COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3004

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

IN RE THE MARRIAGE OF:

JEANETTE E. NORMINGTON,

PLAINTIFF-RESPONDENT,

V.

PETER J. NORMINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 VERGERONT, J. Peter Normington appeals the judgment of divorce from Jeanette Normington, contending that the trial court erroneously exercised its discretion in (1) imputing $11,400 annual income to him based on the

residence and related services he was provided by the corporation of which he was part owner; (2) imputing $5,000 annual income to him and to Jeanette each from interest and dividends; and (3) awarding Jeanette maintenance of $1,000 per month for three and one-half years, and $750 per month for the next two and one-half years. We conclude the trial court did not make any errors of law and properly exercised its discretion in making each of these decisions. We therefore affirm.

BACKGROUND

¶2 The judgment of divorce was entered on May 6, 1999, after a nineteen-year marriage. Peter was then forty-five and Jeanette was forty-three. They had three minor children and were both in good health. Since 1982 or 1983 Peter has been employed by Saddle Mound Cranberry Co., Inc. (Saddle Mound), a closely held corporation, the stock of which has always been owned by Peter, his parents, and his sister. At the time of the divorce, it was owned by Peter, his mother, and his sister. Peter is president of Saddle Mound, on the board of directors, and is the principal manager of the day-to-day operations of the corporation. Prior to the divorce he owned 315 shares, or 25.4%, of the stock in the corporation. In addition to Peter's salary, since 1983 Saddle Mound provided the parties with a house, health insurance, a credit card for groceries and household supplies, a vehicle, and the company paid for all expenses associated with the vehicles and with the residence, including phone, utilities, maintenance, taxes, and insurance, as well as paying for family vacations and recreational vehicles and equipment.

¶3 At the time of the divorce Jeanette was attending a technical college, working toward an associate degree in Business Administration and Human

Resources. She had not earned wages since 1983, and had been the primary caretaker of the children and primarily responsible for household tasks.

¶4 The parties stipulated to joint legal custody and primary physical placement of the children with Jeanette. They also entered into a stipulation on property division under which Jeanette received, for her interest in the Saddle Mound stock, payments in the amount of $2,322.17 per month for a period of ten years, with between $1,000 and $1,100 per month as interest income, and Peter received all shares of the Saddle Mound stock. Jeanette received other assets that had a value of $165,730, as well as personal effects, household goods and an automobile. Peter received accounts totaling $135,000, as well as personal effects, household goods, an automobile, furniture, sporting goods and equipment, a boat, and a jet ski.

¶5 The disputed issues at the final hearing were child support and maintenance for Jeanette. The court found that Jeanette's annual income was $12,500 interest from the stock redemption and $5,000 from other interest or dividends, and Peter's income was $63,550: $43,550 in wages, $11,400 as the imputed value of the residence provided by Saddle Mound, including utilities, taxes, and insurance; $5,000 in interest or dividends; and $3,600 as the imputed value of automobiles and related costs paid for by Saddle Mound. The $11,400 was based on the trial court's finding that the estimated fair rental value of the residence was between $800 and $950 per month. The court based the $5,000 in interest or dividend income for each party on a finding that the parties' reported taxable interest income was $10,769 in 1997 and $10,547 in 1998.

¶6 The court set Peter's support obligation at 29% of his gross income, or $1,535 per month. The court set maintenance at $1,000 per month for three and one-half years and $750 per month for the next two and one-half years.[1]

DISCUSSION

¶7 The determination of child support and maintenance are both committed to the trial court's discretion. *See* ***Hokin v. Hokin***, 231 Wis. 2d 184, 190, 605 N.W.2d 219 (Ct. App. 1999). We affirm the discretionary rulings of the trial court if the court examines the relevant facts, applies the correct legal standard, and using a rational process, reaches a reasonable conclusion. *See* ***id.*** When the trial court makes factual findings in arriving at its decision, we accept those unless they are clearly erroneous. *See* ***id.*** at 190-91. When the court must rule on the interpretation of statutes or regulations in making its decision, we review those rulings de novo. *See* ***Weis v. Weis***, 215 Wis. 2d 135, 138, 572 N.W.2d 123 (Ct. App. 1997).

Imputation of Income

¶8 Peter first challenges the court's imputation of income to him of $11,400 per year for the value of the residence, including utilities, taxes, and insurance. He contends that under WIS. ADMIN. CODE § DWD 40.02(13)(a) the court may impute no more than the amount considered gross income for the purpose of federal income taxes, and that his expert established that this amount is four-tenths to six-tenths of one percent of the fair market value of the residence.

[1] The divorce was granted on the date of the final hearing, May 6, 1999, but the issues of child support and maintenance were not resolved until the court's written decision entered on September 2, 1999, after post-hearing briefing. An amended judgment of divorce incorporating those rulings was entered on October 18, 1999.

Since the court found the fair market value of the residence to be $131,000, Peter contends that between $5,240 and $7,860 per year should be imputed to him, rather than $11,400.

¶9 WISCONSIN ADMIN. CODE § DWD 40.02(13) defines "gross income" for purposes of computing child support, and includes as gross income "(a) All income considered federal gross income under 26 CFR 1.61-1."

¶10 The accountant for Saddle Mound testified that because the corporation is a subchapter S Corporation, and Peter is more than a 2% shareholder, the cost of the residence provided him, and the related services are not excludable from gross income for federal income tax purposes—either he must pay for them or the value must be added to his income, neither of which had been done in the past due to oversight. According to the accountant, based on discussion with individuals in his firm, the range used is between four-tenths and six tenths of one percent of the fair market value of the residence, and that includes real estate taxes, utility costs, a phone, heat, and electricity.

¶11 Based on the accountant's testimony, the court could reasonably determine that the residence and the related services provided Peter were considered gross income to Peter for federal income tax purposes, and we do not understand Peter to argue otherwise. Rather, we understand his argument to be that, because in the accountant's opinion the value of those benefits for federal income tax purposes was properly computed as between four tenths and six tenths of one percent of the fair market value of the residence, that is the only amount that could be considered gross income to Peter under WIS. ADMIN. CODE § DWD 40.02(13)(a). We do not agree. As we understand the accountant's testimony, the valuation he proposed was not mandated by federal income tax law but was his

opinion of a proper valuation for federal income tax purposes. Section DWD 40.02(13)(a) does not require that the court adopt that valuation. Rather, just as in other valuations in the context of a divorce, the trial court may choose between conflicting expert testimony in deciding the amount of income to attribute to Peter for in-kind benefits that are considered gross income under § DWD 40.02(13)(a).

¶12 Thomas Arnold, a real estate appraiser with experience in rental management, testified that the rental value of the residence was between $800 to $950 per month. Eleven thousand four hundred dollars is an annualization of the latter figure. It was reasonable for the court to choose the high end of that range, given that the amount includes phone, all utilities, and insurance. We conclude the trial court did not err in interpreting or applying WIS. ADMIN. CODE § DWD 40.02(13)(a), and that the $11,400 in annual income imputed to Peter for the residence and related services is supported by the record and is the result of a proper exercise of discretion.[2]

¶13 Peter next challenges the court's imputation of $5,000 in annual income from investments to him and to Jeanette. As noted above, the trial court based this figure on the income of $10,769 and $10,547 reported as "taxable

[2] Peter refers to ***Weis v. Weis***, 215 Wis. 2d 135, 572 N.W.2d 123 (Ct. App. 1997), as a case in which we held the rental value of a residence owned by a partnership in which a payer was living rent free could not be imputed as income for purposes of child support. However, in that case the issue was whether the residence was an unproductive asset under former WIS. ADMIN. CODE §§ HSS 80.02(15) and 80.02(3), now WIS. ADMIN. CODE §§ DWD 40.02(15) and 40.02(3). We concluded the residence was not an asset available for imputing income, because "assets available for imputing income" are defined as "real or personal property over which a payer can exercise ownership or control," *see* § DWD 40.02(3), and the payer in ***Weis*** owned only 50% of the partnership and did not have the authority, under the partnership agreement or otherwise to unilaterally manage the residence or any other partnership asset. We did not address in ***Weis*** whether the residence should be considered gross income under § DWD 40.02(13)(a) and, if so, how that amount of income should be determined. Therefore, ***Weis*** does not assist us in resolving the issue Peter raises on this appeal.

interest" (line 8a of the 1040 form) on the parties' 1997 and 1998 federal income tax returns, respectively. The court noted that although the parties did not present evidence showing what income would be received from their various investments, it "must assume that each of the parties will receive as income from these investments in the future an approximately equal amount, depending, of course, on how they manage their investments." Peter contends the court made a factual error because most of this interest income is "a pass through" from Saddle Mound, and the court stated elsewhere in its decision, Peter asserts, that it was not going to consider the S Corporation distributions in determining the parties' gross incomes.

¶14 The court's comments to which Peter refers were made in the context of its discussion of the fluctuation in the parties' gross income as reported on their federal tax returns: $34,651 in 1997, and $73,023 in 1998. The court observed this difference was attributable to a loss of $23,342 from the S Corporation in 1997, and income of $17,142 from the S Corporation in 1998, although, the court observed, the parties neither sustained that loss nor received that income. The court stated that the effect of subchapter S distributions was an increase or decrease in the tax liability of the recipient but do not change the recipient's gross pay.

> It is also my understanding [the court stated] that many S Corporations will increase their actual cash payments to shareholders in those years in which they must report significant earnings to off-set the tax liability incurred. While there is no evidence to support this observation, there is no reason why the corporation may not do so in the future. Accordingly, the S Corporation distributions are not considered further in this decision.

¶15 We do not agree with Peter that these comments by the court and its decision not to take into account the income or loss shown on line 17 of the federal

income tax returns is inconsistent with its decision to include half of the interest shown on line 8a as income to each party. The court did not include the former because of the court's understanding that the parties did not necessarily receive that income or sustain that loss, whereas the court did not have that understanding with respect to the interest income reported. Peter does not contend that the parties did not actually receive the reported interest income, nor does he point to any evidence indicating that the court's assumption that each party will receive approximately half that amount in interest in the future is unreasonable. We conclude the court did not make a factual error and did not erroneously exercise its discretion in including $5,000 as annual interest income in both Peter's and Jeanette's gross income.

Maintenance

¶16 Peter challenges the amount of the maintenance awarded Jeanette on two grounds: (1) after paying his child support he does not have enough income to meet his monthly expenses, and (2) the court imputed $3,600 per year in income to him for personal use of the vehicle provided by Saddle Mound, but did not impute income to Jeanette for the monthly payments Saddle Mound was making on the vehicle she was awarded under the stipulated property division, even though at trial, when asked by Peter's attorney, she agreed the monthly payments should be imputed to her as income.

¶17 In deciding whether to award maintenance, and, if so, for how long and in what amount, the court is to consider the factors in WIS. STAT. § 767.26 (1997-98),[3] which are designed to further two objectives: support and fairness.

[3] WISCONSIN STAT. § 767.26 provides as follows:

(continued)

See ***Hokin***, 231 Wis. 2d at 228-29. The former ensures the spouse is supported in accordance with the needs and earning capacities of the parties, the latter ensures a fair and equitable arrangement between the parties in each individual case. *See* ***id.***

¶18 The trial court considered each of the statutory factors with reference to the evidence in this case, and identified the "unique factor" here to be the

---

> **Maintenance payments**. Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:
>
> (1) The length of the marriage.
>
> (2) The age and physical and emotional health of the parties.
>
> (3) The division of property made under s. 767.255.
>
> (4) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (7) The tax consequences to each party.
>
> ….
>
> (9) The contribution by one party to the education, training or increased earning power of the other.
>
> (10) Such other factors as the court may in each individual case determine to be relevant.

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

parties' lifestyle enjoyed during the marriage because "essentially, everything they wanted or needed was provided for them by the family corporation." The court also found that Peter continues to enjoy these benefits, noting that he has received "expensive hunting rifles, a dog kennel with food and veterinary services provided by the corporation." The court stated that Jeanette claimed $3,471 per month in expenses for herself and her children, and Peter claimed $1,555 per month in expenses including $300 per month in installment payments on debts totaling $55,276. These expenses of the parties were not challenged, the court stated, and it "ha[d] no reason to believe they are not at least fair estimates of the various expenses incurred by the parties." Peter points out that after the deduction of child support, he has a monthly net income of $1,029.59, and, if he pays maintenance of $1,000 per month, he has only $29.59 to meet his expenses of $1,555.

¶19 Peter's argument overlooks these points: (1) the court found he would have $5,000 in interest income, a finding we have sustained; (2) Peter will be paying the ordered amount of child support at the longest, until his oldest son turns nineteen, on September 20, 2002, and, more likely, only until the spring of 2002; (3) the court did not find Peter's expenses were necessary, but only that they were "fair estimates of the various expenses incurred" by him; (4) even with everything Peter is provided by the corporation, his expenses minus the loan payment are still more for one person than the amount spent per person in Jeanette's household of four. The court could reasonably decide that Peter's lifestyle after the marriage was more comfortable than Jeanette's, given everything he received from the corporation, and that an amount of maintenance that, together with child support and her other earnings, slightly exceeds her modest monthly expenses is justified. The court could also reasonably decide that Peter has the means to pay the amount ordered while still enjoying a comfortable lifestyle.

¶20 We also decide the court did not erroneously exercise its discretion in failing to impute to Jeanette as income the monthly payments the corporation was making on the van she received under the stipulated property division. Peter received various sporting vehicles and sporting equipment in that division as well as an automobile. In addition, the in-kind benefits he receives from the corporation on a continuing basis include gasoline, vehicle maintenance, and access to several vehicles without restriction of his use of them. On this evidentiary basis, the court could reasonably decide not to impute to Jeanette as income the monthly payments for the one vehicle she received under the property division, but to impute to Peter the value of the vehicle use, gasoline, and maintenance that he is provided on an ongoing basis.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.