we find that the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). If, however, a trial court fails to adequately set forth its reasoning in reaching a discretionary decision, this court will search the record for reasons to sustain that decision. ***Looman's v. Milwaukee Mut. Ins. Co***., 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968). Generally, "[w]e will not reverse a discretionary determination by the trial court

if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Indeed, "[b]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions." ***Schneller v. St. Mary's Hosp.***, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990), *aff'd*, 162 Wis.2d 296, 470 N.W.2d 873 (1991).

Isadore focuses his critique of the trial court's decision on the trial court's statement that Isadore had an "earning capacity" of $30,000. He contends that, because there was no evidence in the record to show that he had unreasonably reduced his earning capacity, or that he was "shirking" to avoid his child-support responsibilities, the trial court should not have based its award on earning capacity.

Although Isadore has a valid point regarding the trial court's use of "earning capacity" to set child support, we "do not necessarily review a decision based upon the legal term of art used by the circuit court to characterize its reasoning." ***Daniel R.C. v. Waukesha County***, 181 Wis.2d 146, 156, 510 N.W.2d 746, 750 (Ct. App. 1993). Rather, "[w]e review the overall analysis used by the court." ***Id***.

Daniel R.C. involved a father's payment obligation for treatment provided to his son by a county department. The father claimed yearly gross income of $26,000, but the county produced evidence to show that the father and his wife had income of $96,500 per year. The trial court found the father's testimony incredible, and held that his "ability to pay" was $96,500.

The father challenged the trial court's decision to base his obligation on "earning capacity." We agreed with the father that the trial court had used the incorrect term in deciding the father's obligation. We noted, however, that although the circuit court had erroneously spoken of the father's "ability to pay" and "earning capacity," what the circuit had actually done was determine the father's true income for purposes of that obligation. ***Id.***, 181 Wis.2d at 160, 510 N.W.2d at 751. We concluded that the trial court's decision to impute income to the father was supported by the evidence.

The same analytical framework applies here. Even though the trial court stated that it was determining Isadore's "earning capacity," the heart of the circuit court's decision was finding Isadore's true income for child support purposes. Although Isadore testified that his only income would be the $25,000 per year he made as a roofing foreman, the evidence adduced by Isadore's own testimony on cross-examination indicated otherwise. As noted, he testified that, in 1994, the year of the hearing, he would receive $1600 from MATC. Evidence was also adduced to show that Isadore had earned over $2,500 through July 1994 from his carpet-cleaning business. Although Isadore testified that he had discontinued his carpet-cleaning business and that he would no longer engage in construction work other than his roofing, the evidence again suggested otherwise. The record shows that Isadore continued to rent a carpet-cleaning machine, and that he maintained a telephone number for his carpet-cleaning business. Isadore admitted that he continued to contract for private repair and construction jobs.

The trial court was not required to accept Isadore's testimony regarding his carpet-cleaning business, or his extra construction work. *See* ***Mullen v. Braatz***, 179 Wis.2d 749, 756, 508 N.W.2d 446, 449 (Ct. App. 1993) (in a trial to the court, it is the trial court's function to assess weight and credibility of testimony). The trial court, apparently due to Isadore's dissembling testimony, found Isadore not to be a credible witness. The trial court's decision to discount Isadore's claim that he would only work as a roofing foreman after completion of the divorce was not clearly erroneous. *See* § 805.17(2), STATS. (trial court's findings of fact will "not be set aside unless clearly erroneous," and this court gives due regard to the trial court's opportunity to judge the credibility of the witnesses).

Even though the trial court couched its support award in terms of Isadore's "earning capacity," the record shows that the trial court was attempting to determine Isadore's true income and his likely future income. Its decision to impute income to Isadore in addition to his income from roofing was reasonable given the evidence in the record. We are therefore satisfied that the trial court's child support award represents a proper exercise of discretion.

II. CONTRIBUTION TO ATTORNEY FEES

"The award of contribution to attorney fees rests within the discretion of the trial court and will not be altered on appeal" unless the trial court erroneously exercised its discretion. ***Ondrasek v. Ondrasek***, 126 Wis.2d 469, 483, 377 N.W.2d 190, 196 (Ct. App. 1985). When a spouse in a divorce incurs unnecessary attorney fees because the other spouse "overtries" a case, the trial court may award a contribution to those attorney fees without a determination of the "victim" spouse's need, and the other spouse's ability to pay. ***Id***. at 484, 377 N.W.2d at 196.

The trial court awarded the contribution to attorney fees after Sandra complained that much of the trial on child support was necessitated by Isadore's failure to provide her with complete financial records. Isadore had apparently failed to provide financial information to Sandra by the time of trial, and Sandra's questioning of Isadore reflected that lack of information. At the end of the hearing on the first day, the trial court impressed upon Isadore the need to provide financial records for the following day's testimony. Much of the testimony from the second day revolved around identification of financial documents and records. We see no erroneous exercise of discretion in the trial court's decision to impose a portion of the costs Sandra incurred because of Isadore's failure to provide financial records. In addition, the record shows that the support hearing was protracted because of Isadore's own "failure to be forthright regarding his income."[1]

Isadore argues, however, that the marital settlement agreement in which he and Sandra each agreed to pay their own attorney fees was binding. He contends that the stipulation had been entered on the record and, since Sandra made no motion to reopen the stipulation, the trial court should not have ordered him to contribute to Sandra's attorney fees. We disagree.

"A stipulation between parties to a divorce action is only 'a recommendation jointly made by them to the court suggesting what the

[1] In his brief, Isadore disputes the assertion that he failed to provide full financial information to Sandra prior to trial. He contends that he turned over to Sandra the financial documents she requested. The record appears to contradict this assertion. Even assuming the truth of Isadore's contention, however, the record clearly indicates that the support hearing was substantially prolonged by Isadore's inconsistent testimony and his failure to provide financial records until ordered to do so by the trial court.

judgment, if granted, is to provide.'" ***Norman v. Norman***, 117 Wis.2d 80, 81, 342 N.W.2d 780, 781 (Ct. App. 1983)(citation omitted). Here, although Sandra and Isadore presented the marital settlement agreement to the court for its approval, Sandra, prior to the trial court's approval, repudiated the portion of the agreement regarding attorney fees and sought a contribution for the trial on child support. The trial court had the authority to approve -- or to disapprove -- the stipulation. The trial court chose to approve the stipulation except as to attorney fees. The trial court did not erroneously exercise its discretion when it allowed Sandra to repudiate the portion of the stipulation relating to attorney fees, or in awarding a contribution to Sandra.

By the Court.--Judgment affirmed.

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