COURT OF APPEALS DECISION DATED AND FILED

August 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals of Wisconsin

NOTICE

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No. 99-0439

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

IN RE THE MARRIAGE OF:

RANDALL A. EHLE,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

DEBORAH L. EHLE,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 DEININGER, J. Randall and Deborah Ehle each appeal an order in which the trial court ordered Randall to pay a child support arrearage, together with interest and a sizeable contribution to Deborah's litigation expenses. Randall claims the court erred by (1) including a portion of corporate income as Randall's income for child support computation purposes; (2) refusing to modify an "ever-increasing" child support provision contained in the divorce judgment; (3) commencing the accrual of interest on the child support arrearage prior to the date of the order; and (4) awarding Deborah over $35,000 in litigation expenses. Deborah, meanwhile, argues that the trial court should have established an even greater support arrearage by attributing more corporate income to Randall than it did.[1]

¶2 We find only one claim to be meritorious, and that is Randall's claim that the trial court should have voided the unusual, "ever-increasing" child support provision in the divorce judgment on public policy grounds. We thus reverse those portions of the appealed order which require Randall to pay child support for 1997 and the years thereafter based on his 1995 peak in income. We affirm the order in all other respects.

[1] Deborah also moved to dismiss Randall's appeal because he was found to be in contempt of court for failing to make the payments called for in the appealed order. We took the motion under advisement until disposition of the appeal. Randall's counsel subsequently filed an affidavit with this court averring that as of June 30, 1999, Randall had "paid all sums due and owing for child support, contribution to litigation expenses and interest as required by the court's orders." Deborah has not disputed that statement. We deny Deborah's motion and decide the appeal and cross-appeal as discussed in this opinion.

BACKGROUND

¶3 Randall and Deborah were divorced in 1989. The divorce judgment includes the following provision regarding child support for the parties' two minor children, who were primarily placed with Deborah at the time:

> Beginning May 1, 1989, and continuing annually on May 1st of each year thereafter, the parties shall exchange their tax returns from the preceding year. If the petitioner's tax returns demonstrate an increase in his income, child support shall be adjusted automatically to an amount equal to 25% of his previous year's gross income, paid weekly, beginning with the first Monday in May.

Randall and his brother, Robert, are each fifty-percent owners of Ehle, Inc., a cement contracting business. In the years following the divorce, 1990 through 1997, Randall's reported earnings from the corporation ranged from $15,275 to $22,750.

¶4 The current post-judgment litigation began in December 1995, when Deborah filed a motion seeking an increase in child support payments. The family court commissioner ordered Randall to pay additional child support for the years 1990 through 1995 based on the quoted provision in the divorce judgment, and on information from Randall's tax returns showing his adjusted gross income for the years in question. Randall requested a hearing de novo in the circuit court. Before the hearing took place, however, Randall also moved for an order modifying the divorce judgment "because there has been a change in circumstances in that the parties' minor child Jason … has been residing with [Randall] at [Deborah]'s insistence and request." Deborah subsequently requested the court to establish child support for the years 1990 through 1995, and prospectively, "based on the terms and provisions of the parties' Judgment of Divorce." This motion raised the

interrelationship between the corporation's income and Randall's, and it also contained a request for a contribution to Deborah's attorney fees.

¶5 Following the resolution of some interim discovery disputes and contempt allegations, as well as a change in judge and in counsel for Deborah, the trial court addressed the pending motions. The court heard testimony on four different days, issued memorandum decisions in April and August of 1998, and entered a final order on January 12, 1999. The court made several key findings regarding Ehle, Inc. and Randall's relationship to the corporation. The court found that when the corporation was created in 1990, "Randall's child support obligation was also discussed noting that a 'C' corporation could minimize the impact of the 25% of gross income support formula mandated in the court order." The court further found as follows:

> 7. Ehle, Inc. is controlled by Randall and Robert and they have conveniently used the corporation for their personal purposes as demonstrated by: 1) the corporation has kept the salaries of Randall and Robert low; 2) the corporation has retained earnings of nearly $400,000 over seven years; … 4) the corporation has paid for some of Randall's attorney fees in this divorce action … 5) in addition the corporation purchased homes which the brothers have lived in and paid reduced rents; … 7) the corporation paid $42,000 in premiums on life insurance policies for the two Ehle brothers for which the corporation improperly took a tax deduction … 8) the corporation has paid $100,000 for improvement for properties owned by the brothers as partners.

The court went on to conclude, based on expert testimony in the record, that the retained earnings of the corporation were "excessive." It ordered Randall's income for child support purposes to be calculated by aggregating the following for each year:

> [G]ross wages paid by Ehle, Inc.; his share of all partnership and investment income; one half of the retained earnings of Ehle, Inc. with an exclusion of $7,000 as his share of acceptable retained earnings of the business; one half of the $42,000 in insurance premiums and one half of the wages improperly paid to family members.

¶6 In the subsequent order implementing its decision, the court set forth Randall's income for child support purposes computed in accordance with the quoted formula, and it applied the child support provision of the divorce judgment to the income so computed. Under these calculations, Randall's income for child support purposes increased from $19,741 in 1990 to $92,129 in 1995. In 1996 and 1997, however, the income for child support purposes dropped to $64,283 and $61,497. Nonetheless, in accordance with the language of the child support provision in the divorce judgment, the court based the child support award for years following 1995 on Randall's 1995 income level. The court also ordered interest payable on the arrearages at the rate of 1.5% per month commencing at the time of each support shortfall. Finally, the court ordered Randall to pay $35,521 as a contribution to Deborah's legal costs and expert witness fees, which represented sixty-six percent of the litigation expenses Deborah had incurred in the post-judgment proceedings.[2]

¶7 Randall and Deborah both appeal the January 1999 order implementing the trial court's decisions on their post-judgment motions.

[2] The order also adjusted Randall's support obligation for a six-month period during 1996 when one of the parties' children resided primarily with him, and it reduced Randall's support obligation to seventeen percent of his income after December 31, 1997, to account for one of the children attaining majority. These provisions are not at issue in the appeal or cross-appeal.

ANALYSIS

¶8 Randall lists ten separate arguments in his opening brief, although they relate to only four claims of error. Deborah organizes her cross-appeal around three separate issues, but at bottom, each of her claims is simply that the trial court should have gone further in attributing corporate income to Randall for child support purposes. Accordingly, we address first the trial court's handling of the corporate-versus-personal income issue, considering the challenges made by both parties to the court's conclusions in that regard. We then take up the issues Randall has raised regarding the "ever-increasing" child support provision contained in the divorce judgment, the accrual of interest on the child support arrearages, and the contribution he was ordered to make toward Deborah's litigation expenses.

¶9 The overall determination of a child support award is committed to the sound discretion of the trial court, and we will not disturb it unless we are convinced that the trial court has erroneously exercised its discretion. *See* ***Cameron v. Cameron***, 209 Wis. 2d 88, 98-99, 562 N.W.2d 126 (1997). We will accept the factual findings upon which the trial court has based its child support award, unless one or more of the findings are clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98).[3] To the extent that a party claims error stemming from the trial court's allegedly erroneous view of the law, we will consider the legal question de novo. *Cf.* ***State v. Wyss,*** 124 Wis. 2d 681, 734, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 495, 451 N.W.2d 752 (1990).

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[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶10 Neither party expressly challenges any of the trial court's factual findings. After reviewing those findings and the trial court's child support determination based on them, we conclude that the trial court applied the correct law to the findings it made and did not erroneously exercise its discretion in ordering Randall to pay child support based in part on portions of the corporate income of Ehle, Inc. We further conclude that the trial court did not err in declining to go further in imputing corporate income to Randall, or by declining to adopt the "adjusted net worth" approach advocated by Deborah. We also find no error in the court's treatment of interest accrual on the support arrearage, or in its order that Randall contribute to Deborah's litigation expenses. We do conclude, however, that the "ever-increasing" child support provision contained in the divorce judgment must be voided on public policy grounds, and that there is no procedural bar to doing so in the instant proceedings.

¶11 In directing that Randall's income for child support purposes include a portion of the corporation's retained earnings, as well as one-half of certain insurance premiums and wages "improperly paid to family members," the trial court relied on this court's decisions in ***Evjen v. Evjen***, 171 Wis. 2d 677, 492 N.W.2d 361 (Ct. App. 1992) and ***Lendman v. Lendman***, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990). We concluded in ***Lendman*** that when a trial court finds that a sole shareholder of a corporation has artificially reduced his or her income to avoid a maintenance obligation, the court may take the corporation's retained earnings into account when setting maintenance. *See* ***Lendman***, 157 Wis. 2d at 613-16. Then, in ***Evjen***, we expanded on the ***Lendman*** rationale, concluding that it should apply whenever a manipulation of corporate income might permit a party to avoid family financial obligations:

> It does not matter what guise the obligor uses; whether the corporate income is labeled "retained earnings," "earned surplus," or "salary," 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.

Evjen, 171 Wis. 2d at 685 (citing ***Lendman***, 157 Wis. 2d at 614-15).

¶12 Randall first argues that the term "gross income" as used in both the child support provision in the parties' divorce judgment, and in the version of WIS. ADMIN. CODE § HSS 80 in effect at the time of the divorce, refers to a child support payor's "gross income" for income tax purposes.[4] He asserts that the trial court could thus apply the percentage expressed in the divorce judgment only to income that was included on his tax return, which ruled out the attribution of any corporate income items. He goes on to point out that, under a 1995 amendment to HSS 80, corporate income can be attributed to a support payor, but only if the payor "has an ownership interest sufficient to *individually* exercise control or to access the earnings of the business" (emphasis added).[5] Randall argues that he alone as a fifty-percent owner could not do this, citing ***Weis v. Weis***, 215 Wis. 2d 135, 572 N.W.2d 123 (Ct. App. 1997). Randall asserts further that, while a court might have been able, under the "old" HSS 80 definition of income, to attribute corporate income to a support payor, it could only be done when initially establishing support, but not when "computing a child support obligation

[4] The former WIS. ADMIN. CODE § HSS 80 has been renumbered to WIS. ADMIN. CODE § DWD 40.

[5] *See* WIS. ADMIN. CODE § HSS 80.02(13)(g), renumbered as § DWD 40.02(13)(g).

established by an order which was already in place." And finally, according to Randall, under the "new" HSS 80 income definition, corporate income can only be attributed when a payor unilaterally exercises control over corporate finances.

¶13 We reject these arguments. The language added to HSS 80 in 1995 which expressly includes corporate income in a controlling owner's income for child support purposes, does not invalidate our holdings in ***Evjen*** and ***Lendman***, which allow a court to attribute portions of corporate income to support payors based on certain findings. Similarly, we did *not* say in ***Weis*** that earnings retained in a business could *never* be attributed to one of two equal owners. Implicit in ***Weis*** is the proposition that a court might find that, despite a nominal 50-50 split in record ownership, a support payor's de facto control over corporate finances is sufficient to trigger the provisions of WIS. ADMIN. CODE § HSS 80.02(13)(g).[6] *See* ***Weis***, 215 Wis. 2d at 140 ("[T]he trial court made no finding that [the payor] had the authority to unilaterally manage the partnership….").

¶14 The "individual control" provision under HSS 80 provides a basis, but not the only basis, for including undistributed corporate income in a payor's gross income for child support purposes. Here, regarding "control" of the corporate business enterprise, the trial court found that "Randall and Robert together acted in the business to address their individual wants and desires." We agree with Randall that this finding, standing alone, may be an insufficient basis on which to include corporate retained earnings in Randall's income for child support purposes under WIS. ADMIN. CODE § HSS 80.02(13)(g). But, as we have noted, the rationale of ***Evjen*** and ***Lendman*** remains viable as a second and

[6] Now, WIS. ADMIN. CODE § DWD 40.02(13)(g).

separate basis for attributing corporate income to a payor, whenever a court finds that corporate finances have been manipulated to artificially reduce a payor's income for child support purposes, a finding that is made and amply supported in the present record.

¶15 Deborah's argument on the cross-appeal is that, once the trial court "pierced the corporate veil," it could not stop at simply including in Randall's income a portion of the retained earnings and a handful of other questionable payments made by the corporation on Randall's behalf. She asserts that the trial court should have recast the entirety of the corporation's financial transactions as though they were Randall's, resulting in much larger additions to his income for child support purposes. Alternatively, Deborah contends that if we were to conclude that untangling the corporate finances would prove too difficult on the present record, we should direct the trial court to adopt the "adjusted net worth" approach, whereby "the average annual increase in the value of Randall's 50% share of the pierced Corporation" is added to his reported income. Finally, Deborah presents a second fallback position, in which she argues that, if this court is unwilling to direct a global attribution of corporate earnings to Randall for child support purposes, we should at least direct the inclusion of a few more corporate items in Randall's income for child support purposes, such as corporate improvements to certain real estate, improper "like-kind" exchanges, and the artificially low rent charged for Randall's living quarters.

¶16 We reject Deborah's arguments. In its well-reasoned and thoughtful decision, the trial court declined Deborah's request to evaluate each and every corporate transaction to determine its legitimacy, noting that the approach was unsatisfactory because it left "to speculation what expenses are legitimate and others which may not be." The court also rejected the "adjusted net worth"

approach because it felt compelled by the support provision in the divorce judgment to calculate precise income figures for each year to which the support percentage could be applied, rather than to attribute an average annual income to Randall based on seven years of growth in corporate net worth. Instead, the court attributed to Randall those items of corporate income it concluded were clearly established by the testimony and exhibits in the record:

> Based upon the record there is no absolute way to reconstruct all of the petitioner's income. However, on the balance, the use of retained earnings together with other specified items, is the fairest approximation. Ehle, Inc. operated as a "C" corporation and the primary device to avoid taxes and payment of child support was retained earning. There also seems to be no disagreement by the parties of the retained earnings figures. I also added in the insurance premiums and family wages because there was no dispute of these figures either.

¶17 As we have noted, child support determinations are committed to the sound discretion of the trial court. *See* ***Cameron***, 209 Wis. 2d at 98-99. When we review a discretionary determination, we look to see what the trial court did and why it did so. If our review convinces us that the court applied the correct law to the relevant facts and reached a reasonable result which a reasonable judge could reach, we affirm that result and our work is done. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). It is not our role to ponder the wisdom of other approaches the trial court may have pursued or other results it may have reached, but did not in the proper exercise of its discretion. Deborah in her cross-appeal asks us to take these extra steps, essentially asking that we substitute our judgment for that of the trial court. We decline to do so given that we conclude the trial court did not erroneously exercise its discretion in ordering Randall to pay the additional amounts of child support set forth in the appealed order.

¶18 Before moving on to the remaining issues, we note that Randall also argues the trial court erred in redefining his income for child support purposes for the period prior to May 1996, because this constituted a retroactive revision of child support in violation of WIS. STAT. § 767.32(1m).[7] We disagree with this characterization of the trial court's action. The court specifically declined to "revise" the amount of support Randall was ordered to pay under the divorce judgment. At issue under Deborah's motion, and what the court decided, was the proper calculation of Randall's gross annual income upon which the twenty-five percent support order was to operate. We reject Randall's argument that the language of the divorce judgment limited his income for child support purposes to that which he reported on his income tax returns, and that the court's decision to add in a portion of corporate income therefore represents a modification of the judgment. What the court did was to correct "previous errors in calculations" of child support resulting from the underreporting of Randall's income, which the statute expressly permits to be accomplished retroactively. *See* § 767.32(1m), quoted in footnote 6.

¶19 We turn next to Randall's claim that the trial court erred by calculating his child support under the "ever-increasing floor" provision in the divorce judgment. Under the language of the judgment, child support ratchets up to twenty-five percent of Randall's gross income in the preceding year whenever that income has increased from a previous year, but there is no corresponding decrease in child support for years following a drop in Randall's income. Thus,

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[7] WISCONSIN STAT. § 767.32(1m) provides that "[i]n an action … to revise a judgment or order with respect to child support … the court may not revise the amount of child support … due, or an amount of arrearages in child support … that has accrued, prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations."

under the appealed order, the child support Randall was ordered to pay increased each year from 1990 through 1996 to reflect his increased earnings in each year through 1995. When his income dropped significantly in 1996 and 1997, however, the amount of child support continued to be computed based on Randall's 1995 peak in income.

¶20 The trial court refused to modify the operation of the child support provision because it concluded that Randall had not given notice to Deborah that he was seeking a modification removing the increasing floor from the child support formula in the judgment. Randall's only motion had been to reduce support to account for the change in physical placement of one of the parties' children. The court acknowledged that "it might make sense to make some changes in the support provisions, to save the expense of further litigation," but it did not believe it could do so without Deborah's consent to take up the issue. We conclude, however, that Randall's failure to move for a modification of the judgment deleting the "ever-increasing floor" provision does not prevent this court or the trial court from declaring the provision void as a violation of public policy.

¶21 Randall makes a number of arguments on this issue, ranging from a claim that the support ordered for years after 1996 violates statutes requiring the use of the percentage child support guidelines, to a contention that the effect of the order is to "double count" income from the previous high-income year. We do not find it necessary to analyze each of Randall's claims, it being sufficient that the patent unfairness, not to mention impracticality, of the ever-increasing floor support provision is easily demonstrated by considering some examples of its operation. The present facts are dramatic enough, where following a drop in his annual income of some $30,000, Randall has been ordered to pay child support amounting to almost forty percent of his gross income for 1996 and 1997, instead

of the twenty-five percent level contemplated by the percentage support guidelines and the parties' divorce judgment. Even more dramatic disparities would be evident if Randall had sold his interest in the cement contracting business, generating a dramatic "one-time" spike in income, followed by a return to more "normal" annual income; or if he had suffered a disabling injury which greatly curtailed his earnings in a given year.[8]

¶22 We concluded in ***Krieman v. Goldberg***, 214 Wis. 2d 163, 165-66, 571 N.W.2d 425 (Ct. App. 1997), that a stipulated provision that a payor's "child support obligation shall remain the same regardless of his [or her] income" violated public policy. In doing so, we recognized that a "supporting parent's financial circumstances may change dramatically for reasons beyond the payor's control." ***Id***. at 178. We concluded that to immunize a support payor's obligation from "the vagaries of life" could "impoverish the payor parent and place him or her in financial jeopardy," which "may have detrimental effects on the parent/child relationship and in this way would ultimately not serve the best interests of the child." ***Id.*** We acknowledged that an agreed-upon, time-limited floor for child support may not offend public policy, *see* ***Honore v. Honore***, 149 Wis. 2d 512, 439 N.W.2d 827 (Ct. App. 1989), but we distinguished that provision from a non-modifiable support order that lacked a reasonable time limitation. *See* ***Krieman***, 214 Wis. 2d at 175-76.

¶23 We realize that the provision before us in ***Krieman*** was different than the one complained of here, but the present provision suffers from the same

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[8] Randall's construction skills and experience were apparently a key factor in the financial success of Ehle, Inc. The trial court found that Randall "is an experienced finisher who works on jobs, supervises work and does take offs for bids." His brother, Robert, the other fifty percent shareholder did "more of the managing of the business."

infirmities as the one we invalidated in the prior case. There, the issue was the necessity of permitting both the payor and the payee under a support order to seek modifications when a change in circumstances required it. Here, of course, the language of the divorce judgment does not prevent Randall from seeking a modification of child support, and Deborah's principal argument against a modification is procedural, citing the "lack of notice" relied on by the trial court. We conclude, however, that unlike a child support order specifying a fixed amount, or even one that combines a percentage order with a fixed floor, the present "ever-increasing floor" support provision accomplishes no discernible goal and invites inevitable litigation to modify the support order.

¶24 Fixed-amount or hybrid, percentage-over-fixed-floor child support orders are often motivated by concerns related to earning capacity, or by predictable fluctuations in earnings, and the fixed sums are based on circumstances known and quantifiable at the time of the entry of the order. The concept behind pure percentage-of-income support orders, however, which are the beneficiaries of several statutory presumptions in their favor,[9] is that these orders will generally continue to generate child support over time that is reflective of a payor's ability to pay, a primary factor in child support determinations. Thus, these orders will be less likely to require successive and repetitive periodic redeterminations of child support. *See, e.g.,* WIS. STAT. § 767.32(1)(b)2 and (c)1 (providing that "unless the amount of child support is expressed in the judgment or order as a percentage of parental income," the passage of thirty-three months or a change in the payor's income may be deemed a sufficient change in circumstances to modify the support order). The present order, however, provides no similar

[9] *See, e.g.,* WIS. STAT. §§ 767.25(1j) and 767.32(2).

linkage between Randall's future ability to pay and his child support obligation, as the examples we cited demonstrate.

¶25 Deborah argues, and to some extent the trial court agreed, that Randall should be forced to endure the consequences of the ever-increasing child support provision because of his "unclean hands" in manipulating corporate finances to deflate his income for child support purposes. However, the remedy for such behavior is contained in other portions of the trial court's order: the recalculation of Randall's support obligation for past years, the awarding of 1.5% per month interest on the resulting arrearages, and the order that Randall make a sizeable contribution to Deborah's costs in litigating the matter. In an appropriate case, contempt sanctions might also be in order for the willful avoidance of child support obligations by way of devious corporate financial practices. The perpetuation of an ill-conceived, unfair and litigation-inviting child support provision, however, should not be among the remedies available to Deborah or the "punishments" Randall must endure.

¶26 Finally, we address Deborah's claim that had she known a modification to the ever-increasing child support floor was at issue in the present litigation, she would have conducted additional discovery, and possibly presented different evidence and argument in the trial court. We first note that it is difficult to conceive of how Deborah would have tried this matter differently if she had known earlier that the increasing floor provision was in jeopardy. Moreover, since we conclude that the "ever-increasing floor" violates public policy, there is no set of facts that Deborah could have presented that would justify retaining the provision. Deborah has the right to litigate the amount of Randall's income that should be subject to the standing percentage support order, as she has done here. She can also seek at any time to have the court enter an order for support above

the guidelines based on the factors set out in WIS. STAT. § 767.25(1m), or to request that child support be ordered in a fixed amount based on a claim of shirking and Randall's earning capacity. But we conclude that she should not be entitled to the perpetual and automatic benefit of increases in Randall's income, without sharing in the belt-tightening occasioned by a reversal of his fortunes. *Cf.* ***Nichols v. Nichols***, 162 Wis. 2d 96, 114, 469 N.W.2d 619 (1991) (noting that both payors and payees of maintenance must bear the risks of future financial setbacks to either party).[10]

¶27 The appealed order assesses interest at 1.5% per month on the amounts of child support determined to be unpaid in each year from 1990 through the date of the order, as required under WIS. STAT. § 767.25(6) (1995-96).[11] The interest accrual was ordered to commence "on the first day of the second month following the due date" of each support payment, and the court found a total of $26,194 in interest to be due as of August 31, 1998, with accrual on the unpaid balance at 1.5% continuing thereafter. Randall argues that interest should not have been assessed until the first day of the second month following the court's

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[10] The dissent reasons that the provision at issue does not truly provide for an "ever-increasing" floor, but merely shifts the burden from Deborah to Randall to ask for a change in child support. (Dissent at ¶¶35-38). According to the dissent, if "Randall believed that he should have been paying less child support because his income had decreased, he could have petitioned the court for a decrease in child support." (Dissent at ¶35). The trial court's order denying Randall's request for relief from the upward-only support adjustment provision in the parties' judgment, however, precluded him from doing so. The appealed order, which finally established Randall's child support obligations for the years 1990 through 1998 based on his recalculated income, was not entered until January 12, 1999. The order requires Randall to pay child support for the years 1996, 1997 and 1998 based on his peak 1995 income, despite the drop in his income as calculated by the court for the following two years.

[11] WISCONSIN STAT. § 767.25(6) (1995-96) provided that "[a] party ordered to pay child support under this section shall pay simple interest at the rate of 1.5% per month on any amount unpaid, commencing the first day of the 2nd month after the month in which the amount was due."

decision and order which determined that additional amounts of child support were due for past years. Randall is wrong.

¶28 The trial court in ***Cameron v. Cameron***, 209 Wis. 2d 88, 562 N.W.2d 126 (1997), like the present trial court, determined that additional amounts of child support were due from a payor under a percentage of income support order in the divorce judgment, and it ordered the past due amounts paid together with interest. The supreme court, in setting aside a trust which the trial court imposed on the arrearage, explained the purposes of assessing interest on the past due amounts:

> [T]he purpose of imposing interest on unpaid child support obligations is to encourage prompt payment of current support "for the benefit of the child and the custodial parent." Another purpose of the interest requirement is to provide some compensation for "recipients" who do not receive timely payments. There are important policy reasons for the legislature's encouragement of timely support payments. "Payment of past due arrearages is ... to be encouraged, for not only have the child and the custodial parent been deprived of the payments over time, but the noncustodial parent, contrary to court order, has enjoyed the use and benefit of those funds."

Id. at 108-09 (citing ***Greenwood v. Greenwood***, 129 Wis. 2d 388, 392-93, 385 N.W.2d 213 (Ct. App. 1986)) (citations omitted). The trial court did not newly impose a support obligation on Randall in 1998, nor did it increase his obligation. Rather, the appealed order simply determined what amounts of child support were properly due from Randall under the terms of the parties' divorce judgment. Accordingly, the assessment of interest under WIS. STAT. § 767.25(6) (1995-96), commencing at the times the support shortfalls occurred, is consistent with both the language of the statute and the supreme court's discussion of it in ***Cameron***.

¶29 Finally, we address Randall's contention that the trial court's order that he contribute some $35,000 toward Deborah's post-judgment litigation expenses "is not supported by sufficient facts in the record." Randall does not identify any items in Deborah's claim for litigation expenses to which he specifically objects, but claims generally that Deborah "failed to make a case for reasonableness" of the costs and fees she was seeking. He acknowledges that the trial court "correctly identified the three factors to support an award of litigation expenses: 1) Need of the spouse receiving the award; 2) ability of the paying spouse to pay; and 3) the reasonableness of the fees."[12] Randall is critical, however, of the "cursory" nature of the trial court's discussion of Deborah's claim for litigation expenses. He also argues that Deborah was unsuccessful in her efforts to get the trial court to recast *all* of the corporation's transactions as Randall's own, and that she could have obtained the relief she did with far less expenditures for attorneys and expert witnesses.

¶30 As with the trial court's child support determination, the decision to order one party involved in family litigation to contribute to the costs and fees incurred by the other is a matter committed to the sound discretion of the trial court. *See* ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App.

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[12] The trial court, citing the three factors set forth in ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996), gave the following rationale for its award of litigation expenses to Deborah:

> Based upon the comparison of the incomes of the parties, I find [Deborah] has a need and that [Randall] has the financial ability to pay. Further, I find the fees and costs incurred to be reasonable in light of the circumstances. It is difficult to have any sympathy for [Randall] in light of his actions to avoid support obligations. The business practices of the Ehle brothers and the nearly total lack of business records, made the task of [Deborah]'s counsel and experts challenging. For these reasons I order [Randall] make a contribution toward [Deborah]'s attorney fees and expert witness fees of 66% of the amount incurred.

1996). We agree with Randall that the trial court applied the correct law in making its determination, and we also conclude that the court considered the relevant facts and reached a conclusion that a reasonable judge could reach. Although its discussion of the relevant factors in its supplemental decision addressing the issue was succinct, the court's findings, analysis and conclusions throughout the twenty-four pages comprising the appealed order and two underlying memorandum decisions, are consistent with and support the conclusion the court reached on the fees issue. In short, Randall has failed to convince us that the trial court erroneously exercised its discretion in ordering him to contribute $35,521 to Deborah as a partial reimbursement of her post-judgment litigation expenses.

CONCLUSION

¶31 For the reasons discussed above, we reverse the appealed order insofar as it perpetuates the provision in the parties' divorce judgment which requires Randall's child support obligation to increase annually based upon increases in his income, but never to fall when Randall's income decreases. All other provisions of the appealed order are affirmed. On remand, the amounts of child support Randall is required to pay shall be recomputed disregarding the "ever-increasing floor" provision in the original divorce judgment.[13]

[13] Because Randall's income rose each year through 1995, the computation of his child support for the years through and including 1996 should not be affected by our disposition of this appeal. The drops in Randall's income for child support purposes which occurred in 1996 and 1997, however, should be reflected in his child support obligations for 1997 and 1998. Support for subsequent years should similarly be based on the preceding year's "gross income for child support purposes" as calculated under the trial court's formula, irrespective of Randall's income in earlier years.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.

¶32 DYKMAN, P.J. *(concurring in part; dissenting in part).* While I agree with some of the majority's reasoning and conclusions regarding Randall Ehle's appeal, I disagree with its determination that the "ever-increasing" child support provision in the divorce judgment is void because it violates public policy. I also disagree with the majority's reasoning and conclusion regarding Deborah Ehle's cross-appeal. I therefore concur in part and dissent in part.

I. The "Ever-increasing" Child Support Provision

¶33 In any support order in any divorce case where minor children are involved, one party or the other bears the burden of moving for a change in child support. In the usual case, support is set at an amount to be paid weekly or monthly. That is true here. Randall Ehle was ordered to pay child support of $80.00 per week beginning July 31, 1989. In the usual case, inflation and increased costs associated with children becoming older place the burden on the support recipient to bring and prove up a motion to increase support. Conversely, support payers who believe that their support payments should be lower have the burden to bring and prove up a motion to decrease support. The determination of who has the burden to permit or require an increase is more than academic. WISCONSIN STAT. § 767.32 (1997-98)[14] permits the revision of child support judgments, but the person requesting a change must show a "substantial change in circumstances." WIS. STAT. § 767.32(1).

[14] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶34 There is nothing of which I am aware that prohibits parties to a divorce action from allocating this burden to one or the other of them. The usual divorce judgment does not do so, but it does not strike me as illegal or contrary to public policy if the parties agree that one or the other of them has this burden. The method by which the burden is allocated to the support payer can be an increasing support order. This places the burden on the payer to bring a motion to reduce or continue a level of support if he or she is dissatisfied when a previously agreed to increase in support becomes effective. Just as a support recipient must bring a motion to increase support, a support payer must bring a motion to continue or reduce support. Indeed, WIS. STAT. § 767.33(1) provides for what could be an ever-increasing support order:

> **Annual adjustments in child support order.** **(1)** An order for child support under s. 767.23 or 767.25 may provide for an adjustment in the amount to be paid based on a change in the obligor's income, as reported on the disclosure form under s. 767.27(2m) ….

¶35 Randall and Deborah Ehle's divorce judgment provided for increased support payments if Randall's tax returns demonstrated an increase in income. If Randall's income did not increase, neither did his support payments. The majority errs in assuming that Randall's support payments were "ever-increasing." They were not. All that the divorce judgment did was to shift the burden of asking for a change in child support from Deborah to Randall. The parties did not agree that WIS. STAT. § 767.32 would be inapplicable to them, or that they would not avail themselves of this statute if they desired to do so. If Randall believed that he should have been paying less child support because his income had decreased, he could have petitioned the court for a decrease in child support. This is not that much different from the usual situation in which a

support payer's income decreases. He or she must petition for a decrease in support to have support payments lowered. The burden is particularly important, since pursuant to § 767.32(1m) and ***Schulz v. Ystad***, 155 Wis. 2d 574, 581-82, 456 N.W.2d 312 (1990), arrearages in child support may not be expunged.

¶36 The majority defends its conclusion by noting that the trial court precluded Randall from obtaining relief from the "ever-increasing" order. But this is only part of the story. The reason the trial court precluded Randall from seeking relief was that he did not ask for relief until late in the proceedings. The trial court reasoned that it would be unfair to Deborah to expand the issues at that stage of the trial without giving her time to prepare. The majority is therefore concluding, by omission perhaps, that the trial court erroneously exercised its discretion by preventing Randall from raising another issue late in the proceedings. In my view, the trial court's ruling was an appropriate exercise of discretion.

¶37 The reason why Randall was ordered to pay child support based on his peak income was therefore not because of anything the trial court did or did not do, but because Randall did not bring a motion to reduce his support, though he could have done so.

¶38 I conclude that the majority has incorrectly concluded that Randall's "ever-increasing" child support was void for public policy reasons. The "ever-increasing" child support order was in reality no such thing. Had Randall really wanted to decrease his child support obligation, he could have brought a motion to do so. That he did not bring such a motion is probably more a result of his fear that his real income would be discovered than a belief that he was forever tied to an "ever-increasing" child support order.

¶39 What the majority has done is to prevent divorce litigants from utilizing a valuable tool in allocating the burden of bringing a motion to revise a support judgment. This is unnecessary and unfortunate. I would conclude that the child support adjustment provision in the Ehles' divorce judgment was enforceable, and therefore affirm the trial court's determination to that effect.

II. Deborah Ehle's Cross-Appeal

¶40 The trial court rejected Deborah's two approaches to determining Randall's real income since 1990, from which his child support payments would be calculated. The court stated that we had approved the use of a reasonable approximation of net income when a support obligor intentionally misrepresents both his or her income and expenses in ***Lellman v. Mott***, 204 Wis. 2d 166, 174-75, 554 N.W.2d 525 (Ct. App. 1996). However, the trial court said:

> The court rejects [an adjusted net worth] formula despite the attractiveness of its simplicity. The divorce judgment calls for a May review of income each year and if Randall's income has increased, so too does the child support based upon a percentage. *The language* [of the parties' agreement] *does not mention any reduction. This requires the court to scrutinize each year in question*.

(Emphasis added.)

¶41 This is the entirety of the trial court's explanation of why it rejected the adjusted net worth method of determining Randall's child support payments. There is no mention of difficulty or uncertainty in using this method. Indeed, the trial court commented on its simplicity. The reason the trial court rejected this method of setting child support was that the parties' agreement provided only for "ever-increasing" child support payments, and an adjusted net worth method of

setting child support payments is incompatible with an ever-increasing support obligation agreement.

¶42 The trial court rejected Deborah's second approach to setting child support, which was an attempt to reconstruct Randall's gross income from Ehle, Inc., together with partnership income. Here is the entirety of what the trial court said as to why it was rejecting this method of setting child support:

> Because of the records of the corporation (or the lack thereof) I have some discomfort with this approach also. This method as proposed, allows some business expenses, i.e. payroll, supplies, while disallowing others which it terms soft, i.e. insurance and legal fees. It leaves to speculation what expenses are legitimate and others which may not be.

¶43 I disagree that the adjusted net worth method and the gross income reconstruction method of determining Randall's income are inapplicable to the facts of this case. Still, we review a trial court's decision regarding support amounts for an erroneous exercise of discretion, *see* ***Evenson v. Evenson***, 228 Wis. 2d 676, 687, 598 N.W.2d 232 (Ct. App. 1999), and I conclude that the trial court's decision is an appropriate exercise of discretion.[15] My concern is with the effect the majority's decision has on the trial court's decision not to use the adjusted net worth formula to calculate child support.

¶44 The only reason the trial court gave for not using the adjusted net worth formula to calculate Randall's child support is that the parties had agreed to an ever-increasing floor for child support, and the adjusted net worth formula does

[15] When the trial court rejected the adjusted net worth method, it could not know that the majority would later conclude that ever-increasing support payments violate public policy. Thus, based on the then-applicable law, the trial court's decision was a proper exercise of discretion.

not fit in well with that agreement. The majority has now concluded that ever-increasing child support agreements are void as a violation of public policy.

¶45 The result of what we have done is unfair to Deborah. We have undercut the only reason the trial court gave for not using an easily applied formula and yet have not included in our remand a directive that the trial court reconsider whether it should use the adjusted net worth formula to compute child support. We have given no reasons for doing so. Had a trial court concluded that it would not use that formula, but gave no reason for its conclusion, we would reverse and remand for further consideration. It seems unfair to hold trial courts to this standard but to ignore it ourselves. I would remand to permit the trial court to consider using the adjusted net worth formula in light of our conclusion that ever-increasing support orders are contrary to public policy.

¶46 This is no small matter. Deborah asserts that Randall's gross income from 1990 to 1996 was, according to a certified public accountant, $558,489. The trial court, by using a retained earnings method of calculating Randall's income, concluded that his income for that period was $363,124, a figure that is only sixty-five percent of and $195,365 different from that used by Deborah's accountant. Deborah complains of three instances in which substantial sums of money were improperly used by Ehle, Inc., which, had they been properly treated, would have greatly increased Randall's income. The trial court did not consider these three situations in calculating support, and, except for some general conclusions regarding standard of review, the majority has failed to explain why Deborah is incorrect in her assertions that Randall has hidden nearly $200,000 of income which should have been used as a basis on which to set child support.

¶47 Deborah asserts that Ehle, Inc., expensed $100,000 for improvements which should have been capitalized. Whether the problem is viewed in this way, or, as the trial court found, that Ehle, Inc., had paid $100,000 for improvements to properties owned by Randall and his brother as partners, the result is nearly the same. Had the trial court considered the $100,000, or the portion of that sum which was improperly expensed, one-half of which should have been credited to Randall as wages, Randall's income would have been increased by that amount. The $100,000 was not included in Ehle, Inc.'s retained earnings, and thus was not accounted for in the trial court's method of determining income which considered only retained earnings.

¶48 Deborah devotes a section of her brief to this missing $100,000. The majority ignores this section of her brief, and gives no reason for doing so. It does so despite the absence of any substantive response to Deborah's argument in Randall's respondent's brief. We usually take a failure to respond to a proposition as a confession that the proposition is correct. *See* ***State ex rel. Sahagian v. Young***, 141 Wis. 2d 495, 501, 415 N.W.2d 568 (Ct. App. 1987). Ignoring a specific part of Deborah's brief is unfair to Deborah and contrary to WIS. STAT. § 752.41(1), which requires that the court of appeals provide written decisions which contain reasons for its decisions.

¶49 There is more. Deborah asserts that, in 1993 and 1995, Ehle, Inc., improperly deferred gains totaling $117,024. Had the gains been properly reported, Randall's income would have been increased by one-half of that amount. The trial court might have taken issue with Deborah's certified public accountant's interpretations of several provisions of the Internal Revenue Code to conclude that the exchanges of property which generated the gains were proper. But it focused

on Ehle, Inc.'s retained earnings and thus ignored any gains which should have been attributed to Randall.

¶50 Again, the majority ignores the section of Deborah's brief which argues that Randall has been able to hide a considerable portion of his income by using an improper (Deborah terms it "illegal") method of calculating income. Deborah deserves an answer. Were I writing for the majority, I would conclude that although the trial court is afforded considerable discretion in setting support orders, discretion entails the application of the facts of the case to the law, using a process of reasoned decisionmaking. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Although the trial court was certainly correct in noting that there is no absolute way to reconstruct all of Randall's income, I cannot see how ignoring a transaction involving $117,024 has any benefit other than possibly allowing Randall to hide that sum of money from child support use. The majority has accepted the trial court's conclusion that the use of an adjusted retained earnings method is the fairest approximation of Randall's income. But, accepting that conclusion without inquiry seems to me too much to cover with the cloak of standard of review.

¶51 Deborah's last assertion concerns a lakefront home that Ehle, Inc., purchased for Randall's use, and for which it paid real estate taxes, utilities and phone bills. Ehle, Inc., received almost no income from its investment, and Randall received the use of a lakefront home and the benefit of real estate taxes, utilities and telephone bills paid by Ehle, Inc. The result is that Randall has avoided paying support on more income. Deborah calculates this income at $21,000 per year since the home was purchased in 1995. But Randall does not contest Deborah's assertion of imputed income, and the majority again ignores the portion of Deborah's brief which claims that she is entitled to child support based

on the additional $21,000 per year. I conclude that Deborah deserves an answer, and that if we do not give her one, it is likely that she will never get an answer.

¶52 My answer would be to remand this and the other matters involving additional income to the trial court. I would not direct the trial court to accept Deborah's assertions. But as to the items she has specifically identified and other significant items, I would ask the trial court to explain specifically why it has rejected these items as additions to Randall's income, or to include them. As with many family law cases, there may be valid reasons for making a discretionary decision. But, as the supreme court noted in ***Bahr v. Bahr***, 107 Wis. 2d 72, 82, 318 N.W.2d 391 (1982), the important part of a discretionary decision is more than the articulation of the decision. It extends to the explanation of that decision. In ***Bahr***, the court said: "We are left with a nagging question: *Why* is $1,500 per month a proper maintenance award under the facts and circumstances of this case based upon these recited factors?" ***Id.*** In Deborah and Randall's case, the nagging question is "Why is the use of only retained earnings the fairest test, given that this test ignores $300,000 of Ehle, Inc.'s income not substantively contested by Randall?"

¶53 The majority evidently accepts the trial court's explanation of its decision to use Ehle, Inc.'s retained earnings. I am unable to determine a rational reason for the trial court's decision to use that method of calculating Randall's income. There may well be such a reason, but I cannot find it in the trial court's decision.[16]

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[16] I include the entire portion of the trial court's opinion in which it discusses its conclusion to use fifty percent of Ehle, Inc.'s retained earnings, modified by a few factors, as Randall's earnings for child support calculation:

(continued)

After much pause and consideration, Randall's gross income for purposes of child support shall include the following: his gross wages from Ehle, Inc.; one half of all partnership income; one half of all retained earnings; and one half of the $42,000 insurance premium and the wages paid to family members. I have not included corporate income taxes because Ehle, Inc. is a "C" corporation (not a sub chapter 5) and taxes are a legitimate expense. The court's formula should be applied on a yearly basis with only increases in income allowed and no decreases consistent with the terms of the divorce judgment. Based upon the record there is no absolute way to reconstruct all of the petitioner's income. However, on the balance, the use of retained earnings together with other specified items, is the fairest approximation. Ehle, Inc. operated as a "C" corporation and the primary device to avoid taxes and payment of child support was retained earning. There also seems to be no disagreement by the parties of the retained earnings figures. I also added in the insurance premiums and family wages because there was no dispute of these figures either. In making the calculations for the years 1990-1991, $7,000 of retained earnings should be excluded from Randall's income as his share of acceptable retained earnings for the corporation.