COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2621 **Cir. Ct. No. 2012FA990**

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

IN RE THE MARRIAGE OF:

DARLENE TIRELLA,

PETITIONER-RESPONDENT,

V.

CARMEN TIRELLA, SR.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Carmen Tirella, Sr., and Darlene Tirella were divorced in July 2015 after a twenty-four-and-one-half-year marriage. Carmen

appeals an order denying his motion for reconsideration of the trial court's rulings on income it imputed to him, the duration and terms of maintenance, and his ordered contribution to Darlene's attorney fees. He also appeals an order finding him in contempt for willful nonpayment of child support, maintenance, and a contribution to Darlene's attorney's fees. We affirm the orders.

¶2 Carmen has worked in the specialty tape business since 1997. In 2006, the Tirellas moved from New Jersey to Wisconsin for Carmen to join two former clients as a partner in their new company, Specialty Tape. When Specialty Tape's profits declined, Carmen was edged out.[1] In 2009, he established his own company, Champion Tape, of which he has 100% ownership.

¶3 In 2010, Carmen purchased a daycare facility he named Little Champions Learning Center (the Learning Center). In August 2013, the prior owner won a $183,000 judgment against the Learning Center and Carmen personally. The Learning Center ceased operations on September 30, 2013. That same day, Carmen "transferred" the daycare, now "Little Champs Academy" (Little Champs) to his girlfriend, Karen Nelson. Little Champs operates under the license issued to Carmen for the Learning Center. In October, Carmen filed for Chapter 13 bankruptcy. Darlene did not join in.

¶4 Carmen's first financial disclosure statement (FDS) listed a gross monthly income from Champion Tape of $13,942, which included $4,792 from the Specialty Tape settlement. Carmen testified that the remaining $9,150 was an

[1] In 2011, Carmen reached a $330,000 settlement with Specialty Tape. Specialty Tape agreed to make $14,375 quarterly payments to him. The debt was satisfied in May 2014.

estimate based on an anticipated large contract that did not pan out. His updated FDS, filed in 2013, projected a 2014 income from Champion Tape of $38,077.

¶5 During much of the marriage, Darlene stayed at home with the parties' four children. Two were minors at the time of the divorce. After the parties separated, Darlene completed her college education. She now works full-time as an accounting clerk earning a gross annual income of $58,250.

¶6 The parties do not dispute that they lived well above their means in the pre-divorce years. The trial court refused to order maintenance or child support based on a lifestyle "enjoyed as a result of creating debt," focusing instead on the parties' "real income." It found Darlene's $58,250 gross annual income to be accurate, but found that Carmen "purposely failed to accurately disclose his income" and relinquished no management or control of the daycare with the alleged transfer to Nelson. It thus imputed to him a gross annual income of $156,000—$8,000 a month from Champion Tape and $5,000 a month from Little Champs. It ordered Carmen to pay monthly child support of $996.62 and indefinite monthly maintenance of $2,000. The court denied Carmen's motion to reconsider the final divorce orders and granted Darlene's motions to show cause for contempt for Carmen's arrearages. Carmen appeals.

¶7 Carmen argues that the trial court's determination of his imputed income from Champion Tape and Little Champs is an erroneous exercise of discretion because it is not supported by the trial evidence, the court gave no basis for its findings, and his only income from Little Champs is the fifteen dollars an hour he makes as a bookkeeper working about twenty-one hours a week.

¶8 We first address the standard of review. A trial court's income determination is a finding of fact that we will not set aside unless clearly

erroneous. ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989). "If more than one reasonable inference may be drawn from the evidence, we must accept the one chosen by the trial court." ***Id.*** at 583.

¶9 The trial court found that Carmen's "maneuvers with his income" made it "difficult to exactly determine" his income, noting that he "reported significantly different incomes to this court, to the bankruptcy court, and for other purposes during the period of the divorce" and gave "equally contradictory" trial testimony. It concluded, however, that, despite the lack of clarity, the evidence nonetheless was sufficient to make a reasonable estimate.

¶10 For example, Darlene produced a 2012 budget spreadsheet Carmen developed showing his Champion Tape "income" and "pay" to be $8,673 a month. Carmen acknowledged that the "pay" represented personal expenses paid from Champion Tape's account. And while Darlene's accounting expert, John Peters, identified Champion Tape income to Carmen of $4,000 a month plus an additional $1,000 in perks, he also testified that he found items that "strongly suggest" a higher income. He noted inconsistencies between the Champion Tape general ledger and corresponding bank statements. Peters also described numerous "slush" entries and "routine transfers of 3,000, 5,000, 8,000 [dollars]" from the Champion Tape account into personal accounts as well as "substantial transfers of funds" ranging from $20,000 to $35,000, sums not fully accounted for as income on tax returns. He opined that the size of the inter-account transfers and slush entries were "certainly suggestive" of both bookkeeping problems and an income greater than that shown on the books. He also noted that Champion Tape does not

remit credit card money to Little Champs after processing its credit card transactions.[2]

¶11 Carmen's accounting expert, John Chiappetta, reviewed Carmen's returns from 2013, but for no other years; did not cross-reference those taxes with Carmen's other financial information or cross-reference the 2013 profit-and-loss statement with the general ledger; and did not consider Carmen's earnings as shown on his Social Security statement. Chiappetta agreed that "round-number" fund transfers between Little Champs and Champion Tape were "unusual," but attributed it to "sloppy accounting." Chiappetta also agreed that Champion Tape should be counting as income the credit card monies it kept from the transactions processed for Little Champs.

¶12 The trial court commented that it was "struck by [Carmen's] inconsistencies and maneuvers to avoid accurate information to establish his income" and found Peters' testimony more compelling than Chiappetta's. That court is better positioned than are we to gauge their credibility and the weight to give their testimony. ***HMO-W, Inc. v. SSM Health Care Sys.***, 2000 WI 46, ¶59, 234 Wis. 2d 707, 611 N.W.2d 250.

¶13 Carmen's disagreement about the income imputed to him leads him to argue that the trial court erred in fashioning the maintenance award. An award of maintenance rests within the trial court's sound discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the trial court "examined the relevant facts, applied a

[2] Carmen testified that Champion Tape processes Little Champs' credit card transactions for client payments because Little Champs does not have an on-site processing machine.

proper standard of law, and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach." ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2) (2013-14).[3]

¶14 Carmen contends the trial court considered only four of the WIS. STAT. § 767.56(1c) statutory factors in making the maintenance award: the parties' current ages, the division of property, the children's ages and placement, and the health of the parties. We disagree with his reading of the decision.

¶15 The court also addressed Darlene's earning capacity; Carmen's argument that the lawsuit against him and the Learning Center should be considered in light of property division; whether maintenance should play a part in helping Darlene achieve a standard of living—one the court called "far beyond their income"—comparable to that enjoyed during the marriage; and tax consequences. The court explained its reasons for rejecting the property division and comparable-standard-of-living arguments. We are satisfied the court adequately considered relevant factors.

¶16 Carmen also complains that the trial court erroneously imputed Little Champs income to him despite transferring the daycare to Nelson. He argues that the Learning Center money judgment made transferring the business a necessity because, as the judgment creditor had begun to garnish accounts attached to the Learning Center, he merely was trying to avoid employee wage claims, vendor invoice claims, additional litigation for money owed, and the "draining of marital

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

accounts." He also contends the court should have applied the four-factor test discussed in ***Markham v. Markham***, 65 Wis. 2d 735, 748, 223 N.W.2d 616 (1974), to determine whether the transfer was fraudulent.

¶17 A ***Markham*** analysis was unwarranted. The issue there was whether the husband fraudulently transferred property without consideration for purposes of reducing the marital estate. *See* ***id.*** at 745-46. The dispute here is Carmen's income. The court expressly found that the issue of "transferring" the daycare was for the income it generated for Carmen, not as an asset for purposes of property division. It also concluded that no real transfer occurred. Carmen's own LinkedIn page, dated just one month before trial and fifteen months *after* the claimed transfer to Nelson, supports that conclusion: Carmen held himself out as the owner of Little Champions Learning Center.

¶18 Carmen testified that Nelson solely owns Little Champs, but it remains in his name, no money exchanged hands, only he held the necessary state license, he holds a debit card through Little Champs, and his sole income from Little Champs is from his part-time bookkeeping. He also testified that Champion Tape receives rent from Little Champs.

¶19 By contrast, Darlene's expert noted commingled finances between Champion Tape and Little Champs. Peters testified that Carmen supplied incomplete financial data for Champion Tape and that he, Peters, was "missing substantially more information on the day care business." Because of the "piecemeal bank data" provided, the "full economic substance of the inter-relationship between the 2 companies [could not] be completely discerned." Peters' professional opinion, however, was that the daycare transfer to Nelson "appears to be a 'sham'" and that Carmen enjoyed monthly income from Little

Champs of between $5,000 and $9,000. The court's findings that there was no change of management or control by Carmen and that he continues to benefit from the daycare income are not clearly erroneous.

¶20 Carmen moved for reconsideration on grounds that the court erroneously determined his income, shown by the conflicts in the expert testimony regarding his Champion Tape income and the "undisputed" testimony that he no longer owns the daycare. Carmen also argued that the court should have ordered a finite term of maintenance and the $5,000 contribution to Darlene's attorney's fees should have been offset by the earlier-ordered $4,000 contribution to her expert's fee. At bottom, he asserted that fairness demanded reconsideration.

¶21 Carmen's arguments do not present newly discovered evidence or establish a manifest error of law or fact as to his income and, thus, the maintenance order. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. "A 'manifest error' is not demonstrated by the disappointment of the losing party." ***Id.*** (citation omitted). The court properly exercised its discretion in denying Carmen's motion for reconsideration. *See* ***id.***, ¶6.[4]

¶22 The final issue arises from Darlene's motions to show cause for contempt for Carmen's failure to pay his support obligations and contribute as ordered to her attorney's fees. Carmen contends the trial court erred in finding him in contempt without holding an evidentiary hearing and specifically finding there that he is able to pay and that his failure to pay the amounts ordered is

[4] The court held the motion to reconsider under advisement until denying it at the October 23 continued hearing on Darlene's contempt motion.

intentional. *See* ***Evans v. Luebke***, 2003 WI App 207, ¶25, 267 Wis. 2d 596, 671 N.W.2d 304.

¶23 We review the court's use of its contempt power for an erroneous exercise of discretion. ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). "We look for reasons to sustain a discretionary ruling." ***Board of Regents-UW Sys. v. Decker***, 2014 WI 68, ¶19, 355 Wis. 2d 800, 850 N.W.2d 112; *see also* ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995) (we may independently search record for reasons to support court's exercise of discretion).

¶24 In remedial contempt actions, due process requires that the trial court hold an on-the-record evidentiary hearing. *See* ***Mercury Records Prods., Inc. v. Economic Consultants, Inc.***, 91 Wis. 2d 482, 504, 283 N.W.2d 613 (Ct. App. 1979). As pertinent here, "[t]he evidence adduced at the hearing must support resultant findings of fact that the contemnor engaged in 'intentional … [d]isobedience … of the … order of a court.' WIS. STAT. § 785.01(1)(b)." ***Evans***, 267 Wis. 2d 596, ¶24 (alteration in original).

¶25 On October 21, 2015, the court heard Darlene's motions for contempt. Carmen agreed that he was in arrears on all of his obligations but that it was unintentional and due to his inability to comply. He also asserted that, short of liquidating more assets, he had no plan or timeline for making at least his support and maintenance payments. Darlene argued that Carmen continues to pay his bankruptcy plan, the insurance on his "numerous vehicles," and his substantial

mortgage,[5] although Carmen asserted he was behind on that. She contended that if Carmen truly was trying, he could be making some kind of weekly support payment. The court found Carmen in contempt but adjourned the matter to October 23 to take the contempt purge under advisement.

¶26 At the continued hearing, the court first denied Carmen's motion to reconsider. It then advised the parties that it had set up a schedule for Carmen to make payments because, as the case had been going on since 2012, the matters "have to be addressed and taken care of." The court acknowledged that the minimum payments it ordered would not satisfy the arrearages in the near term, but the aim was compliance, not incarceration.

¶27 The procedures contained within WIS. STAT. § 785.03(1)(a) for imposing remedial sanctions "require, at a minimum, notice that sanctions for contempt are being sought, and in the absence of stipulated facts, an evidentiary hearing sufficient to permit the court to make specific findings regarding whether the alleged contemnor intentionally disobeyed its orders." ***Evans***, 267 Wis. 2d 596, ¶25. The record satisfies us that the due process requirement was met. The contempt motions—the first filed in March 2015—by themselves put Carmen on notice that contempt sanctions were being sought. Taken together with the two-day trial and the post-trial decision in which the court specifically found that Carmen maneuvered his income and had the ability to pay the ordered maintenance, we are satisfied Carmen had adequate opportunity to prove an inability to pay. While the reasons for the court's determinations on ability to pay

[5] Carmen testified at trial that $3,228 of his approximately $8,000 in monthly expenses is the mortgage on the 7,400-square-foot house the parties bought when they moved here and that he hopes to remain in.

and willful disregard may not have been exhaustive at the contempt hearings, they did not need to be. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). We can glean them from the court's comments throughout the record.

By the Court.—Orders affirmed.

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