COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2220

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

IN RE THE MARRIAGE OF:

NANCY THIEDE,

PETITIONER-RESPONDENT,

V.

TERRY NEUMAN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Vergeront, Deininger, and Jones,[1] JJ.

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[1] Circuit Judge P. Charles Jones is sitting by special assignment pursuant to the Judicial Exchange Program.

VERGERONT, J. Terry Neuman appeals from an order of the circuit court regarding his child support obligation. The order was entered after Nancy Thiede, Neuman's former wife, brought a motion alleging that he was paying less than 25% of his gross income for child support. Neuman contends that the court erred in including in his gross income certain income of Neuman Electric, Inc., based on a finding that he had control of the corporation. This is error, Neuman contends, because he and his current wife each own 50% of the stock in Neuman Electric, Inc. We conclude that the court correctly applied the applicable regulation and its factual findings are supported by the record. We therefore affirm that portion of the decision determining Neuman's current gross income and child support obligation.

Neuman further appeals the decision of the circuit court awarding Thiede retroactive support payments at 18% interest, and one-half of her costs and attorney's fees. We conclude that the court did not err in awarding retroactive support payments and interest, and accordingly uphold that portion of the circuit court's decision. However, we hold that the court did err by awarding Thiede attorney's fees after quashing Neuman's discovery requests for Thiede's financial information. Accordingly, we reverse and remand the portion of the decision relating to attorney fees.

BACKGROUND

Neuman and Thiede were divorced in 1988. Included in the marital estate was Neuman's share of the proceeds from the dissolution of Norb's Electric, a partnership with his father. After dissolution of the partnership, Neuman worked as an employee of his father, d/b/a Norb's Electric. After a maintenance

obligation ceased in 1989, Neuman was to pay child support in the amount of 25% of his gross income.

Neuman married Mary Ann Neuman in 1988. After their marriage, they formed a corporation, Neuman Electric, Inc., to purchase the assets of Norb's Electric from Neuman's father. Neuman and Mary Ann Neuman each paid $500 for 500 shares of stock (1,000 shares total), holding the shares as survivorship marital property. The corporation used the capital to purchase the assets of Norb's Electric. As employee-owners of the corporation, Neuman performed the electrical work and Mary Ann Neuman performed administrative functions. Neuman received a salary of $23,400 per year from the corporation. When he worked for his father, he was paid a salary of $22,704.

On January 23, 1996, Thiede filed an order to show cause why an order should not be entered finding Neuman in contempt for failure to pay court-ordered child support "or in the alternative, for reduction to judgment on arrears accrued by failure to make these payments." The motion also asked for an income assignment for future child support, costs and attorney fees incurred in bringing the motion, and "further relief as may be deemed just and reasonable." In an accompanying affidavit, Thiede averred that Neuman had been paying less than 25% of his income for child support, which was his obligation pursuant to the judgment of divorce.

The trial court found that although Neuman and Mary Ann Neuman are both 50% owners of the corporation, Neuman was in a position to individually control the corporation and access the corporation's earnings. Neuman had this control, the court found, because he is the president, and because his skill as an electrician is essential to the business.

The trial court found that Neuman's salary was not kept artificially low to avoid his child support payment and that he was not shirking his child support obligation. However, the trial court found that Mary Ann Neuman's salary of $23,400 was excessive, and that the reasonable value of her services was $20,000. The court also found that the excess salary paid Mary Ann Neuman was unjustified by any investment in the corporation. The court determined that the amount of the excess, $11,780 total for fiscal years 1992 to 1996,[2] was subject to child support because it should have been paid as income to Neuman. The court also considered the amounts withheld as depreciation by the corporation. The corporation used accelerated depreciation, which the trial court determined was a reasonable business decision. However, the court found that only half of the excess depreciation was necessary for reinvestment in the corporation, and the other half was available as gross income to Neuman. That amount totaled $30,055 for the five fiscal years.

The court found the total child support arrearage to be $10,459.13. The court ordered that interest of 18% be paid on the arrearage. Finally, Neuman was ordered to pay half of Thiede's attorney's fees and costs, in the amount of $5,458.89. The trial court did not make a finding of financial need by Thiede, and denied Neuman's request for discovery of Thiede's financial information.

[2] May Ann Neuman was paid $23,400 per year for fiscal year 1995 and thereafter, and lesser amounts, but still more than $20,000 per year, for fiscal years 1992-94.

DISCUSSION

Determination of Neuman's Gross Income

The trial court applied WIS. ADM. CODE §§ HSS 80.02 and 80.03 in determining the amount of Neuman's gross income for purposes of child support. WISCONSIN ADMINISTRATIVE CODE § HSS 80.03(1) provides that in determining the payer's "base," against which the percentage of child support is applied, the payer's "gross income available for child support" and "imputed income" are added together. The relevant definitions in WIS. ADM. CODE § HSS 80.02 are:

> (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).
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> ….
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> (13) "Gross income" means:
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> ….
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> (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);
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> (14) "Gross income available for child support" means the amount of gross income after adding wages paid to dependent household members 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.

The rules governing the construction of administrative rules are the same as those applicable to statutory construction. ***Weis v. Weis,*** 215 Wis.2d 135, 138, 572 N.W.2d 123, 124 (Ct. App. 1997). The application of an administrative rule to a given set of facts is a question of law, which we address without deference to the court below. ***Id.*** However, we affirm the factual findings of the trial court unless they are clearly erroneous. *See* § 805.17(2), STATS.

Neuman first argues that the trial court erred in applying the above-cited definitions in WIS. ADM. CODE §§ HSS 80.02(3) and 80.02(13)(g) to determine his gross income for periods prior to March 1, 1995, because that was the effective date of those sections. We asked the parties to address whether this issue was raised before the trial court and, based on their responses, we are satisfied that it was not. We do not agree with Neuman that, because Thiede submitted a copy of the regulation to the trial court, she had an obligation to bring to the trial court's attention its effective date. Nor do we agree that the effective date, March 1, 1995, on the copy of the regulation Thiede submitted to the trial court constitutes raising the issue of its applicability prior to that date.

If Neuman believed that a different version of the regulation was applicable for time periods before March 1, 1995, it was his obligation to bring that to the court's attention so that the court could rule on that legal issue, and then make the necessary factual findings, depending on the version of the regulation the court determined was applicable. The general rule is that issues not raised before the trial court are waived. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 104, 536 N.W.2d 101, 105 (Ct. App. 1995). We do not reverse the decision of a trial court on a legal theory not presented to the trial court, *see* ***Leon's Frozen Custard v. Leon Corp.***, 182 Wis.2d 236, 246 n.2, 513 N.W.2d 636, 641 (Ct. App. 1994), and that is particularly true when the new legal theory might require factual findings, which

the trial court, not this court, must make. *See* ***id.*** We therefore decline to address the issue whether the version of the regulation effective March 1, 1995, applies to time periods prior to that date, and we will assume that it does, as the trial court did.[3]

Neuman next argues that since he and Mary Ann Neuman are each 50% owners of the company, he cannot individually exercise control within the meaning of WIS. ADM. CODE §§ HSS 80.02(3) or 80.03(13)(g). To establish that he does not have control, Neuman points to § 180.0721, STATS., which provides that each share is entitled to one vote in matters voted on at shareholder meetings. Section 180.0728(1), STATS., provides that directors are elected by a plurality of votes cast by shares, "plurality" meaning the largest number of votes. Because his voting power is insufficient to unilaterally elect the directors of the corporation, Neuman argues, he does not have control of the business, and therefore the trial court's determination that funds, in addition to his salary, are available to him for child support purposes is erroneous. Neuman maintains that his inability to unilaterally declare a dividend necessarily renders him not in control, and therefore neither the accelerated depreciation nor the retained earnings of the corporation can be included in his gross income for purposes of child support.

We reject Neuman's premise that the issue of control is conclusively resolved by the number of shares Neuman owns. In ***Weis,*** we considered the question of control within the meaning of WIS. ADM. CODE §§ HSS 80.02(3) and 80.013(g), although in a partnership, not corporate, context. ***Weis***, 215 Wis.2d at

[3] Since Neuman's argument based on ***In re Paternity of Steven J.S.***, 183 Wis.2d 347, 353, 515 N.W.2d 719, 721 (Ct. App. 1994), is premised on application of a prior version of the regulation, we also do not address this argument.

139-42, 572 N.W.2d at 125-26. Although we concluded in ***Weis*** that the obligor did not have control, our reasoning in reaching that conclusion persuades us that the trial court correctly applied the regulation to the facts it found in this case.

Clayton Weis was a 50% owner of a partnership that owned certain farm property. One parcel of the property was a farmhouse, in which he lived rent free. The trial court imputed 50% of the fair rental value of the farmhouse to Clayton for child support purposes, because the partnership had forgone income available to it by renting it out to the public. On appeal, we held that "[t]o control something is to have the power or authority to guide or manage, to have directing or restraining domination." ***Weis***, 215 Wis.2d at 139, 572 N.W.2d at 125 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 496 (1976)). We determined that Clayton had no authority to assign his interest to a third party or utilize the property for a non-partnership purpose without the consent of the other partner. We stated that, although his 50% ownership "gives Clayton a restraining power in that he may veto [the other partner's] decisions with regard to the farmhouse, it also means that he lacks the power or authority with respect to the farmhouse." ***Id***. at 140, 572 N.W.2d at 125. Accordingly, we concluded that the fair rental value of the house could not be imputed to Clayton's income. ***Id***.

We reached the same result with respect to the retained earnings of the partnership. The trial court imputed 50% of the retained earnings of the partnership to Clayton under the theory that he had manipulated the partnership in order to distort his true income. ***Weis***, 215 Wis.2d at 140, 572 N.W.2d at 126. We concluded that because, pursuant to the partnership agreement, Clayton did not have the authority to individually exercise control over the partnership or access its retained earnings, the undistributed earnings could not be imputed to him. ***Id***. at 142, 572 N.W.2d at 126.

In ***Weis***, we rejected the former wife's argument that the 50% division of the farmhouse did not reflect the reality that Clayton controlled the farmhouse by living there, because the trial court made no finding that Clayton, in fact, had control over the farmhouse. ***Weis***, 215 Wis.2d at 140, 572 N.W.2d at 125. In the absence of such a finding, we stated, we were limited to considering the partnership agreement as the factual basis for how control was exercised. ***Id.*** In this case, in contrast, the trial court *did* find that Neuman had control of the corporation because he was the president and had expertise crucial to the business that the other owner did not have. Therefore, we hold explicitly what was implicit in ***Weis***: if, despite a 50/50 split in record ownership, the court specifically finds that one of the owners in fact has the authority to unilaterally control the enterprise, that owner exercises control within the meaning of WIS. ADM. CODE § HSS 80.02(2) and (13)(g). The trial court in this case did make such a finding and it is not clearly erroneous.

Neuman next contends that Wisconsin's Marital Property Law, at § 766.51, STATS., provides that both spouses must act together to manage and control marital property. He argues that the trial court erred by imputing a larger portion of the corporation's income to himself, and in so doing reviving the common law property ownership disabilities of women in violation of § 766.97, STATS., which affirms that women and men possess an equal right to hold and convey property. We reject this argument for the reasons stated in ***Abitz v. Abitz***, 155 Wis.2d 161, 455 N.W.2d 609 (1990):

> The Marital Property Act was not intended to alter divorce law. . . . No language within the Marital Property Act expressly or impliedly preempts the factors that the circuit court must consider when determining an obligated parent's ability to pay child support pursuant to sec. 767.32(1), STATS. Likewise, no language within the

> Marital Property Act restricts the traditionally broad definition of income that can be considered by the circuit court upon review of total economic circumstances.
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> ….
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> [Accordingly,] in order to properly apply the percentage standard on revision when the paying party has remarried, the circuit court must determine the paying parent's gross income as if he or she were still single. The circuit court would then convert that gross income into the base to which it would apply the relevant percentage standard.

Id. at 176, 181-82, 455 N.W.2d at 615-16, 18. We conclude that Mary Ann Neuman's marital property rights are irrelevant to the determination of Neuman's gross income for child support purposes.[4]

Neuman next argues that because his business is a corporation, it is protected by the "corporate veil." He maintains that the court may not impute corporate income to him unless it makes the requisite findings for piercing the corporate veil as established in ***Lendman v. Lendman,*** 157 Wis.2d 606, 460 N.W.2d 781 (Ct. App. 1990); ***Evjen v. Evjen***, 171 Wis.2d 677, 492 N.W.2d 361 (Ct. App. 1992).

In ***Lendman***, this court recognized that corporate income can in certain circumstances be considered income of a child support obligor, even if that income is not taxed to the obligor. ***Id***. at 614-15, 460 N.W.2d at 784-85. The obligor in ***Lendman*** was a 100% shareholder of a corporation. The corporation paid the obligor a salary and retained the rest of the earnings within the corporation. ***Id***. at 613, 460 N.W.2d at 784. Despite an accountant's testimony

[4] Mary Ann Neuman was granted a partition motion under § 766.70, STATS., whereby her 500 shares of Neuman Electric stock were declared her individual property. That, too, is irrelevant to a determination of Neuman's child support obligation; there has been no interference with Mary Ann Neuman's property rights.

that the retained earnings and salary paid were appropriate under the circumstances of the business, the trial court found that the obligor's salary was "bogus," and that it was artificially low in order to avoid his child support obligation. ***Id.*** In upholding the trial court's determination that a portion of the corporation's retained earnings should be included in the obligor's gross income, we stated:

> Depending on the individual case, retained earnings might be a necessary adjunct of a well-managed corporation or a pretext for a one-man band shareholder to keep profits from being considered by the family court for maintenance. We decline to write a bright-line rule in favor of a case-by-case analysis to be conducted by the trial court in its discretion.

Id. at 615, 460 N.W.2d at 785. Although there was only one shareholder in ***Lendman***, that case does not hold, as Neuman contends, that inclusion of corporate income is unavailable if there is more than one shareholder. Rather, ***Lendman*** and WIS. ADM. CODE § HSS 80.02(3) and (13)(g) require only that the shareholder/obligor have control of the corporation.

In ***Evjen***, we stated that "a family court is authorized to pierce the corporate shield if it is convinced that the obligor's intent is to avoid financial obligations arising from the marital relationship," and it is for the family court to determine whether retained earnings are a business necessity or a pretext to avoid a marital obligation. ***Evjen***, 171 Wis.2d at 685, 492 N.W.2d at 364.

Neuman argues that because the trial court specifically found that he had no intent to bury income in the corporation to avoid paying child support, the trial court's decision to include corporate income in his gross income cannot be reconciled with ***Evjen*** and ***Lendman***. We disagree. Although ***Evjen*** and ***Lendman*** both found an intent to hide income, it does not follow that such a

finding is necessary in order to include corporate income in the gross income of the controlling shareholder for child support purposes. Nowhere in the language of WIS. ADM. CODE § HSS 80.02(3) or (13)(g) is there a requirement that there be such a finding. Rather, once "an ownership interest sufficient to individually exercise control or to access the earnings" has been found, WIS. ADM. CODE § HSS 80.02(13)(g), the question is whether the retained earnings, accelerated depreciation, salaries paid, or other disputed business decisions can be justified by legitimate and reasonable business purposes.

Neuman argues that, regardless of the question of marital property rights, Mary Ann Neuman's 50% ownership interest in the corporation should have precluded the trial court from imputing 100% of the excess depreciation to him. He argues that the distribution of corporate surplus must be made equally on a per-share basis, and therefore the excess depreciation from the business' assets should be attributed equally between Neuman and Mary Ann Neuman, making only 50% of the excess depreciation available for Neuman's child support obligation. Neuman's argument presumes that the trial court considered the excess depreciation it included in Neuman's income as a corporate distribution. However, we understand the trial court to have found that the excess depreciation was available to Neuman as an employee of the corporation as compensation, rather than as a distribution to Neuman as a shareholder. We further understand the trial court to have found that the value of Neuman's services to the corporation includes the amount of excess depreciation that it considered to be part of his gross income.

In summary, we conclude that the trial court did not err in determining that Neuman's gross income included a portion of Mary Ann Neuman's salary and of excess depreciation. The trial court properly applied WIS.

ADM. CODE § HSS 80.02(2) and (13)(g) to the factual findings and those findings are not clearly erroneous.

Award of Back Support and Retroactive Interest

Neuman argues that the court's ruling was a revision of his child support obligation, and that a revision cannot operate retroactively, only prospectively. *See* WIS. STAT. ANN. § 767.32(1m) (West Supp. 1997).[5] An order for back support, in Neuman's view, is proper only if the court first finds him in contempt under § 767.305, STATS.[6] For a finding of contempt, the court must find that the defendant is able to pay, and willfully refuses to pay with the intent to avoid paying. *See* ***In Support of B., L., T. & K.***, 171 Wis.2d 617, 623, 492 N.W.2d 350, 353 (Ct. App. 1992). By specifically finding that Neuman did not intend to avoid payment, Neuman argues, the trial court found he was not in contempt.

Thiede's motion asked for a finding of contempt for failure to pay child support "or in the alternative, for reduction to judgment on arrears accorded by failure to make these payments"; it also asked for "other and further relief as

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[5] Section 767.32, STATS., governs the revision of child support judgments. That section provides:

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

[6] Section 767.305, STATS., provides for contempt proceedings as provided in ch. 785, STATS., when a party has a financial obligation under a child support order (and certain other orders) and has failed to pay within a reasonable time or as ordered by the court.

may be deemed just and reasonable under the circumstances." Thiede's motion did not ask for a revision to the amount of child support due under the existing order but rather sought to compel Neuman to pay the correct amount of child support due under that existing order. The court's findings of fact, conclusions of law and order did not include a finding of contempt. The court concluded, as described above, that Neuman was not paying 25% of his gross income, as defined by the administrative regulations, and ordered that he do so in the future as well as make back payments for the arrearage with interest. Neuman has cited no authority for the proposition that a court cannot order that Neuman pay the amount of support due but not paid under an existing child support order without a finding of contempt. We conclude that the court was not required to make the finding necessary for contempt in order to reach the conclusion it did.

Neuman's related argument is that the family court erred in ordering that Neuman pay 1.5% per month interest on the amount in arrears pursuant to § 767.25(6), STATS.,[7] because this higher rate is intended to be punitive, and therefore requires a finding of willfulness and an intent to avoid payments. To support this proposition, he cites ***B., L., T. & K.***, which holds that a finding of contempt requires a refusal to pay that is willful and intended to avoid payment. However, ***B., L., T. & K***. did not involve an award of interest.

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[7] Section 767.25(6), STATS., provides:

> A party ordered to pay child support under this section shall pay simple interest at the rate of 1.5% per month on any amount unpaid, commencing the first day of the 2nd month after the month in which the amount was due. Interest under this subsection is in lieu of interest computed under s. 807.01(4), 814.04(4) or 815.05(8) ....

WIS. STAT. ANN. § 767.25(6) (West Supp. 1997).

In a recent case, ***Douglas County Child Support Enforcement Unit v. Fisher,*** 200 Wis.2d 807, 547 N.W.2d 801 (Ct. App. 1996), this court noted that "[u]nder the unambiguous language of § 767.25(6), STATS., a person ordered to pay child support is required to pay interest when child support is overdue." ***Id.*** at 815, 547 N.W.2d at 804. We are unaware of any case applying § 767.25(6) that has held or even hinted that a finding of willfulness or an intent to avoid payment is necessary for its application. *See, e.g.,* ***Cameron v. Cameron,*** ___ Wis.2d ___, 562 N.W.2d 126, 130-31 (1997) (noting that [a] party ordered to pay child support ... shall pay simple interest at the rate of 1.5% per month on any amount unpaid); ***Douglas County,*** 200 Wis.2d at 814, 547 N.W.2d at 804 (holding that obligor spouse's statutorily required to pay 1.5% per month interest, without finding willfulness or intent to avoid payment); ***Greenwood v. Greenwood,*** 129 Wis.2d 388, 392, 385 N.W.2d 213, 214-15 (Ct. App. 1986) (awarding interest on amount in arrears without finding willfulness or intent to avoid payment).

By its plain terms, § 767.25(6), STATS., requires simple interest at 1.5% per month on "any amount unpaid" when a "party is ordered to pay child support." When Neuman's gross income is calculated according to the administrative regulations as properly construed by the trial court, the difference between 25% of that sum and what he actually paid is the "amount unpaid" within the meaning of § 767.25(6). We conclude that the trial court properly ordered payment of the support past due but unpaid and properly ordered interest at the rate of 1.5% per month on that amount.

Attorney's Fees

Thiede sought attorney fees with her motion. The court denied Neuman's request for discovery of Thiede's financial information, concluding that

her income, assets, expenses and liabilities were irrelevant to Thiede's motion. Neuman argues that he was entitled to information regarding Thiede's financial status because of her request for attorney fees. We agree with Neuman.

Section 767.62(1)(a), STATS., provides that, in actions affecting the family, "after considering the financial resources of both parties," the court may order either party to pay a reasonable amount of the costs and attorney's fees of the other party. An award of attorney's fees is discretionary and will be upheld absent an erroneous exercise of discretion. ***Van Offeren v. Van Offeren,*** 173 Wis.2d 482, 499, 496 N.W.2d 660, 666 (Ct. App. 1992). Fees are awarded upon a showing of need by one party, ability to pay by the other, and the reasonableness of the fees. *See* ***id.*** Among the factors that necessarily must be considered are the assets, income and liabilities of both parties. ***Id.*** at 500, 496 N.W.2d at 666. A court erroneously exercises its discretion when it applies an incorrect legal standard. *See* ***Berg v. Marine Trust Co.***, 141 Wis.2d 878, 887, 416 N.W.2d 643, 647 (Ct. App. 1987). The court applies an incorrect legal standard in awarding attorney's fees when it does not consider both parties financial status. *See* ***Wiederholdt v. Fischer,*** 169 Wis.2d 524, 536, 485 N.W.2d 442, 446 (Wis. App. 1992) (trial court must make findings of need, ability to pay, and the reasonableness of the fees).

The trial court ordered Neuman to pay one-half of Thiede's attorney's fees. The court explained that it was not ordering the full amount because Thiede had failed to show bad faith by Neuman; on the other hand, the court observed, without Thiede's vigorous prosecution of the motion, funds that should have been paid for child support would have stayed "behind the corporate shield." The court ordered Neuman to pay the fees within the year, finding that

this could be done based on Neuman's retroactive support obligation and other obligations.

We conclude that the court erroneously exercised its discretion in awarding attorney's fees without considering Thiede's income. The correct legal standard requires that the court consider her need as one factor. We therefore reverse and remand for further proceedings on attorney's fees. We affirm on all other issues.

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

Not recommended for publication in the official reports.