

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-3697-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

ANNAMARIE INGRILLI,

PETITIONER-RESPONDENT,

v.

VINCENT ANTHONY INGRILLI,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

FINE, J. Vincent Anthony Ingrilli appeals from a judgment divorcing him from his former wife, Annamarie Ingrilli, and complains that the trial court erred in fixing his earning capacity at an amount higher than his current income for the purposes of: 1) setting family support; 2) ordering him to

contribute \$5,000 towards Annamarie Ingrilli's attorney's fees; and 3) as a basis for the trial court's decision to divide equally between the parties their tax deductions for dependents. We affirm.

I.

The critical facts underlying this appeal are not disputed. Vincent and Annamarie Ingrilli were married in 1982 and divorced in 1997. They have four children. In 1997, the children's ages ranged from three to thirteen years. Vincent Ingrilli works for a plumbing company owned by his father. He is not a plumber, but, rather, has a degree in business from Marquette University and helps his father to run the business end of the company. In return, Vincent Ingrilli was paid the following:

1993 — 57,556 (48,326 in salary, and 9,230 as a year-end bonus)
1994 — 76,726 (57,536 in salary, and 19,190 as a year-end bonus)
1995 — 82,762 (57,981 in salary, and 24,781 as a year-end bonus)
1996 — 63,959 (salary only; no bonus)
1997 — 50,000 (salary only; no bonus)

Bonuses were based on the amount of cash available to the business at the end of the year. Vincent Ingrilli's father, as owner of the business, received as a bonus one-half of the money; until 1996, Vincent Ingrilli and his brother, Michael Ingrilli, split the remainder.

Annamarie Ingrilli filed for divorce in February of 1996. In November of 1996, Vincent Ingrilli told her that his father was cutting his pay and eliminating his bonuses. Michael Ingrilli continued to receive his bonus, however. At a hearing before the trial court, Vincent Ingrilli and his father gave both the divorce and a concern that the Internal Revenue Service might view Vincent Ingrilli's high income as a gift that the business could not deduct, as reasons for cutting Vincent Ingrilli's income. In a letter to Vincent Ingrilli dated October 30,

1996, however, his father referred only to the divorce as the reason he was cutting Vincent Ingrilli's income to "plumber's wages, \$24 per hour plus benefits" for a forty-hour week, because, ostensibly, the divorce was diverting too much of Vincent Ingrilli's time and energy away from the business. Vincent Ingrilli never objected to this cut in his income. Vincent Ingrilli's vocational witness testified that Vincent Ingrilli's earning capacity was approximately \$41,000 per year.

The trial court viewed the decision to reduce Vincent Ingrilli's income from the plumbing business as a sham engineered by Vincent Ingrilli and his father, and, in the course of its oral decision, made the following findings of fact:

[Although Vincent Ingrilli was designated as the plumbing company's office manager, he] clearly performs services beyond that which are ordinarily performed by an office manager.... The corporation is totally controlled by the father, who testifie[d] that he discusses purchases, orders, orders parts, materials with [Vincent Ingrilli], and thereafter makes policy decisions predicated upon those conversations and meetings.... The corporation increased its sales over the period of time that [Vincent Ingrilli] spent with the corporation, with 1996 being the highest annual sales volume achieved in the history of that corporation, either before or after [Vincent Ingrilli started to work for the company].... [Vincent Ingrilli] works 55 to 60 hours a week.

The salary reduction or failure to pay a bonus in 1996 was entirely the result of [Annamarie Ingrilli]'s commencement of the divorce action and for no other reason. The testimony was to the effect that in the event [Annamarie Ingrilli] wants the benefits of the business, she has to be a team player, and by starting a divorce action she is not a team player. [Vincent Ingrilli] testified that he never asked his father not to cut [his] wages or bonus and that both his father and himself did not want Mrs. Ingrilli to be able to take quote, advantage, end quote, of the family business, through receipt of adequate maintenance and child support according to the laws.

... The reduction of the income of [Vincent Ingrilli] was at least acquiesced to by [him], and from the circumstances of

the situation it would be unreasonable to assume there was not cooperation between the father and son. However, the reduction acquiesced to by [Vincent Ingrilli] effectively deprives the children of the support to which they are reasonably entitled. This action was a deliberate action on the part of [Vincent Ingrilli] as is evidenced by testimony which has never been heard in this court before, although I suspect many times the feeling was there. That testimony was this, the testimony was that the children would have to suffer as the result of his reduction in income, but that he nevertheless would not request his father to increase the income back to where it was. But then he said in response to a question, if the children have to suffer, so be it.¹

The trial court rejected Vincent Ingrilli's post-divorce-filing income as contrived, and found that he had an annual earning capacity while working in his father's business of \$82,762, which was what he earned in 1995. The trial court directed Vincent Ingrilli to pay family support of \$3,000 per month. Vincent Ingrilli concedes that if the earning-capacity aspect of the trial court's decision is affirmed, the \$3,000 per month figure is correct, and the trial court's direction that he pay \$5,000 towards Annamarie Ingrilli's attorney's fees was within the trial court's discretion, as was its division of the deductions for dependents.

II.

A decision to base maintenance, child support, or family support on earning capacity rather than actual earnings is within the trial court's discretion. *See Sellers v. Sellers*, 201 Wis.2d 578, 588, 549 N.W.2d 481, 485 (Ct. App. 1996). A party liable for maintenance, child support, or family support may not

¹ The trial court was, apparently, referring to the following colloquy between Annamarie Ingrilli's lawyer and Vincent Ingrilli:

- Q And if the children suffer in the meantime, so be it?
- A At this point everybody's suffering. The children suffer, I'm suffering, my wife is suffering, you know.

voluntarily reduce his or her income to avoid or evade that obligation. *Sellers*, 201 Wis.2d at 587, 549 N.W.2d at 484–485; *Smith v. Smith*, 177 Wis.2d 128, 135–139, 501 N.W.2d 850, 853–855 (Ct. App. 1993). The determination of earning capacity is a finding of fact that will not be set aside unless it is “clearly erroneous.” See RULE 805.17(2), STATS.; *Sellers*, 201 Wis.2d at 588–589, 549 N.W.2d at 485. Vincent Ingrilli does not point to any errors of law allegedly made by the trial court; rather, he complains that the trial court's conclusion that he has an earning capacity of \$82,762 is not supported by the evidence.

The trial court is the sole arbiter of the witnesses' credibility. Thus, when more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the trial court. *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). Here, the trial court found, in essence, that Vincent Ingrilli agreed with his father to cut his earnings in order to evade his support obligation. This finding is not clearly erroneous. Based on this finding, the trial court was free to disregard the testimony of Vincent Ingrilli's vocational witness. The trial court's decision to base family support on Vincent Ingrilli's earning capacity was therefore well within its discretion. Further, given the earnings history of both Vincent Ingrilli and the company, the trial court's finding that Vincent Ingrilli's earnings for the last calendar year before Annamarie Ingrilli filed for divorce best represented his earning capacity unalloyed by attempts to reduce the foundation upon which a family support order could be based was also not clearly erroneous. Accordingly, we affirm the trial court's decision to base Vincent Ingrilli's family-support obligation on his earning capacity of \$82,762.

As noted, Vincent Ingrilli concedes that our affirmance of the trial court's decision setting family support on his earning capacity of \$82,762 moots his other appellate issues.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

