

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 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. 97-2852
97-3723**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JAMES P. TROIA,

PETITIONER-APPELLANT,

V.

CARRIE A. TROIA,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. James P. Troia appeals from a judgment of divorce and a subsequent order requiring that he contribute toward the respondent's appellate attorney's fees. He challenges the trial court's determination of his child

support obligation and the inclusion of the remaining proceeds from his worker's compensation award in the property settlement. Because we conclude that the trial court properly exercised its discretion in each of these respects, we affirm the judgment and order.

BACKGROUND

James and Carrie Troia were married in 1992 and had one child, Anna, during their marriage. James worked as a custodian for the Madison Metropolitan School District until 1994, when his employment was terminated due to the continuing effects of a back injury which he had suffered in 1990. He eventually received a worker's compensation award of \$52,400. In 1995, after vocational retraining, he began his own home-inspection business. He performed two or three inspections each week, leaving him considerable time to play golf and socialize during normal business hours. At the time of the divorce, his gross monthly income was \$1,186.79 and his budget was \$1,574. Carrie's gross monthly income as an administrative assistant at Dean Care was \$1,807.95 and her monthly budget was \$2,633.

The parties agreed that Carrie would have primary physical placement of Anna. James proposed to pay 17% of his earning capacity as a home inspector, which he considered to be \$1,400 a month, plus half of Anna's day care costs of \$344 a month. After finding that James had unreasonably diminished his actual income, the trial court ordered him to pay 17% of an imputed \$1,850 a month, plus half of Anna's day care costs, for a total monthly child support obligation of \$500. The trial court also included the remaining funds from James's worker's compensation settlement in its property division and, several

months after the divorce judgment, entered an additional order requiring James to contribute \$1,000 to Carrie's legal fees.

ANALYSIS

Standard of Review.

We review child support and property division awards under the erroneous exercise of discretion standard. *Abitz v. Abitz*, 155 Wis.2d 161, 174, 455 N.W.2d 609, 614 (1990); *Long v. Long*, 196 Wis.2d 691, 695, 539 N.W.2d 462, 464 (Ct. App. 1995). An award of attorney fees also lies within the trial court's discretion. *Bisone v. Bisone*, 165 Wis.2d 114, 123-24, 477 N.W.2d 59, 62 (Ct. App. 1991). We will affirm discretionary awards when they represent a rational decision based on the application of the correct legal standards to the facts of record. *Long*, 196 Wis.2d at 695, 539 N.W.2d at 464.

Child Support.

A non-primary-custodial parent is expected to pay 17% of his or her base gross income in child support. Section 767.25(1j), STATS., and WIS. ADM. CODE § HSS 80.03(1)(a). Where a payor has unreasonably diminished his actual earnings, the trial court may use the payer's earning capacity to determine the base gross income figure. *Sellers v. Sellers*, 201 Wis.2d 578, 587, 549 N.W.2d 481 484, (Ct. App. 1996). Earning capacity may be determined from "the payer's education, training and work experience, and the availability of work in or near the payer's community," or the amount which could be earned "by working 40 hours per week for the federal minimum hourly wage." WIS. ADM. CODE § HSS 80.03(3). Although James himself proposed a child support obligation based upon imputed income plus half of Anna's day care costs, he now disputes the method by

which the trial court determined the amount of his earning capacity and the resulting amount of the trial court's deviation from the percentage standards.

As a threshold matter, James argues that Carrie should have borne the burden of proof in establishing his earning capacity and the necessity for an upward deviation from the percentage standards. We conclude, however, that James bore the burden to establish that he was exercising his full earning capacity because he was in the best position to do so. While we agree that Carrie needed to demonstrate that use of the guidelines would be unfair, our review of the record satisfies us that the trial court did not shift the burden of proof on that issue. A finding that use of the percentage guidelines would be unfair was implicit in the trial court's finding that a deviation from the guidelines would be fair.

James next contends that the trial court applied an incorrect standard of law when it determined his earning capacity based upon *both* his training as a home inspector *and* the minimum wage, instead of choosing one method or the other, as he claims § HSS 80.03(3) requires. We interpret administrative regulations in the same manner as statutes. *Uebele v. Oehmsen Plastic Greenhouse Mfg., Inc.*, 125 Wis.2d 431, 434, 373 N.W.2d 456, 458 (Ct. App. 1985). Our goal is to determine the intent of the agency that adopted the regulation. *Id.* If the language at issue clearly and unambiguously sets forth that intent, our inquiry ends, and we will apply the plain language to the facts of the case. *See Truttschel v. Martin*, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). If the language used is capable of more than one meaning, however, we will determine intent from the context, subject matter, scope, history, and the object of the provision, taking care to avoid absurd or unreasonable results. *Id.*

Even if the language of § HSS 80.03(3) might be read in the disjunctive to require a mutually exclusive choice between one measure of earning capacity or the other, such an interpretation would lead to absurd and unreasonable results. Here, for instance, the trial court found, based upon James's own testimony, that he could expect to earn about \$1,400 a month as a home inspector. It then found that, even taking into consideration the promotional needs of a new business, James could reasonably be expected to work an additional twenty hours a week. The trial court had no factual basis to assume that there was any more inspection work available to James on a weekly basis, and so could not impute extra income on that basis. Yet it would be patently unreasonable to disregard the actual income which James was capable of earning in excess of minimum wage on a part-time basis. We conclude that the regulation allows a trial court to consider a payor's training and work experience, or the minimum wage, or both, when determining earning capacity. The trial court therefore rationally applied a proper standard of law to the facts of record to reach a reasonable result, and we will not disturb its child support award.

Worker's Compensation.

Personal injury awards are initially presumed to be the individual property of the injured spouse. *Weberg v. Weberg*, 158 Wis.2d 540, 550, 463 N.W.2d 382, 386 (Ct. App. 1990). A non-injured spouse who seeks to include the proceeds of such an award in the marital estate may overcome the individual property presumption by showing either that the identity of the proceeds has been lost or the character of the proceeds has been converted to marital property by donative intent. *Spindler v. Spindler*, 207 Wis.2d 327, 338, 558 N.W.2d 645, 651 (Ct. App. 1996). Placing individual funds in a joint account creates a presumption

of donative intent. *Trattles v. Trattles*, 126 Wis.2d 219, 224, 376 N.W.2d 379, 382 (Ct. App. 1985).

James initially deposited \$5,000 of his worker's compensation award in a joint checking account, and the balance in a joint savings account. The funds in the savings account were transferred to a number of different accounts, eventually ending up in a Merrill Lynch account titled as survivorship marital property. The parties agreed that James had spent over half of his worker's compensation award for marital purposes, and that the \$27,177 in the Merrill Lynch account at the time of the divorce represented the remaining proceeds from the award. The trial court found that James's actions of placing the award in joint accounts and using it for marital purposes evinced an intent to convert the funds into marital property. The determination that James converted his worker's compensation award to marital property by donative intent represents a rational decision based upon the applicable law and the facts of record. The inclusion of the award in the marital estate was therefore a proper exercise of discretion.

Attorney's Fees.

When considering whether to award appellate attorney's fees, the trial court should take into account each party's needs and ability to pay, the likelihood of success on appeal, and the reasonableness of the total fee. *Beaupre v. Airriess*, 208 Wis.2d 238, 251, 560 N.W.2d 285, 290-91 (Ct. App. 1997). James argues that the trial court erroneously exercised its discretion by basing its decision solely on his ability to pay. However, James did not present the trial court with an argument regarding the reasonableness of the fee or likelihood of success on appeal. A trial court does not misuse its discretion when it fails to

consider factors or arguments which were not presented before it. *Fowler v. Fowler*, 158 Wis.2d 508, 519, 463 N.W.2d 370, 373 (Ct. App. 1990).

Furthermore, the record shows that the trial court also considered the relative needs of the parties. It noted that each party was spending more each month than he or she was bringing in, but expressed skepticism at the extent of James's business expenses.¹ Taking into account cash assets, it found that James, who had approximately \$4,000 in savings, had a limited ability to pay attorney's fees, while Carrie had no ability to pay. The trial court's determination that James should contribute \$1,000 to Carrie's appellate fees was a rational exercise of its discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published in the official reports. See RULE 809.23(1)(b)5, STATS.

¹ James was spending about \$1,600 a month to generate an income of \$815 a month.

