COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2384 **Cir. Ct. No. 2008FA1374**

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

IN RE THE MARRIAGE OF:

BECKY A. CALLEN,

PETITIONER-RESPONDENT,

V.

JEFFREY E. CALLEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Jeffrey E. Callen appeals from a judgment of divorce, arguing that the trial court erred in: (1) finding his gross income available

for child support to be $306,000 a year; and (2) awarding his now-ex-wife Becky A. Callen $5000 in attorney fees. We affirm.

BACKGROUND

¶2 Jeffrey and Becky were married on January 25, 2003. The couple have two minor children, Alexander and Gabrielle, who were born or adopted during the marriage. Prior to the marriage, the parties signed a premarital agreement, which set forth the division of property and maintenance upon divorce. Among other things, the premarital agreement established that Jeffrey had a net worth of over $15 million and required Jeffrey to pay Becky $25,000 to be used for relocation and attorney fees within fifteen days of the filing of a petition for divorce. The parties do not argue on appeal that the terms of the premarital agreement were not met. However, the agreement did not take into consideration custody, placement, or child support.

¶3 Becky filed a petition for divorce on October 23, 2008. At the time the petition was filed, Jeffrey was employed as the president of Moldmakers, Inc., a division of MGS Manufacturing Group. Jeffrey had an ownership interest in MGS Holdings, the voting trust that owns approximately eighty percent of MGS Manufacturing Group.[1] He also had interests in several real estate entities, including, but not limited to, Fulton Realty and Moose Lake Partners.

[1] Throughout the parties' briefs and in the record, MGS is referred to generically, without clarifying whether MGS refers to MGS Manufacturing Group or MGS Holdings. Consequently, we too refer generically to MGS without clarification. However, distinguishing between the two is unnecessary for purposes of this appeal.

¶4 During discovery, Becky requested that Jeffrey "[i]dentify any and all business enterprises in which [he has] had an interest … during the term of the marriage" and for each business identified to disclose "its full legal name, all locations where it has conducted business, whether it has filed federal or state tax returns over the last three (3) years, and who the present officers and directors are." Becky also asked Jeffrey to turn over "[f]ederal and state tax returns for all legal entities in which [he] had an interest." Jeffrey responded that "[he did] not know what interest [he had], but [he] believe[d] that [he had] interests in MGS Enterprises, MM Leasing, Moose Lake Partners, [and] Fulton Realty." However, he further stated that "[he did] not have the rights or authority to release any information or documents about any of the business enterprises."

¶5 Becky filed a motion to compel Jeffrey to turn over the corporate documents. During a hearing on the motion, the trial court accepted the representations of Jeffrey's counsel that Jeffrey did not have a majority interest in any of the business entities, and therefore, did not personally have the ability to release copies of partnership agreements or any of the various businesses' tax returns. However, the trial court awarded Becky attorney fees based on its conclusion that Jeffrey knew who could release the documents but (1) never contacted that individual himself and (2) waited five months to tell Becky the name of the individual.[2]

[2] The Honorable James R. Kieffer presided over the hearing on Becky's motion to compel and entered the subsequent written order.

¶6 Jeffrey filed a motion for reconsideration, arguing that the delay in discovery was not caused by him, but was instead the result of Becky's failure to sign a confidentiality agreement provided to her by corporate counsel for the various business entities. On the record during a hearing on the motion for reconsideration, the trial court granted the motion, concluding that, while Jeffrey did not tell Becky who she needed to contact to receive the corporate documents, Becky was in contact with corporate counsel for the business entities and only needed to sign the confidentiality agreement to receive the information she requested.[3] Becky received the corporate documents she requested before trial.

¶7 A trial to the court was held from September 8 to September 9, 2009.[4] During trial, Becky testified that she believed she was entitled to additional attorney fees from Jeffrey because of the additional litigation she was forced to engage in when Jeffrey would not turn over the corporate documents during discovery. In support of her testimony, the trial court admitted into evidence a copy of the current billing statement from her attorney. The billing statement was a running tally of the amounts Becky owed, but it did not describe the work the attorney did on Becky's behalf.

¶8 At the close of trial, before making any ruling, the trial court gave the parties an opportunity to file post-trial memoranda. Both parties did so. In her

[3] Judge Kieffer presided over the hearing on Jeffrey's motion for reconsideration and entered his findings and order on the record. The Honorable Lee S. Dreyfus signed the written order memorializing Judge Kieffer's findings and order made during the hearing.

[4] Judge Dreyfus presided over trial and the subsequent fact finding hearing and entered the judgment of divorce.

post-trial memorandum, Becky again requested attorney fees based upon Jeffrey's failure to disclose the corporate documents during discovery, requesting an additional $27,000. She argued that Jeffrey's testimony during the trial of his efforts to obtain the documents—that he asked someone in his office whether he could access them—did not amount to due diligence and that had he referred to the relevant state statutes he would have discovered that he could have obtained the documents. Becky's counsel attached to the post-trial memorandum a detailed itemization of her time and charges, with full descriptions of the basis for each charge.

¶9 On October 6, 2009, the trial court, after acknowledging the evidence admitted at trial and its review of the parties' post-trial memoranda, rendered an oral decision setting forth its findings of fact and conclusions of law. The trial court concluded, relevant to this appeal, that Jeffrey's anticipated 2009 gross annual income was $306,000 and imputed an annual income of $30,000 to Becky. Based upon those figures, the trial court set child support for Alexander at $3000 per month and for Gabrielle at $2081 per month, for a total monthly child support order of $5081. The trial court also ordered Jeffrey to pay $5000 in attorney fees to Becky for the "unnecessar[y]" steps Becky's counsel had to take to obtain the various corporate documents that were requested during discovery.

¶10 The trial court's findings of fact and conclusions of law, and the judgment of divorce were entered on August 5, 2010. Jeffrey appeals both the trial court's finding that his anticipated 2009 gross income amounts to $306,000 and the $5000 award to Becky for attorney fees.

DISCUSSION

I. Jeffrey's Anticipated 2009 Gross Income Available for Child Support

¶11 Jeffrey first argues that the trial court erred when it found his anticipated 2009 gross income to be $306,000 for purposes of child support. Rather, Jeffrey submits that his expert, David Franklin, a forensic accountant, presented evidence demonstrating that Jeffrey's income for purposes of child support was $163,675—the difference resulting from "pass through" income that was reasonably necessary for the operation of Jeffrey's businesses—and Jeffrey argues that Becky submitted no evidence to contradict Franklin's testimony. We disagree.

¶12 Setting child support is committed to the sound discretion of the trial court. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We affirm the trial court's discretionary "decision if it examined the relevant facts, applied the correct standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.***

¶13 WISCONSIN STAT. § 765.001(2) (2009-10)[5] bestows upon each spouse a responsibility to equally support his or her minor children. Although the obligation is equal, each spouse's individual obligation is measured on a case-by-case basis "in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

minor children." ***Id.*** The Wisconsin Department of Children and Families has been charged with "promulgat[ing] rules that provide a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents." WIS. STAT. § 49.22(9). Jeffrey challenges the trial court's calculation of his anticipated gross income.

¶14 WISCONSIN ADMIN. CODE § DCF 150.02(21) (Nov. 2009) defines "'[m]onthly income available for child support'" to "mean[] the monthly income at which the child support obligation is determined, which is calculated by adding [1] the parent's annual gross income or, if applicable, *the parent's annual income modified for business expenses*; [2] the parent's annual income imputed based on earning capacity; and [3] the parent's annual income imputed from assets, and dividing that total by 12." (Emphasis added.) As relevant to the trial court's analysis, "'[g]ross income'" is defined to mean:

> 1. Salary and wages.
>
> 2. Interest and investment income.
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> ....
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> 9. Undistributed income of a corporation, including a closely-held corporation, or any partnership, including a limited or limited liability partnership, in which the parent has an ownership interest sufficient to individually exercise control or to access the earnings of the business, unless the income included is an asset under s. DCF 150.03(4). In this paragraph:
>
> a. "Undistributed income" means federal taxable income of a closely held corporation, partnership, or other entity plus depreciation claimed on the entity's federal income tax return less a reasonable allowance for economic depreciation.

See § DCF 150.02(13). "'Income modified for business expenses'" is defined as:

> the amount of income after adding wages paid to dependent household members, adding undistributed income that the court determines is not reasonably necessary for the growth of the business, and *subtracting business expenses that the court determines are reasonably necessary for the production of that income or operation of the business* and that may differ from the determination of allowable business expenses for tax purposes.

See § DCF 150.02(16) (emphasis added).

¶15 Jeffrey's expert, Franklin, estimated at trial that Jeffrey's gross income for tax purposes in 2009 would be $306,807. Franklin based his projections on Jeffrey's tax returns for the previous three years (in which Jeffrey claimed $430,118 in gross income for 2008), on various corporate documents, and a chart from MGS's accounting department on its payouts to Jeffrey. However, Franklin testified that while $306,807 was Jeffrey's anticipated 2009 gross income reportable for tax purposes, Jeffrey would not actually receive or control that amount of money, in that much of it was given directly back to MGS as "pass through" income.

¶16 For instance, Franklin testified that "Partnerships" income, totaling $70,400, was undistributed income that was attributable to Jeffrey as a partner, but which was used to pay partnership debt. Income designated as "Interest – MGS," totaling $76,195, was in fact a personal loan Jeffrey took out on behalf of MGS when MGS's borrowing power was diminished because of the failing economy. Jeffrey then reloaned the money to MGS and paid the interest back to the bank.

¶17 Jeffrey argues that both his "Partnerships" income and "Interest – MGS" income should be deducted from his total reportable gross income because it in fact belonged to MGS and he never controlled it. After deducting both

amounts (and adding in $3463 in elective deferrals from a 401(k)), Franklin testified that Jeffrey's actual anticipated gross income for 2009 was $163,675. Jeffrey submits on appeal that the trial court erroneously exercised its discretion in failing to recognize the "Partnerships" income and "Interest – MGS" income as business expenses and to adjust his gross income appropriately. *See* WIS. ADMIN. CODE § DCF 150.02(13), (16), (21).

¶18 In support of its finding that Jeffrey's anticipated 2009 gross income was $306,000, the trial court took note of Franklin's testimony about "pass through" income, but ultimately found that Franklin testified that $306,000 was the projected amount Jeffrey would report for tax purposes. The trial court also noted that while the struggling economy had significantly changed MGS's income structure, setting Jeffrey's income at $306,000 took "into account what appears to be a substantial[,] at least establishing for 2009 and moving forward, … income, especially in light of the prior years where [Jeffrey's income] was $408,000 in calendar year 2008 and substantially higher than that in preceding years."

¶19 The trial court also noted that it doubted the veracity of Jeffrey's testimony that his income had plummeted in 2009 due to the struggling economy, noting that it did not appear that Jeffrey had altered his lifestyle, as would be expected in response to his lower 2009 income. Jeffrey testified at trial that since he and Becky separated, he continued to live in the couple's million dollar home in Hartland; that he drove a corporate car; that the company paid for the car's expenses, including gas, insurance, and maintenance; that he golfs approximately three times a week at The Bog; and that he makes regular trips to Florida for golf and work.

¶20 The trial court did not erroneously exercise its discretion. The trial court was not required to accept Franklin's testimony as true simply because he was designated as an expert. *See* ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996). The trial court rationally found Jeffrey's income to be $306,000 based on the gross amount he claimed on his income taxes. The trial court considered the variability of Jeffrey's income annually, noting that in the previous few years it had exceeded $400,000, and that the alleged downturn in 2009 did not greatly affect Jeffrey's lifestyle. The court's conclusion was rational and based upon testimony in the record.

II. Attorney Fees

¶21 Next, Jeffrey argues that the trial court erred in awarding Becky $5000 in attorney fees for his failure to disclose the corporate documents requested during discovery because the trial court did not adequately set forth its reasoning for ordering the award on the record. We conclude that the trial court adequately set forth its reasons for awarding Becky $5000 in attorney fees, and to the extent that the trial court's reasoning is not adequately set forth, its decision is otherwise amply supported by the record.

¶22 WISCONSIN STAT. § 767.241(1)(a) permits a trial court, after considering the parties' financial resources, to require one party to pay a contribution to the other party for the cost of maintaining or responding to a family court action. Additionally, the "court in a divorce action may award attorney fees to one party … because the other party has caused additional fees by overtrial, … or because the other party refuses to provide information which would speed the process along." ***Randall***, 235 Wis. 2d 1, ¶22 (internal citations omitted). Whether to award attorney fees is committed to the sound discretion of the trial court. ***Id.***

As we stated above, we affirm the trial court's discretionary "decision if it examined the relevant facts, applied the correct standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.***, ¶7. However, in cases where the trial court inadequately sets forth its reasoning, or fails to fully explain its ruling, we "independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶23 The trial court held, with respect to the $5000 attorney fee award, that Jeffrey's failure to provide the corporate documents caused Becky "more work than was -- would have otherwise been necessary." Based on Jeffrey's status as a partner in the various business entities, the court noted that Jeffrey "was entitled to copy it statutorily and he didn't do that. Certainly he could have. That would have eliminated certainly a great deal of expense." *See* WIS. STAT. § 178.16 (mandating that "every partner shall at all times have access to and may inspect and copy" partnership books); WIS. STAT. § 180.1602(1), (2)(a)2. (permitting shareholders to inspect and copy "[a]ccounting records of the corporation"); WIS. STAT. § 183.0405(1)(c), (2) (mandating that limited liability companies maintain copies of the companies' federal and state income taxes for the four most recent years and permitting members to copy such records). The trial court concluded that had Jeffrey obtained these records as he was permitted to under the relevant state statutes, Becky would not have had to circumvent Jeffrey and deal with corporate counsel for the various business entities or file a motion to compel, costing her additional money in attorney fees.

¶24 Jeffrey admits on appeal that the Wisconsin Statutes allow for minority partners and minority shareholders to obtain and copy partnership and corporate documents, but contends he still did not have the authority to release

those documents unless Becky signed a confidentiality agreement, as required by the corporate counsel. He argues that it is "incongruous" for Becky to argue that he did not cooperate with her discovery requests when he did not have the authority to release the documents.

¶25 Jeffrey testified at trial that when he received Becky's discovery requests he "went directly to someone in the company and gave them the interrogatories and said, I need this information," but that when he was told that he did not "have the rights or authority for this" he did nothing more to obtain or inquire about the documents.

¶26 The trial court did not err in concluding that Jeffrey could have done more to obtain the documents Becky requested and that Jeffrey's failure to exercise due diligence required Becky to take "unnecessar[y]" steps to retrieve the documents. The trial court found that Jeffrey "could have done more" and thereby explicitly rejected as incredible Jeffrey's testimony that he lacked the authority to provide the information. *See* ***State v. McCallum***, 208 Wis. 2d 463, 480, 561 N.W.2d 707 (1997) (We defer to the trial court's findings of credibility.). Jeffrey admitted at trial that he did nothing to obtain the documents other than make one inquiry within the company. His claim that he lacked the authority within his business to turn the corporate records over to Becky without the confidentiality agreement was rejected by the court. The evidence of his role in the various businesses supports the trial court's finding. And, even if Becky was required to sign a confidentiality agreement before receiving the documents directly from Jeffrey, he could have made her aware of that early in the divorce and she would have been saved the expense of circumventing Jeffrey and dealing with the business entities' corporate counsel. The trial court properly exercised its

discretion in concluding that Jeffrey could have done more, given that Jeffrey testified he merely asked one person to handle the request.

¶27 Based upon its conclusion that Jeffrey could have done more to obtain the corporate documents, the trial court ordered that Jeffrey make "an additional contribution of $5,000" to Becky "for the purposes of legal fees." The trial court reasoned from the clause in the premarital agreement, in which Jeffrey agreed to give Becky $25,000 for attorney fees, that $5000 was an appropriate contribution for Jeffrey's failure to do what was necessary to obtain the corporate documents in response to Becky's proper demand. This was a proper exercise of the trial court's discretion.

¶28 When setting the contribution at $5000, the trial court had before it the parties' financial resources, the premarital agreement, and the billing records submitted by Becky's counsel, including the detailed itemization submitted in the post-trial memorandum. The trial court was aware of the court time Jeffrey's failure to cooperate during discovery entailed, including time spent on both the motion to compel and the subsequent motion for reconsideration. The trial court stated that it was "satisfied [that $5000] would satisfy what was without exception additional work that was necessary … in order to get access to the various corporate records." Although the trial court did not articulate which time and charges composed its order for the $5000 contribution, it stated a rationale for the award and tied that rationale to what the parties originally agreed was a reasonable contribution for attorney fees, namely, $25,000 for the entire divorce. Additionally, we note that the trial court's award was significantly less than the $27,000 requested by Becky. The record, including Becky's counsel's detailed billing statement, supports the trial court's calculation of that amount.

¶29 The trial court demonstrated a rational process and reached a reasonable decision. Consequently, we affirm the trial court's order for $5000 in attorney fees.

By the Court.—Judgment affirmed.

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