COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-2548

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

IN RE THE MARRIAGE OF:

MARILYN OLINGER,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

JOHN DAVID OLINGER,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Marilyn Olinger appeals from the trial court's order determining the amount of a child support arrearage owed to her by her former husband, John Olinger. She asserts: (1) that the trial court erred in deviating from the terms of a 1994 child support order in determining the amount of the arrearage; (2) that the trial court erred in determining the amount of John Olinger's gross income for 1995, 1996 and 1997; (3) that the trial court erred in denying her motion to hold John Olinger in contempt; and (4) that the trial court erred in determining the portion of her attorney's fees that John Olinger was to pay.[1] John Olinger cross-appeals. He argues: (1) that the trial court erred in interpreting the 1994 child support order; (2) that the trial court erred in determining the amount of the child support arrearage; and (3) that the trial court erred in ordering him to pay a portion of Marilyn Olinger's attorney's fees. We affirm in part, reverse in part, and remand.

I. BACKGROUND

¶2 Marilyn Olinger and John Olinger married in 1969, had two children together, and then divorced in 1982. In 1994, John Olinger and Marilyn Olinger entered into the following stipulation regarding child support for their daughter, Courtney Olinger, who lived with Marilyn Olinger:

> Commencing on the pay period immediately following January 7, 1994, the respondent [John Olinger] shall pay to the petitioner [Marilyn Olinger] toward the support of the minor child, Courtney, date of birth: November 17, 1980, 14 percent of the respondent's gross income, said

[1] Marilyn Olinger raises various other issues that we decline to address. *See* ***Libertarian Party v. State***, 199 Wis.2d 790, 801, 546 N.W.2d 424, 430 (1996) (appellate court need not address issues that "lack sufficient merit to warrant individual attention"); ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

> percentage to be deducted from his income pursuant to an assignment of income as hereinafter provided….
>
> All child support payments shall be by income assignment. The respondent's employer shall be ordered to withhold 14 percent of the respondent's gross income from money due on a bi-weekly basis and send the payment to the Clerk of the Circuit Court of Marathon County.

The trial court approved the stipulation and incorporated it into an order for child support.

¶3 In November of 1995, John Olinger received from his employer, the HammerBlow Corporation, 8,447 shares of stock in the corporation. On his 1995 tax return, John Olinger reported the stock as gross income with a value of $473,563. The corporation loaned John Olinger the money to pay his income tax obligation on the receipt of the stock. In 1996, the corporation forgave John Olinger's loan obligation in lieu of paying him a bonus. The corporation also gave John Olinger the money to pay the income tax obligation he incurred when the corporation forgave his loan obligation. On his 1996 tax return, John Olinger reported gross income of $453,935 as a result of these two transactions. John Olinger did not pay child support on the income he received from the foregoing events.

¶4 On February 7, 1997, Marilyn Olinger filed a motion to hold John Olinger in contempt for failing to pay child support of 14 percent of his gross income, and to compel John Olinger to pay any outstanding child support obligation. On the same day, John Olinger filed a motion to modify his child support obligation. In the motion, John Olinger requested "that the court cap the support at a certain level based on the needs of the child." John Olinger also requested that "if a cap is not placed on my child support payments that payments in excess of 14 percent of $100,000 be placed in a trust for the benefit of the minor

child." John Olinger did not seek a change of the percentage established by the child support order that was in effect. On August 27, 1997, before the motions were litigated, John Olinger sold half of his stock in the corporation for $321,000.

¶5 After hearings on the motions, the trial court determined that John Olinger had an outstanding child support obligation as a result of the stock acquisition and the stock sale, but that, due to considerations of fairness, the outstanding obligation should not be calculated as prescribed in the 1994 order for child support. The trial court, therefore, deviated from the order and calculated a total outstanding child support obligation of approximately $33,000. Despite the arrearage, the trial court did not find John Olinger in contempt of court. The trial court denied John Olinger's motion to impose a cap on his child support payments, or in the alternative, to establish a trust for child support payments. The trial court also ordered John Olinger to pay a portion of Marilyn Olinger's attorney's fees.

II. DISCUSSION

A. Construction of the order for child support.

¶6 Marilyn Olinger argues that the trial court erred in failing to apply the plain language of the child support order, which, she claims, requires John Olinger to pay child support of 14 percent of his gross income, regardless of its source. Thus, she argues, John Olinger was required to pay child support of 14 percent of the value of the stock, the tax payments, and the profit from the sale of the stock. Conversely, he argues that the 1994 order applies only to his regular bi-weekly income.

¶7 A stipulation that has been incorporated into a judgment or order is to be construed like other written instruments. *See* ***Vaccaro v. Vaccaro***, 67

Wis.2d 477, 482, 227 N.W.2d 62, 65 (1975). The construction of the stipulation is a question of law. *See* ***Duhame v. Duhame***, 154 Wis.2d 258, 262, 453 N.W.2d 149, 150 (Ct. App. 1989). If the stipulation is unambiguous, we must apply its plain meaning, *see* ***Levy v. Levy***, 130 Wis.2d 523, 531, 388 N.W.2d 170, 173 (1986), and we may not look to extrinsic evidence to determine the intent of the parties, *see* ***Rosplock v. Rosplock***, 217 Wis.2d 22, 31, 577 N.W.2d 32, 37 (Ct. App. 1998).

¶8 As noted, the stipulation that the trial court incorporated into the order for child support provides that John Olinger shall pay "14 percent of [his] gross income, said percentage to be deducted from his income pursuant to an assignment of income as hereinafter provided." The stipulation further provides that "[a]ll child support payments shall be by income assignment," and that John Olinger's employer "shall be ordered to withhold 14 percent of the respondent's gross income from money due on a bi-weekly basis."

¶9 The stipulation unambiguously requires John Olinger to pay child support of "14 percent of [his] gross income." The stipulation does not limit John Olinger's child support obligation to income derived from his bi-weekly wages. The language indicating that John Olinger's employer shall withhold 14 percent of his "gross income from money due on a bi-weekly basis," merely provides the mechanism by which the child support is to be paid. If we were to construe the stipulation as requiring John Olinger to pay child support of 14 percent of his bi-weekly wages, the references in the stipulation to gross income would be rendered superfluous. We therefore reject John Olinger's construction of the order for child support, and conclude that the unambiguous language of the order requires him to pay child support of 14 percent of his gross income, regardless of the source of the income. *See* ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 263, 371

N.W.2d 392, 394 (Ct. App. 1985) (written instruments should be construed so as to avoid rendering language superfluous); ***Stanhope v. Brown County***, 90 Wis.2d 823, 848–849, 280 N.W.2d 711, 722 (1979) ("Other things being equal, a construction which gives reasonable meaning to every provision of a contract is preferable to one leaving part of the language useless or meaningless.").

B. Child support determination.

1. Stock acquisition and tax payments.

¶10 As noted, the trial court determined that although John Olinger had an outstanding child support obligation as a result of the 1995 stock acquisition, due to considerations of fairness, the outstanding child support obligation should not be calculated as prescribed in the 1994 order for child support. The trial court also determined that John Olinger did not owe child support on the payments he received for his tax obligations. Marilyn Olinger argues that the trial court erred in deviating from the terms of the order in determining John Olinger's outstanding child support obligation. She asserts that the stock acquisition and tax payments constituted gross income, as defined in WIS. ADM. CODE § HSS 80.02 and 26 C.F.R. § 1.61-1, and that they were, therefore, subject to the order for child support, at the values John Olinger reported on his tax returns.[2] John Olinger responds that the trial court was justified in deviating from the order for child support, and that the trial court appropriately rejected the value of the stock that he

[2] Pursuant to the Wisconsin Administrative Code, "gross income" includes all income that is considered federal gross income under 26 C.F.R. § 1.61-1. *See* WIS. ADM. CODE § HSS 80.02(13)(a) (renumbered as WIS. ADM. CODE § DWD 40.02(13)(a), effective August 1, 1999). Under 26 C.F.R. § 1.61-1, "[g]ross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services."

reported on his tax return and accurately determined the fair market value of the stock.

¶11 At the motion hearings, John Olinger presented testimony that the fair market value of the stock he had received was less than the value he had reported on his 1995 tax return. John Olinger and his expert witnesses testified that the stock value that was established for income tax purposes did not reflect a large corporate debt that would later be incurred pursuant to the agreement by which John Olinger obtained the stock. This large corporate debt would result in a negative book value for the stock. The expert witnesses further testified that the stock had fair market value that was less than the value reported on the 1995 income tax return because the stock represented a minority interest in the corporation, and because the stock was subject to a restrictive buy-sell agreement. The chief financial officer of the HammerBlow Corporation testified that John Olinger did not have the option to receive cash instead of the stock, that he could not redeem the stock, and that the buy-sell agreement greatly restricted his ability to sell the stock.

¶12 Additionally, John Olinger testified that his standard of living did not increase as a result of either the stock acquisition or the money that he received from the corporation to cover the tax obligations that arose from the stock acquisition. He testified that he had the same amount of disposable income that he would have had if he had never acquired the stock.

¶13 The trial court concluded that the fair market value of the stock that John Olinger received was not accurately reflected by the 1995 tax return. The trial court subtracted John Olinger's proportional share of the corporate debt from the value reported in the 1995 tax return, and thereby calculated a fair market

value of $173,563 for the stock. The trial court then calculated a "presumed 14 percent child support obligation of $24,299." The trial court concluded, however, that this presumed amount was unfair to John Olinger because he did not receive any disposable income from the stock transaction, and because the buy-sell agreement greatly restricted his ability to sell the stock. Therefore, the trial court calculated the child support obligation based upon the yearly amount of income that John Olinger would receive if one of the other shareholders purchased his shares of stock under the buy-sell agreement. This resulted in a child support obligation of $1,264.

¶14 With respect to the 1996 payments for John Olinger's income tax obligations, the trial court concluded that if John Olinger were required to pay child support on these transactions, the child support related to these transactions would amount to 40.1% of John Olinger's "actual earned income in 1996." The trial court reasoned that "to order child support payments on the unreceived tax contributions would clearly be unfair to John." The trial court therefore decided that "no child support should be paid on this amount" because it "did not increase John's wealth, his standard of living or his ability to pay child support in any way."

¶15 The trial court's decision to deviate from the percentage standard established in the order for child support was based upon the rationale set forth in ***State v. Wall***, 215 Wis.2d 595, 573 N.W.2d 862 (Ct. App. 1997). In ***Wall***, a divorced father was ordered to pay to his former wife child support of 25 percent of his gross income. Thereafter, the father's employer rewarded him for his job performance with trips to Mexico. The cash value of the trips was included in the father's wages and taxed as part of his gross income, but he did not pay child support on the cash value of the trips.

¶16 The State brought an action against the father, seeking to collect as an arrearage 25 percent of the cash value of the trips. The trial court found that although the trips fell within the Wisconsin Administrative Code's definition of gross income, it would be unfair to include the trips in the father's gross income "because they could not be converted to cash, traded or sold." ***Id.***, 215 Wis.2d at 598–599, 573 N.W.2d at 863. The trial court, therefore, excluded the value of the trips from the father's gross income. This court affirmed the trial court, concluding that the trial court had the authority, pursuant to § 767.25(1m)(i), STATS., to deviate from the established percentage standard "if by the greater weight of the credible evidence it would be unfair to include the noncash income in the payor's gross income as defined in WIS. ADM. CODE § HSS 80.02(13)(a)." ***Id.***, 215 Wis.2d at 600, 573 N.W.2d at 864.[3]

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[3] Section 767.25(1m), STATS., provides, in relevant part:

> Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:
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> ….
>
> (i) Any other factors which the court in each case determines are relevant.

Section 767.25(1j), STATS., provides: "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)."

As noted, in ***State v. Wall***, 215 Wis.2d 595, 573 N.W.2d 862 (Ct. App. 1997), this court relied on the foregoing statute in determining that the trial court could "deviate from the percentage standards" and thereby exclude an item from a payor's gross income. *See* ***id.***, 215 Wis.2d at 600–601, 573 N.W.2d at 864. This statute sets out the circumstances under which a trial court may deviate from the percentage standards when setting a child support obligation. Deviation from the percentage standards is not at issue when calculating the amount due under an existing child support order. Moreover, the exclusion of an item from gross income does not constitute a deviation from the percentage standards. Nonetheless, we apply the rule established in ***Wall*** because "published opinions of the court of appeals are precedential," and "the court of

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¶17 This court agreed that it would be unfair to include the cash value of the trips in the father's gross income "because they did not generate any cash or assets that would enhance [the father's] net worth and therefore his financial means to make additional child support payments." ***Id.***, 215 Wis.2d at 601, 573 N.W.2d at 864. This court further explained:

> [U]nlike other types of assets, such as a television, car or stock certificate, the trips could not be assigned or sold to a third party; they had no marketable value. Also, [the father] did not have the option of receiving the cash value of the trips; [the father's] employer gave him one option: take the trips to Mexico or lose the trips altogether.

Id.

¶18 Like the trips in ***Wall***, neither the stock acquisition nor the tax payments increased John Olinger's disposable income. It would therefore be unfair to include the full value of those items in John Olinger's gross income. The record reveals that John Olinger did not have the option to receive cash instead of the stock, that he could not redeem the stock, and that the buy-sell agreement greatly restricted his ability to sell the stock. Nonetheless, John Olinger could generate some disposable income if he sold the stock under the terms of the buy-sell agreement. The trial court therefore properly set John Olinger's child support obligation based upon that potential income.[4]

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appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals." ***Cook v. Cook***, 208 Wis.2d 166, 189–190, 560 N.W.2d 246, 256 (1997).

[4] The trial court used the fair market value of the stock to calculate the amount that John Olinger would receive if he sold the stock under the buy-sell agreement. As noted, the parties dispute whether the trial court properly determined the fair market value of the stock. To determine the stock's fair market value, the trial court reduced the value reported on John Olinger's tax return by a proportional share of the large corporate debt that was incurred pursuant to the stock transaction. The trial court's calculation of the fair market value of the stock is supported by the expert testimony, which indicated that the value reported on John Olinger's tax return should be reduced to account for the large corporate debt. We therefore conclude that the

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¶19 The record further reveals that the tax payments that John Olinger received did not increase his financial means to make child support payments, but merely placed him in the same financial position that he would have occupied had he never received the stock at all. Thus, pursuant to ***Wall***, the trial court properly excluded the tax payments from John Olinger's gross income.

2. Stock sale.

¶20 With respect to the 1997 stock sale, John Olinger testified that he received $321,000. John Olinger testified that he paid the mortgages on his primary residence and on a cottage, and that he invested the remaining portion of this money. He testified that he did not pay child support on the proceeds from the 1997 stock sale. One of John Olinger's expert witnesses testified that the sale resulted in about $60,000 to $70,000 of taxable income to John Olinger.

¶21 The trial court concluded that the value of the stock on which child support was imposed for 1995 should be subtracted from the proceeds of the stock sale, and the remainder should be used to determine John Olinger's presumed child support obligation. The trial court thereby calculated a presumed child support obligation of approximately $50,000.[5] The trial court determined,

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trial court did not err in determining the fair market value of the stock. *See* ***Schorer v. Schorer***, 177 Wis.2d 387, 396, 501 N.W.2d 916, 918–919 (Ct. App. 1993) (valuation of a closely-held corporation is a finding of fact, which will not be disturbed unless it is clearly erroneous).

Although John Olinger asserts that the trial court properly determined the fair market value of the stock, he argues on cross-appeal that the trial court erred in imposing a child support obligation on the 1995 stock acquisition because the stock was "an unproductive asset with a negative book value." We reject this argument. As noted, the record supports the trial court's calculation of the fair market value of the stock, and the trial court properly used that value to determine the income John Olinger would receive if he sold the stock pursuant to the buy-sell agreement.

[5] In calculating this "presumed" child support obligation, the trial court mistakenly recorded the proceeds of the sale at $361,000 rather than $321,000.

however, that this amount would exceed Courtney Olinger's needs, and that the sale was a "one-time windfall." Therefore, the trial court decided to set the child support obligation based primarily upon Courtney's needs. The trial court thereby concluded that John Olinger owed child support of $30,000 on the 1997 stock sale.

¶22 We conclude that the trial court erred in reducing John Olinger's child support obligation based upon its conclusion that that stock sale was a "one-time windfall." "The standard of living for children of divorced parents is not capped at the standard of living enjoyed at the time of the divorce. It accommodates the parents' subsequent financial prosperity or adversity. The standard is simply that which the children would have enjoyed had the marriage continued." ***Cameron v. Cameron***, 209 Wis.2d 88, 108, 562 N.W.2d 126, 134 (1997). Consistent with this standard, the terms of the 1994 child support order required John Olinger to pay child support of 14 percent of his gross income. Unlike the original stock acquisition and the tax payments, the money John Olinger received from the sale of the stock increased his financial means to pay child support. Indeed, John Olinger testified that he used the money to pay off two mortgages and to fund investments. Thus, the rationale set forth in ***Wall*** cannot be used to justify a deviation from the order for child support with respect to the proceeds of the stock sale.

¶23 The trial court also erred in reducing John Olinger's child support obligation on the ground that the amount payable exceeded his daughter's needs. The trial court cannot retroactively decrease the amount of child support that has become due under a child support order. *See* ***Cameron***, 209 Wis.2d at 100–101, 562 N.W.2d at 131; ***Schulz v. Ystad***, 155 Wis.2d 574, 593–596, 456 N.W.2d 312,

319–320 (1990); § 767.32(1m), STATS.[6] Thus, because the proceeds of the stock sale are not excluded from gross income under ***Wall***, the trial court must apply the terms of the child support order to all of the proceeds that have not yet been subject to the child support obligation.[7]

3. Imputed income.

¶24 In addition to ordering John Olinger to pay child support on the income from the stock acquisition and the stock sale, the trial court also determined that John Olinger was obligated to pay child support for 1996 on imputed income from the stock. The trial court determined that the stock was an unproductive asset that did not result in any income for 1996, but, nonetheless, the trial court imputed income to John Olinger from the stock and calculated a child

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[6] Section 767.32(1m), STATS., provides:

> In an action under sub. (1) to revise a judgment or order with respect to child support, maintenance payments or family support payments, the court may not revise the amount of child support, maintenance payments or family support payments due, or an amount of arrearages in child support, maintenance payments or family support payments that has accrued, prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations.

John Olinger cites ***Nelson v. Candee***, 205 Wis.2d 632, 643–644, 556 N.W.2d 784, 788–789 (Ct. App. 1996), for the proposition that a trial court may set child support at an amount below the statutory guidelines when the guidelines produce an amount in excess of the needs of the child and that excess operates as maintenance to the former spouse. ***Nelson***, however is inapposite because it dealt with setting a prospective child support obligation, not enforcing a previous support order. Here, the trial court did not modify John Olinger's child support obligation; therefore, the stock sale was subject to the terms of the 1994 order for child support.

[7] The trial court imposed the child support obligation on $9,025 of the value of the stock when it was acquired. Therefore, the 14 percent child support obligation should be imposed on the proceeds from the sale ($321,000), minus the value of the stock upon which the child support obligation was previously assessed ($9,025). This results in an outstanding child support obligation of $43,676 on the stock sale.

support obligation of $1,264. The trial court also concluded that John Olinger should pay child support on imputed income from the stock for 1997 and 1998.

¶25 Marilyn Olinger and John Olinger agree that the trial court erred in calculating a child support arrearage based on imputed income from the stock. We therefore reverse the portions of the trial court's order that establish an arrearage based upon imputed income from the stock.

C. Contempt.

¶26 "[A] person may be held in contempt for failure to pay [child support] where that failure is willful and contemptuous and not the result of an inability to pay." ***Van Offeren v. Van Offeren***, 173 Wis.2d 482, 498, 496 N.W.2d 660, 666 (Ct. App. 1992). The principal findings that the trial court must make in holding a party in contempt are that "'the person is able to pay and the refusal to pay is willful and with intent to avoid payment.'" ***Krieman v. Goldberg***, 214 Wis.2d 163, 169, 571 N.W.2d 425, 428 (Ct. App. 1997) (quoted source omitted). The mere fact that a child support arrearage has accrued is insufficient to support a finding of contempt. *See* ***Anderson v. Anderson***, 72 Wis.2d 631, 649, 242 N.W.2d 165, 174 (1976). We will not set aside a trial court's factual findings underlying its contempt decision unless those findings of fact are clearly erroneous. *See* ***Haeuser v. Haeuser***, 200 Wis.2d 750, 767, 548 N.W.2d 535, 542 (Ct. App. 1996).

¶27 A trial court's use of its contempt power is discretionary, and the trial court's determination of whether to hold a party in contempt will not be reversed unless the trial court erroneously exercised its discretion. *See* ***State ex rel. N.A. v. G.S.***, 156 Wis.2d 338, 341, 456 N.W.2d 867, 868 (Ct. App. 1990). This court will sustain the trial court's discretionary determination if the trial court

examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a reasonable conclusion. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414–415, 320 N.W.2d 175, 184 (1982). "We will generally look for reasons to sustain a trial court's discretionary decision." ***Haeuser***, 200 Wis.2d at 765, 548 N.W.2d at 542. "'The power to punish for contempt is to be used but sparingly. It should not be used arbitrarily, capriciously, or oppressively.'" ***Kaminsky v. Milwaukee Acceptance Corp.***, 39 Wis.2d 741, 746, 159 N.W.2d 643, 646 (1968) (quoted source omitted).

¶28 Marilyn Olinger argues that the trial court erred in denying her motion to hold John Olinger in contempt of court for his failure to pay child support on his gross income from the 1995 acquisition of stock and the 1996 payments for his income tax obligations. Based upon the facts of record and the applicable law, we conclude that the trial court did not erroneously exercise its discretion by refusing to hold John Olinger in contempt. John Olinger testified that he had spoken to two accountants and two attorneys regarding whether he was obligated to pay child support on the value of the stock or on the money he received for payment of his income tax obligations, and that the accountants and the attorneys all advised him that these portions of his income were not subject to the child support order. Based upon this testimony, the trial court reasonably concluded that John Olinger had made "a good faith attempt to comply with the terms and conditions of the child support order," and that his failure to fully satisfy his child support obligation was not willful and contemptuous.

D. Attorney's fees.

¶29 Marilyn Olinger argues that the trial court erred in determining that John Olinger should pay only a portion of her attorney's fees. She asserts that

John Olinger's failure to meet his child support obligation necessitated the legal proceedings, and that John Olinger should, therefore, be responsible for all of her attorney's fees. Conversely, John Olinger argues that the trial court erred in ordering him to pay any portion of Marilyn Olinger's attorney fees.

¶30 Section 767.262, STATS., provides that, in actions affecting the family, the trial court, after considering the financial resources of both parties, may order either party to pay a reasonable amount of the costs and attorney's fees of the other party. *See* § 767.262, STATS. An award of attorney's fees is discretionary and will be upheld absent an erroneous exercise of discretion. *See* ***Van Offeren***, 173 Wis.2d at 499, 496 N.W.2d at 666. "The trial court, before awarding attorney's fees, must make findings of the need of the spouse seeking contribution, the ability to pay of the spouse ordered to pay, and the reasonableness of the total fees."[8] ***Kastelic v. Kastelic***, 119 Wis.2d 280, 290, 350 N.W.2d 714, 719 (Ct. App. 1984). The trial court may also consider the past case history and whether either of the parties has "overtried" the case. *See* ***Nelson v. Candee***, 205 Wis.2d 632, 645–646, 556 N.W.2d 784, 789–790 (Ct. App. 1996).

¶31 In concluding that John Olinger should pay a portion of Marilyn Olinger's attorney's fees, the trial court found that Marilyn Olinger had not "overtried" the case, that John Olinger's income was much greater than Marilyn Olinger's income, and that Marilyn Olinger had incurred a home equity loan in order to meet her financial obligations, including the costs of the litigation. The trial court, therefore, ordered John Olinger to pay $8,500 (approximately one half) of Marilyn Olinger's attorney's fees. In arriving at this amount, the trial court

[8] John Olinger does not challenge the reasonableness of Marilyn Olinger's attorney's fees.

reasoned that requiring a party to pay a portion of the attorney's fees that he or she generates provides an incentive for each party to negotiate reasonably and encourages compromise in future conflicts. The trial court's rationale reflects a proper exercise of discretion, based upon consideration of the facts of record and the appropriate legal factors. The trial court also made a finding that Marilyn Olinger contributed to her financial hardship by unreasonable spending. As noted, we will not overturn a trial court's finding unless it is clearly erroneous. This finding is supported by the record and is not clearly erroneous. We therefore uphold the trial court's determination regarding the payment of Marilyn Olinger's attorney's fees.

III. CONCLUSION

¶32 We reverse the trial court's order with respect to the amount of child support John Olinger owed on the 1997 stock sale, and with respect to the imposition of the child support obligation on imputed income from the stock. We affirm the trial court's order in all other respects. We remand this cause to the trial court for entry of an order reflecting John Olinger's outstanding child support obligation as determined in this opinion.

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

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