

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2985-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE PATERNITY OF JONATHAN D.S.:

SHIRL L.B.,

PETITIONER-RESPONDENT,

v.

KARL J.S.

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed.*

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

PER CURIAM. In this paternity matter, Karl J.S. appeals an order setting support obligations for his son.¹ He argues that the trial court erroneously

¹ This is an expedited appeal under RULE 809.17, STATS.

exercised its discretion when it calculated his gross income available for child support. We affirm the order.

Karl owns 100% of the stock of a corporation that is in the trucking business.² His annual salary as president of the corporation is set at \$15,000 per year, plus health insurance and gasoline expenses. The corporation employs Karl's wife as a secretary and pays her \$18,000 per year.

The corporation is organized as a subchapter S corporation. On his 1997 tax return, Karl reported wages of \$15,000 and a net income from his corporation of \$34,467. At trial, Karl testified that he did not receive the \$34,467, but those amounts represented a "book profit." He testified that the corporation cannot afford to pay him more than \$15,000 per year. His accountant agreed and testified that in 1996 and 1997, the corporation "tax returns showed actually losses." Karl also testified that in 1995, for example, the corporation's gross receipts were \$5.1 million, but the total deductions were \$5.3 million.

The trial court determined that Karl's gross income available for child support purposes is \$40,000 and, beginning in September 1998, \$50,000. The trial court explained:

In setting the ongoing child support, the Court has taken into account the type of business that the respondent has, which is a solely owned corporation. The business is very much similar to an agricultural business and other sole proprietorships, where the HSS 80 Guidelines become difficult to follow.

² We derive this factual statement from Karl's brief. At trial, Karl testified that "basically with my wife having an interest of half of that." It is not clear, and the briefs do not explain, whether Karl was referring to title to the stock or the effect of marital property laws. For purposes of this opinion, we will accept his brief's characterization that Karl is the sole owner of the corporation.

In this case, the Court has analyzed the tax returns and the Court agrees with the CPA analysis, some depreciation and capital gains needs to be disallowed. Some factors for corporate benefits to the respondent might also be taken in. Further, the Court could take into account what the respondents ability to work would be such as: How much would the respondent make if he were hired to run [the business?]

We review a trial court's rulings respecting child support for an erroneous exercise of discretion. *Van Offeren v. Van Offeren*, 173 Wis.2d 482, 492, 496 N.W.2d 660, 663 (Ct. App. 1992). We will sustain a trial court's discretionary decisions if we find "that the trial court ... examined the relevant facts, ... applied a proper standard of law, and ... using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *State v. Gudenschwager*, 191 Wis.2d 432, 440, 529 N.W.2d 225, 229 (1995).

Karl argues that the trial court erroneously calculated the amount of his gross income available for child support. He contends that the trial court erroneously included "book profit" that was reported on his individual tax return. We are unpersuaded. The Wisconsin administrative code provides for adjustments to calculate gross income for child support purposes.³ In determining Karl's gross

³ The following definitions are included in WIS. ADM. CODE § HSS ch. 80: HSS 80.02 Definitions. In this chapter:

- (3) "Assets available for imputing income" means all real or personal property over which a payer can exercise ownership or control, including but not limited to, life insurance, cash and deposit accounts, stocks and bonds, business interests, net proceeds resulting from worker's compensation or other personal injury awards not intended to replace income, and cash and corporate income in a corporation in which the payer has an ownership interest sufficient to individually exercise control and when the cash or corporate income is not included as gross income under s. HSS 80.02(13).

....

(continued)

income, the trial court referred to guidelines set out in the Wisconsin Administrative Code. The court examined the nature of the business and the business's financial condition, considered the value of the management services performed by Karl and what his services would command in the open market. After analyzing the tax returns, the court determined that some deductions for depreciation should be disallowed. Similarly, the court made adjustments for capital gains.

Karl argues that these adjustments were improper because the corporation needs to retain all of its earnings to have cash available to operate, as testified by his accountant. The trial court was not required to accept the accountant's testimony. "The general rule in this state, as elsewhere, is that '... the opinion of an expert, even if uncontradicted, is not required to be accepted as such testimony must pass through the screen of the fact trier's judgment of credibility.'" *Capitol Sand & Gravel Co. v. Waffenschmidt*, 71 Wis.2d 227, 233-

(13) "Gross income" means:

(a) All income considered federal gross income under 26 CFR 1.61-1;

....

(g) Undistributed income of a corporation, including a closely-held corporation, or any partnership, including a limited or limited liability partnership, in which the payer 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 sub. (3);

Note: Income considered under this subsection is subject to the adjustments under s. HSS 80.03(2).

....

(14) "Gross income available for child support" means the amount of gross income ... and subtracting business expenses which the court determines are reasonably necessary for the production of that income or operation of the business and which may differ from the determination of allowable business expenses for tax purposes.

34, 237 N.W.2d 745, 749 (1976) (citation omitted). Here, the trial court examined the tax returns and rejected the accountant's testimony. The assessment of weight and credibility is a trial court, not appellate court, function. *Id.* at 234, 237 N.W.2d at 749.⁴ Accordingly, we do not overturn it on appeal.

Karl complains, however, that the court's analysis and articulation of its reasoning is faulty. He contends: "While the court expressed that it 'analyzed the tax returns,' it is evident that the court failed to consider whether [the corporation's] income or profit was available for support. This is particularly evident since [its] 1996 return indicated a \$67,073 loss" Karl does not provide a record citation for this argument. *See* RULE 809.19(1)(e), STATS.

The absence of particularized findings or articulated reasoning is not reversible error when the record supports the court's determination or provides a rational basis for its decision. *See State v. Pharr*, 115 Wis.2d 334, 343, 340

⁴ *Capitol Sand & Gravel Co. v. Waffenschmidt*, 71 Wis.2d 227, 233-34 n.8, 237 N.W.2d 745, 749 n.8 (1976) (citations omitted), provides:

The weight or credibility of opinion evidence as to value is for the jury, court, or other triers of the facts to determine, in the light of their own experience and their knowledge of like matters and subjects, and the knowledge, experience, and capability of the witness to draw a sound conclusion. Such an opinion is not conclusive or binding, and this is true even in a situation in which the opinion is uncontradicted, or is undisputed; it should be weighed by the trier of the facts and judged in view of all the evidence

N.W.2d 498, 502 (1983);⁵ *Moonen v. Moonen*, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968).⁶

Here, the court's written decision satisfies us that discretion was exercised. To determine whether the court's ultimate determination was erroneous, however, it is necessary to review the record before the trial court. Karl's personal and corporate tax returns are particularly material to the issues he raises. However, the tax returns are not included in the record transmitted to us on appeal.

RULE 809.15(1)(a)9, STATS., provides that the record on appeal include "[e]xhibits material to the appeal whether or not received in evidence." We are, of course, bound by the record as it comes to us. See *State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Assertions of fact that are not part of the record will not be considered. *Jenkins v. Sabourin*, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981). It is the appellant's duty to ensure that the record is sufficient to address the issues raised on appeal. See *State Bank of Hartland v. Arndt*, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986); see also § 809.15(2) and (3), STATS. When faced with an incomplete record, we assume that the missing components contain every fact essential to sustain the trial

⁵ When the trial court fails to set forth its reasoning in exercising its discretion, the appellate court may review the record to determine whether discretion was exercised and whether the record reflects a rational basis for the court's decision. *State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

⁶ "While no detailed findings were made, the court has stated it could affirm if the examination of the evidence shows the trial court reached a result which the evidence would sustain if a specific finding supporting that result had been found." *Moonen v. Moonen*, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968).

judge's discretion decision. *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979).⁷

The record before us reveals no error of law and reflects that discretion was exercised. We assume that the missing tax returns contain every fact essential to sustain the trial judge's discretion decision. *Id.* Consequently, we affirm the ruling with respect to the court's determination of Karl's income.

By the Court.—Order affirmed.

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

⁷ “It is boilerplate law that, when an appeal is brought on a partial transcript, the scope of the review is necessarily confined to the record before the court.” *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979); *see also Herro, McAndrews & Porter v. Gerhardt*, 62 Wis.2d 179, 180, 214 N.W.2d 401, 402 (1974); *Gray v. Wisconsin Tel. Co.*, 30 Wis.2d 237, 242, 140 N.W.2d 203, 205 (1966); *Stelloh v. Liban* 21 Wis.2d 119, 122, 124 N.W.2d 101, 102-03 (1963). “While the court can consider errors of law revealed in a trial court memorandum, the court will assume, in the absence of a transcript, that every fact essential to sustain the trial judge's exercise of discretion is supported by the record.” *Austin*, 86 Wis.2d at 641, 273 N.W.2d at 239.

