COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0892-FT **Cir. Ct. No. 97-FA-35**

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

IN RE THE MARRIAGE OF:

KAREN J. MIEMIETZ,

PETITIONER-RESPONDENT,

V.

GEORGE J. MIEMIETZ,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. George Miemietz appeals a child support order and an order denying his motion for reconsideration.[1] He argues that the trial court erroneously determined his income for purposes of applying percentage standards under WIS. ADMIN. CODE § DWD 40.[2] He further contends the court erroneously refused to accept additional clarifying evidence on his motion for reconsideration. Karen filed a motion seeking costs for a frivolous appeal pursuant to WIS. STAT. RULE 809.25(3)(c)2. She also objects on jurisdictional grounds. We affirm the orders and deny Karen's motion. We further deny her jurisdictional objection.

BACKGROUND

¶2 When the parties were divorced in 1999, the court found that George had understated his income and found that he earned $51,000 annually. The court ordered him to pay $1,232 child support for their three children who lived with Karen. In December 2000, George filed a motion to modify placement and child support. Following an October 2002 hearing, their son was primarily placed with George and one daughter was primarily placed with Karen. Their oldest daughter had attained age eighteen and moved in with George.

¶3 At the hearing to modify child support, George testified that he was a self-employed building contractor and carpenter. He stated that his business had not dropped off since the time of his divorce. George presented a copy of his 2001

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] George refers to WIS. ADMIN. CODE § HSS 80. WISCONSIN ADMIN. CODE ch. "HSS 80 was renumbered chapter DWD 40 by emergency rule effective October 2, 1998. Chapter HSS 80 as it existed on July 31, 1999 was renumbered chapter DWD 40, Register, July, 1999, No. 523, eff. 8-1-99." WIS. ADMIN. CODE ch. DWD 40 note (2003).

income tax returns showing a total income of $42,036 and, with depreciation added back in, $47,535. George's 2000 tax returns stated $33,537 annual income. George stated he paid Karen $1,232 per month child support and listed monthly living expenses for himself and their oldest daughter under $1,000 per month.

¶4 Karen testified that she reviewed financial records that George provided through discovery. She estimated that George's financial statement omitted $81,000 in assets. She stated that by reviewing the records, she determined that George's financial disclosure statement failed to include new household furnishings, new appliances, a four-wheeler, a garden tractor and a construction trailer. She also testified that his records indicated he had written contracts for fourteen construction jobs, but sixty-five jobs had no written contracts. In addition, through discovery, George admitted to having bank accounts he previously had not disclosed. Karen testified that George's income was difficult to trace. Sometimes George would barter his labor for tools and sometimes for credit from a business.

¶5 Karen testified that according to George's financial statement, his net worth increased by approximately $180,000 over the forty-two months since the divorce. He listed no debts. Based upon financial information obtained from George, she calculated his net worth in 2002 to be $466,996, which included a new house he built for himself valued at $148,000 that carried no mortgage debt,[3]

[3] George testified that his house cost $110,000 to build, not including the value of his labor. He argues, without citation to the record, that the "net worth increase of $38,000 is caused solely by normal appreciation." Absent record citation, we do not consider this argument. ***Tam v. Luk***, 154 Wis. 2d 282, 290-91 n.5, 453 N.W.2d 158 (Ct. App. 1990).

a 2000 truck valued at $18,500, a 2002 Honda valued at $16,000 and a number of savings accounts, certificates of deposit and securities.

¶6 The court found that there is "no way" George had an income as reported on his income tax return based on his lifestyle and the substantial increase in his assets since the divorce. The court imputed minimal additional income necessary to meet his budget as set forth on his financial disclosure statement to be $2,676 annually. The court calculated George's annual income to be $88,021.

¶7 The court specifically found:

> The Court is aware that [George] claims that his total taxable income is approximately $42,000. The court imputed $51,000 to be his income from his business alone when the divorce decree was entered in January of 1999. [George] now claims that he is making substantially less money. This is not credible based in part on [George's] lifestyle and the substantial additional assets he has accumulated since the divorce. It is obvious that [George] has income that is unreported. The Court is amazed at [George's] willingness to come back to the Court and misrepresent his income for a second time. [George's] Financial Disclosure Statement is unbelievable as it pertains to both his income and the budget for his living expenses. The Court believes [George] is playing a dangerous game with the filing of his tax returns.

Based upon the application of the 17% standard in WIS. ADMIN. CODE § DWD 40.03(1)(a), the court ordered George to pay Karen $1,246.96 per month child support. The court also determined that Karen was to pay George child support of $442 per month.

¶8 George filed a motion for reconsideration seeking clarification of the order and an opportunity to present additional evidence to show that the financial information on which the court relied was inaccurate. The court denied the motion and this appeal follows.

DISCUSSION

1. Gross Income

¶9 George attacks the court's finding of his gross income. He acknowledges that the trial court may make findings as to a party's annual income based upon available evidence when the party's intentional conduct precludes a precise determination, but argues that he made an accurate and complete disclosure. We are unpersuaded.

¶10 The trial court is required to calculate the appropriate award of child support by applying the WIS. ADMIN. CODE § DWD 40 percentage standards to the payor's gross income. *See* ***Evenson v. Evenson***, 228 Wis. 2d 676, 691, 598 N.W.2d 232 (Ct. App. 1999); *see also* WIS. STAT. § 767.25(1) and (1n)(b).[4] George's annual income is a fact to be determined by the trial court based upon the evidence. *See* ***Lellman v. Mott***, 204 Wis. 2d 166, 173, 554 N.W.2d 525 (Ct. App. 1996). Factual determinations made by the trial court are reviewed under a clearly erroneous standard. ***Id.*** at 171. As long as the determination of fact could be achieved by a reasonable fact-finder based upon the evidence presented, a reviewing court is required to accept the facts found by the trier of fact. ***Id.*** at 170-71. The credibility of witnesses and the weight to be attached to that evidence is a matter uniquely within the discretion of the factfinder. ***Id.*** at 172. Appellate courts search the record for evidence to support the findings reached by the trial

[4] WISCONSIN STAT. § 767.25 "Child support," provides in part: "(1j) Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22(9)."

The standard for one child is 17%. WIS. ADMIN. CODE § DWD 40.03(1)(a).

court, not for evidence to support findings the trial court did not but could have reached. ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. ***Id.*** at 151-52.

¶11 As arbiter of credibility, the court could reject George's explanations of his income and expenses. *See* ***Lellman***, 204 Wis. 2d at 172. The fact finder, not an appellate court, determines weight and credibility because it has the opportunity to observe the witnesses and their demeanor. ***Pindel v. Czerniejewski***, 185 Wis. 2d 892, 898-99, 519 N.W.2d 702 (Ct. App. 1994). Based upon all the evidence, including George's accumulation of substantial assets, the court could find that George deliberately manipulated the financial disclosure of his income to minimize his child support obligation. There is sufficient evidence to support the trial court's finding that George enjoyed a substantially higher income than was disclosed as part of his financial disclosures.

¶12 The fact that George by his deliberate conduct frustrated an accurate calculation of his net income does not preclude the trial court from making the appropriate finding of fact. *See* ***Lellman***, 204 Wis. 2d at 172-73. "The trial court may make its finding based upon the available evidence when a party's intentional conduct precludes a precise determination of that annual income." ***Id.*** Because George intentionally misrepresented both his income and expenses, the trial court was left to determine a reasonable figure attributable to George as a net annual income.

¶13 Here, the court was entitled to find that George's financial statement was not accurate. His monthly budget included nothing for his admitted

expenditures for travel and attorney fees. The court could find that despite George's claim that he and his daughter ate wild game, $100 per month listed as food expense for the two of them was understated. Consequently, the court could reasonably find that George's monthly budget was understated by $2,676 per year.

¶14 The record provides a reasonable basis for the court's finding of George's gross income. The court could find that the amount George spent accumulating assets over forty-two months since the divorce reflected greater income than George stated on his income tax returns and financial disclosure statements. It was reasonable for the court to determine that George's accumulation of assets alone reflected spending approximating $50,000 per year. Based on George's financial disclosure statement and testimony, the court could find that George's household expenses approximate at least $15,000 per year to maintain him and the parties' oldest daughter who lived in his household.[5] In addition, the court could find that George paid nearly $15,000 per year in child support. From his income tax returns, the court could find that George paid federal and state taxes of over $10,000 per year. Consequently, it was not clearly erroneous for the court to find a gross income of $88,000.

¶15 George contends, nonetheless, that the trial court erroneously added the increase in his net worth to determine his income for child support purposes. This argument mischaracterizes the court's ruling. The court stated that it found George's statement of income incredible, based upon his lifestyle as evidenced by his increased assets.

[5] George's financial disclosure statement indicated that his budget included expenses for their oldest daugther.

¶16 George also claims that the court improperly used both an asset and its income stream, thereby double counting the assets as income. He complains that this results in paying child support on his income as well as on his assets and argues the court's ruling was based upon an incorrect application of law and facts. George points to nothing in the record that shows the court based its finding of income on double counting. Nothing indicates the court relied on any asset based income stream. The court stated that it determined George's income by evaluating his lifestyle and the accumulation of assets since the time of the divorce. The court was not required to accept George's explanation of income and expenses. *See* ***Lellman***, 204 Wis. 2d at 173.

¶17 George further asserts that the definition of gross income under WIS. ADMIN. CODE § DWD 40.02(13) does not include an increase in net worth based upon an appreciation of assets, unless the increase has been realized through a sale or other disposition of the property. Again, this argument is premised on the misconception that the court added appreciation to earned income to arrive at gross income. That is not what the court did. The court merely stated that based on evidence of George's lifestyle and accumulated wealth, there was "no way" he earned what he said he did.

¶18 George concedes that WIS. ADMIN. CODE § DWD 40.05 permits the court to impute income for child support but argues that the court's findings were inadequate to support his determination of imputed income. The court's findings were thoroughly consistent with ***Lellman*** and adequate to support its determination.

¶19 George also argues that ***Lellman*** does not apply because the financial information he presented "at the time of trial was true, accurate and

complete." George takes inconsistent positions with respect to his disclosure of financial information. On one hand, he points to the documentation that he provided. He contends he presented a complete copy of his 2001 income tax returns showing a total income of $42,036 and, with depreciation added back in, $47,535. He also presented wage information, copies of W-2s, copies of 1099s, deposit slips for all business income, copies of business checking accounts for 2001, computerized records of business income and expenses for the year, and for January through May of 2002. He further contends he presented copies of checks requested, bank and credit union records, and complied with discovery requests.

¶20 In contrast, George argues that the trial court erroneously denied him the opportunity to present additional clarifying evidence on his motion for reconsideration. We conclude that George's argument that he needed an additional hearing to present "clarifying" information supports the court's finding that his presentation at the child support hearing was not true, accurate and complete.

2. Motion for reconsideration

¶21 Next, George argues that the trial court erroneously denied him the opportunity to present additional clarifying evidence on his motion for reconsideration. He contends that he brought the motion to show the trial court that much of the information Karen presented at the child support hearing was untrue. We are unpersuaded.

¶22 A trial court has the authority to amend its findings and conclusions or make additional findings or conclusions and may amend its judgment upon a

motion for reconsideration. WIS. STAT. § 805.17(3).[6] "A trial court has wide discretion to reconsider an earlier decision, and nothing prevents the court from accepting additional evidence in the interests of justice." ***Salveson v. Douglas County***, 2000 WI App 80, ¶43, 234 Wis. 2d 413, 610 N.W.2d 184, *aff'd*, 2001 WI 100, 245 Wis. 2d 497, 630 N.W.2d 182.

¶23 At the hearing on his motion for reconsideration, George introduced exhibits to show that the amount in a business account was $34,853, not the $77,598.62 that Karen claimed. Also, George attempted to show that his personal account contained $2,108, not $5,813 as Karen alleged. In addition, George introduced an exhibit to show that he had $137,018 in his business accounts, rather than the $197,088 presented at the hearing. George also sought to introduce personal bank statements, monthly ledgers and income tax returns.

[6] WISCONSIN STAT. § 805.17(3) reads:

> Reconsideration motions. Upon its own motion or the motion of a party made not later than 20 days after entry of judgment, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly. The motion may be made with a motion for a new trial. If the court amends the judgment, the time for initiating an appeal commences upon entry of the amended judgment. If the court denies a motion filed under this subsection, the time for initiating an appeal from the judgment commences when the court denies the motion on the record or when an order denying the motion is entered, whichever occurs first. If within 90 days after entry of judgment the court does not decide a motion filed under this subsection on the record or the judge, or the clerk at the judge's written direction, does not sign an order denying the motion, the motion is considered denied and the time for initiating an appeal from the judgment commences 90 days after entry of judgment.

¶24 The trial court considered WIS. STAT. § 805.17(3). The court reasoned that it was "not sure how it would be just to have another kick at the cat, when given all the information that they failed to provide or omitted in [the] original hearing, that was in his control" and now attempt to relitigate the matter. The court observed "this isn't a time for a whole new trial." The court stated that it would consider whether the court properly applied the law to the facts as found at that time. The court stated that it initially found that George was not credible and that George's showing on the motion to reconsider did not justify further testimony because the information in the exhibits was in his control at the time of the initial hearing.

¶25 The record reveals a rational basis for the court's decision. "A judge's job is to do justice." ***Salveson***, 234 Wis. 2d 413, ¶43 (citation omitted). The court considered that George was not credible at the modification hearing. The court determined that it would be unjust to permit one party, who was deemed not credible at the motion hearing, to have what would amount to a new trial and bring in evidence that was in his control and available at the time of the hearing. Contrary to George's assertion, the evidence offered at the reconsideration hearing was of the type one would be prepared to offer at a child support modification hearing. George "cannot be heard to complain that this approximation was excessive when the precise information available to make that determination was in his exclusive control." ***Lellman***, 204 Wis. 2d at 175. Here, the same reasoning holds true, that George cannot be heard to complain that the information at the motion hearing was incomplete or inaccurate when the information in question was in George's control.

3. Frivolous appeal

¶26 Karen argues that she is entitled to attorney fees and costs under WIS. STAT. RULE 809.25 because George's appeal is frivolous. We are unpersuaded that the award of frivolous fees and costs would be appropriate in this case. Karen responded to George's arguments in large part by comparing his 1998 deposition to his 2002 deposition testimony. Her brief fails to indicate whether these depositions were considered by the trial court in making its findings and whether they are part of the record made at the October 22, 2002, child support hearing. The clerk's exhibit sheet indicates that the depositions were not made exhibits at the hearing and it is not clear whether the court took them into consideration in making its ruling. Because of the paucity of appropriate record citation, Karen's brief does not fully comply with WIS. STAT. RULE 809.19(3). Therefore, we decline to award Karen costs under RULE 809.25(3). *See* WIS. STAT. RULE 809.83(2).

4. Jurisdiction

¶27 Karen argues further that the court of appeals does not have jurisdiction to hear George's appeal because George's motion for reconsideration did not raise a "new issue." We conclude that we have jurisdiction over this appeal. Whether a new issue was raised presents a question of law that this court reviews de novo. ***State v. Edwards***, 2003 WI 68, ¶7, 262 Wis. 2d 448, 665 N.W.2d 136. "An 'order is not appealable where ... the only issues raised by the motion were *disposed of* by the original judgment or order.'" ***Id.***, citing ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972) (emphasis added). Thus, the narrow issue is whether George's motion for reconsideration, which requested that the circuit court clarify its ruling and permit additional

evidence to be presented, raised a "new issue" that was "not disposed of by the original order." ***Id.*** (citation omitted). We have "liberally applied the 'new issues' test for determining whether an order denying reconsideration is appealable." ***Id.*** at ¶12 (citation omitted). "'[A] liberal application of the *Ver Hagen* new issues test is consistent with the policy favoring reconsideration. The supreme court encourages litigants to request the trial courts for reconsideration as a method of correcting errors.'" ***Id.*** (citations omitted). Applying the new issues test liberally, we conclude that George's motion for reconsideration seeking clarification and to present additional evidence to correct inaccuracies raises a new issue. Therefore, because the motion for reconsideration raised a new issue, George may appeal the denial of its motion for reconsideration to the court of appeals. *See* ***Edwards***, 262 Wis. 2d 448, ¶13.

¶28 We have jurisdiction to review both the post-divorce child support order and the order denying George's motion for reconsideration. The record contains a November 4, 2002, post-divorce order and November 11 motion for reconsideration under WIS. STAT. § 805.17(3). That statute modifies the appeal process if the reconsideration motion is made timely (within 20 days) and if the underlying order arises from a bench trial, as is the case here. The reconsideration motion was orally denied on January 10, which is the event that starts the appeal clock for both the reconsideration and the initial order ticking under WIS. STAT. § 805.17(3). Therefore, the March 28 notice of appeal is timely as to both orders. A written order denying reconsideration was entered on March 6, but there is no need for a written order in that instance, as § 805.17(3) is formulated.

By the Court.—Orders affirmed.

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