COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1027

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

IN RE THE MARRIAGE OF:

LESLIE L. KUPER,

PETITIONER-APPELLANT,

V.

CRAIG A. KUPER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM A. JENNARO, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. Petitioner Leslie L. Kuper appeals from a court order finding her liable to her ex-husband, respondent Craig A. Kuper, for $40,184, representing back taxes, interest, and penalties assessed against Craig by

the state and federal governments. Leslie also contends that the court erred in finding her liable to Craig for $1750 in attorney fees and costs. We find in favor of Leslie on both issues and remand for further proceedings.

FACTS

¶2 Leslie and Craig were divorced in 1986 after eleven years of marriage. The judgment of divorce incorporated the parties' settlement agreement, in which the parties agreed that Craig would pay Leslie $1000 per month in maintenance and $1700 per month in child support for the parties' two minor children. Maintenance was to be held open until September 1, 1994.

¶3 In August of 1994, Leslie requested an order modifying and extending maintenance. In her affidavit in support of that order, Leslie stated that while she had obtained a master's degree in educational psychology, she was unsuccessful in obtaining self-supporting employment. Craig requested that further maintenance be denied on the basis that he had already paid maintenance for a time period nearly as long as the time period in which the parties were married, that the parties were young when they divorced, that Leslie lived with a significant other who shared the rent payment, and that Leslie had over eight years to become self-supporting.

¶4 The parties ultimately came to a new agreement in 1995, filed as a stipulation and proposed order. The agreement provided that Craig would pay Leslie "$2,333.33 per month as Section 71 payments." Section 71 refers to a section of the Internal Revenue Code ("Code") relating to alimony and separate maintenance payments. 26 U.S.C. § 71 (1994). The agreement further stated that family support payments were terminated and child support payments would cease indefinitely because the minor child was adequately supported by the newly

agreed-upon § 71 payments. The agreement specifically noted that the § 71 payments were to be deductible to Craig and taxable to Leslie. The payments were to begin January 1, 1995, and were to end May 31, 1997. Finally, the agreement provided that if the Internal Revenue Service ("IRS") disallowed the § 71 payments, the agreement would be modified to denote the payments as "Maintenance and Family Support." This new "stipulation and order" was signed by the court and took effect on January 1, 1995.

¶5 In April of 1999, Craig filed a motion requesting an order holding Leslie in contempt for violating the parties' agreed-upon stipulation and order. Craig's affidavit in support of that motion asserted that while Craig made the agreed-upon payments and deducted those payments from his income, Leslie failed to claim the payments as income on her 1995, 1996, and 1997 income tax returns, triggering an IRS audit. As a result of the audit, the IRS disallowed Craig's deductions on the basis that the proposed § 71 payments ended four months after the parties' youngest child turned eighteen. Because the payments ended within six months of the youngest child obtaining the age of majority, the payments were considered child support pursuant to § 71(c) of the Code. 26 U.S.C. § 71(c) (1994). Ultimately, the IRS and the Wisconsin Department of Revenue levied $44,631 in back taxes, interest, and penalties against Craig.

¶6 The trial court initially found Leslie in contempt, noting that she could purge herself of the contempt order by filing amended returns including the payments received from Craig as income. The court later vacated that ruling, re-opened the proceedings, and scheduled an evidentiary hearing. Ultimately, the trial court determined that by failing to claim the payments as income, Leslie triggered the IRS audit. While the court acknowledged that the agreement was in contravention of § 71(c) of the Code, it believed the agreement should still prevail

as between the parties. Therefore, the court determined that Leslie was responsible for the back taxes, interest, and penalties and ordered her to pay Craig $40,184. This amount excludes $4447, which is a portion of the penalty and interest that would have been saved if Craig had paid his liability to the IRS in March of 1999 when the IRS initially disallowed his deductions. The court also ordered Leslie to pay Craig $1750 for attorney fees and costs. Leslie appeals.

ANALYSIS

¶7 On appeal, we first consider whether the trial court erred when it held Leslie responsible for the back taxes, interest, and penalties on the basis that Leslie's failure to report the payments from Craig as income triggered the IRS audit.

¶8 The court order directing Leslie to reimburse Craig was based on the court's continuing jurisdiction to modify the maintenance and support payments provided by Craig to Leslie. *See* WIS. STAT. § 767.32(1) (1999-2000)[1] (a trial court retains jurisdiction to modify a divorce judgment providing for maintenance, child support, or family support). As such, it was a discretionary act. An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). We will not set aside a trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2).

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶9 Leslie contends that the trial court erred when it ordered her to reimburse Craig for back taxes, interest, and penalties. She argues that the trial court should have considered the underlying reason why the additional taxes were assessed, that is, the parties' faulty agreement, rather than what triggered the attention of the IRS. Leslie suggests that the trial court should have invalidated its prior order because the execution of that order would have been contrary to the tax code and because it violated public policy.

¶10 Craig counters that the trial court properly allocated the tax burden to Leslie because the evidence at the hearing showed that if Leslie had complied with the stipulation and order, the probability of an audit would have been "infinitesimally small." Thus, he contends that Leslie is to blame for the imposition of back taxes, penalties, and interest. Craig also argues the agreement is not illegal because the parties agreed that if the IRS disallowed the payments as § 71 payments, then the payments would be deemed for "maintenance and family support."[2]

¶11 For the reasons that follow, we conclude that the trial court erred.

¶12 Section 71 of the Code defines alimony and separate maintenance payments. Alimony and maintenance payments are deductible to the payor, 26 U.S.C. § 215(a) (1994), and taxable to the recipient, 26 U.S.C. § 71(a) (1994). Child support payments, however, are neither deductible to the payor nor taxable to the recipient. *See* 26 U.S.C. § 71(c)(1) (1994).

[2] "Family support" is a substitute for child support orders under WIS. STAT. § 767.25 and maintenance payment orders under WIS. STAT. § 767.26. WIS. STAT. § 767.261. The designation of payments as "family support" is designed to place the tax burden on the recipient, similar to alimony or maintenance. *See* ***Jasper v. Jasper***, 107 Wis. 2d 59, 63, 318 N.W.2d 792 (1982).

¶13 Section 71(c)(2)(A) and (B) of the Code provide that if any payment specified in a divorce or separation agreement will be reduced at a time which can clearly be associated with a contingency relating to a child, such as attaining a specified age, the payment will be treated as child support. 26 U.S.C. § 71(c)(2)(A) and (B) (1994). Section 1.71-1T(c) of the Treasury Regulations, a guide to interpreting § 71, explains that a reduction in payments will be presumed as happening at a time clearly associated with a contingency relating to a child if it occurs "not more than 6 months before or after the date the child is to attain the age of 18." Treas. Reg. § 1.71-1T(c) (1984). This presumption can be rebutted by a showing that the time at which the payments are to be reduced was chosen independently of any contingency relating to a child. ***Id.***

¶14 The 1995 stipulation and order called for Craig's payments to Leslie to end on May 31, 1997, a date within four months of the day the parties' youngest child would obtain the age of majority. Thus, the payments were presumed to be child support under § 71(c) of the Code, and the regulations thereunder, and presumed to be non-deductible on Craig's tax returns. The record indicates that Craig filed an appeal with the IRS concerning the imposition of the back taxes and penalties, though it is not clear on what basis he did so or whether he has received a final decision in that matter. We do not have before us any further information regarding that appeal. In light of the record, we presume**,** as did the trial court, that Craig has been held liable by the IRS for back taxes, penalties, and interest and that the trial court was being asked to transfer the burden of that assessment from Craig to Leslie.[3]

[3] The dissent mischaracterizes the majority's factual assumption in this case and then knocks down a straw man. The majority's assumption, that Craig was or will be unable to rebut the § 71 presumption that his payments were child support, is not unfair to Craig. Indeed, it is (continued)

¶15 The parties' stipulation and proposed order appear valid on their face because there is no mention of the birth date of the youngest child or that the payments were to cease four months after the youngest child's eighteenth birthday. Still, the stipulation and order contemplated an allocation of the tax burden contrary to § 71(c) of the Code. The eventual consequence of Craig's abiding by the terms of the order (by deducting his payments from his gross income) was the imposition of back taxes, interest, and penalties against him by the IRS and the Wisconsin Department of Revenue. Leslie, on the other hand, failed to comply with the stipulation and order, but she apparently complied with the tax code.

¶16 We are not persuaded by Craig's argument that the agreement is proper because the parties agreed that, if the IRS disallowed the payments as § 71 payments, then the payments would be deemed for "maintenance and family support." This decision, like the decision of the trial court below, assumes that Craig has been or will be unsuccessful in advancing this argument with the IRS.

¶17 Understandably, the trial court struggled with this case, but ultimately appeared to believe it was in some sense bound by the prior stipulation and order and that, consequently, it should give Craig a remedy which would put him in the same position he would have been in had Leslie performed on the agreement. We disagree.

¶18 An analogy can be drawn from contract law. Generally speaking, a contract is void when a civil or criminal statute expressly forbids its formation or performance, or when a penalty is imposed for doing the act agreed upon.

Craig's own assumption in bringing his motion seeking reimbursement from Leslie, and it is the assumption adopted by the trial court when it ordered Leslie to pay the assessment. If it turns out that Craig has or will prevail in the tax court, then our disposition in this case does no harm to Craig because he will not owe the assessment.

Hiltpold v. T-Shirts Plus, Inc., 98 Wis. 2d 711, 716-17, 298 N.W.2d 217 (Ct. App. 1980). Moreover, parties are not entitled to the aid of the courts in seeking redress under illegal agreements. *See* ***Kryl v. Frank Holton & Co.***, 217 Wis. 628, 631, 259 N.W. 828 (1935); ***Ehrlich v. City of Racine***, 26 Wis. 2d 352, 360, 132 N.W.2d 489 (1965). If this were a simple contract case, Craig could not expect to receive assistance from the courts in getting compensation from Leslie for her failure to comply with an illegal contract. Similarly, we conclude the trial court was not obliged to restore Craig to the position he would have enjoyed if Leslie had complied with the agreement and if the agreement, in turn, had complied with the tax code.

¶19 The trial court based its ruling on Leslie's failure to report payments from Craig as taxable income, a factor we deem not relevant to the question of who should bear the burden for the tax and penalty assessment. Both Leslie and Craig voluntarily entered into an agreement calling for reporting on their tax returns contrary to the tax code. Both Leslie and Craig should be responsible for the consequences of that agreement. To place the burden on Leslie is to suggest that she should have declared the payments from Craig as taxable income, contrary to the tax code. Courts should not be in the business of sanctioning parties for failing to perform on agreements that are contrary to the tax code. When a trial court bases its decision on an irrelevant factor, it erroneously exercises its discretion. *See* ***Carlson Heating, Inc. v. Onchuck***, 104 Wis. 2d 175, 181, 311 N.W.2d 673 (Ct. App. 1981) (circuit court's discretionary order may be set aside where the court based its ruling on irrelevant factors).

¶20 The trial court's erroneous conclusion that it was constrained by the stipulation and order apparently diverted the court's attention from giving proper consideration to the equities of the situation. When the trial court originally

approved the parties' stipulation, it implicitly determined that $2,333.33 per month, less taxes, was an appropriate amount of support for Leslie and the children. This is true even if the amount was determined by negotiation of the parties instead of by an independent assessment by the trial court. If Leslie is now required to pay the $40,184 assessment against Craig, the net support she would receive from Craig for the three years in question would dwindle from $49,773.57 to $27,482.57.[4] Thus, requiring Leslie to pay this assessment would thwart the trial court's initial attempt to provide adequate support for Leslie and the children, and relieve Craig from paying taxes he was legally required to pay.

¶21 We therefore reverse the order of the trial court requiring Leslie to pay Craig $40,184 and direct the court to equitably allocate the tax assessment between the parties after considering all of the relevant facts and factors. We do not hold that the trial court may not allocate a portion of the back taxes, penalties, and interest to Leslie, only that it was a misuse of discretion to allocate the entire $40,184 to Leslie because of her failure to report the payments from Craig as taxable income.

¶22 Finally, we must determine whether the trial court erred when it ordered Leslie to pay Craig $1750 for attorney fees and costs.

¶23 When presented with a request for a contribution to attorney fees, the trial court must make findings of fact as to the reasonableness of the total fees, the need of one spouse for contribution, and the ability of the other spouse to pay.

[4] The first amount was calculated by subtracting $17,893 in taxes, which Leslie would have paid if she had complied with the agreement, from the $67,666.57 in payments she received from Craig. The second amount was calculated by subtracting $40,184, which the trial court ordered Leslie to pay Craig, from the $67,666.57 in payments from Craig.

See Corliss v. Corliss, 107 Wis. 2d 338, 350-51, 320 N.W.2d 219 (Ct. App. 1982). The decision to order one party involved in family litigation to contribute to the costs and fees incurred by the other is a matter committed to the sound discretion of the trial court. ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996).

¶24 Here, the court appears to have determined that Leslie should contribute to Craig's attorney fees and costs solely on the basis that Leslie was responsible for the IRS audit. Because we have held that what triggered the audit is irrelevant, we reverse the award of attorney fees as well and remand that question for reconsideration by the trial court.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

¶25 DYKMAN, P.J. *(dissenting).* The majority is able to reverse the trial court by converting the trial court's discretionary decision into a question of law, and then concluding that the trial court erred by applying the wrong law. There is facial appeal to this method of reaching a result, but a closer inquiry into the law the majority applies reveals that the facts of this case do not fit the law upon which the majority relies. I therefore am unable to join in the majority's decision.

¶26 The initial flaw in labeling Craig's actions "illegal" or "contrary to the tax code" is that Craig was in the United States Tax Court, litigating whether he is entitled to deduct his § 71 payments on his federal income tax returns.[5] And even if Craig were unsuccessful in that court, and in an appeal from that court, labeling the acts of unsuccessful litigants in the Internal Revenue Service (IRS) or the Tax Court as "illegal" is a disturbing extension of the criminal law into family law matters. But the real problem with the majority's conclusion is that neither the majority nor I know whether Craig was or will be successful in tax court, was or will be successful on appeal, or whether he appealed. The record is silent as to those facts.

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[5] The majority sometimes substitutes the phrase "contrary to the tax code" for the word "illegal." The cases that form the foundation for the majority's decision are "illegal contract" cases. *See* ***Hiltpold v. T-Shirts Plus, Inc.***, 98 Wis. 2d 711, 716-17, 298 N.W.2d 217 (Ct. App. 1980). "A contract is illegal where its formation or performance is expressly forbidden ...." ***Id.*** at 716. By substituting the term "contrary to the tax code" for the word "illegal," the majority pulls the underpinnings from its rationale that courts should not countenance illegal contacts. There is nothing left.

¶27 A related problem with using "illegality" as determined by the majority in this case, is that it necessarily involves appellate fact-finding, an act reserved to trial courts. *See* ***Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998). We see that problem here in the majority's finding that Craig has committed an illegal act, notwithstanding that he was engaged in an appeal which challenged whether he is entitled to deduct his § 71 payments on his federal income tax returns. The question is not whether presuming an unknown fact is fair, but whether an appellate court can independently find facts. It cannot. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980).

¶28 The majority's finding of "illegality" rests on an assumption about a presumption. The majority assumes that because a federal administrative rule grants a presumption to the government in Craig's case, Craig was unable to rebut the presumption. But there is nothing in the record of this appeal explaining Craig's argument to the IRS. The majority's assumption is therefore without a basis. Were a trial court to do this, we would reverse because its decision was based on facts not of record. *See* ***State v. Santiago***, 206 Wis. 2d 3, 26-27, 556 N.W.2d 687 (1996) (finding of fact is clearly erroneous where no evidence supports it).

¶29 In fact, under federal tax case law, we do not know whether Craig and Leslie's agreement is "illegal" or "contrary to the tax code." In ***Shepherd v. Commissioner***, 79 T.C.M. (CCH) 2078 (2000), a pro se petitioner succeeded in rebutting the presumption contained in Temp. Treas. Reg. 1.71-1T(c) (1984). And in ***Hill v. Commissioner***, 71 T.C.M. (CCH) 2759 (1996), the Tax Court again concluded that a petitioner had rebutted the presumption.

¶30 I do not cite ***Shepherd*** and ***Hill*** for their similarity to the facts of Craig's appeal to the United States Tax Court. I cannot do so because here, there are no facts to compare. I cite those cases only to show that it is superficial to conclude that because Craig's payments are presumed to be child support, the agreement is "illegal."

¶31 The majority does not discuss whether Craig could rebut the presumption contained in Temp. Treas. Reg. § 1.71-1T(c). Indeed, that would be a difficult discussion, because the record is devoid of evidence on this subject. Even the majority admits: "The record indicates that Craig filed an appeal with the IRS concerning the imposition of the back taxes and penalties, though it is not clear on what basis he did so or whether he has received a final decision in that matter."

¶32 The majority acknowledges the problem with deciding cases upon dispositive facts unknown to it or the trial court. It solves this dilemma by concluding: "We do not have before us any further information regarding that appeal. In light of the record, *we presume*, as did the trial court, that Craig has been held liable by the IRS for back taxes, penalties, and interest …." (Emphasis added.) "Presume" means "to suppose to be true without proof." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 923 (10th ed. 1993). Creating a presumption which makes evidence unnecessary is an expeditious way to reach a result. But it is not the principled decision making which appellate courts should strive for. *See* Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837 (1991). A presumption of guilt in criminal cases would make convictions easier to obtain, but would lessen public confidence in the legitimacy of the courts. A gender based presumption as to the appropriate parent in a custody dispute would be expedient, but would injure

the public's trust and confidence in the judiciary. A presumption that Craig cannot rebut the Temp. Treas. Reg. § 1.71-1T(c) presumption suffers from the same flaws. It makes appellate decisionmaking easier, but because it ignores cases such as ***Shepherd*** and ***Hill***, finds facts on appeal, and presumes facts that do not exist, it too suffers from a lack of basis.

¶33 It makes no sense to me to turn disputes with state or federal agencies into "illegal" acts. While it might be worthwhile to consider the effect of a judgment convicting Leslie or Craig of tax evasion, there is nothing even suggesting that this might occur. The majority's new concept, though it simplifies the analysis in this case, alters standard of review principles, reintroduces a fault concept into divorce proceedings, and prevents litigants from explaining why they acted as they did. Were I writing a majority opinion, I would do a standard analysis, giving the trial court the deference to which it is entitled.

¶34 The reason this case is here is because Leslie failed to follow a stipulation to which she agreed in a post-divorce document. She did not move for relief from that stipulation. *See* WIS. STAT. § 806.07(1) (1999-2000). The stipulation is signed not only by Leslie and Craig, but by their respective attorneys. We do not know whether by paying income taxes on the § 71 payments she received, Leslie would have been doing an "illegal" act. Most people rely upon advice and documents prepared by their attorneys. The best that could be said here is that at the time she signed the agreement, Leslie could have been told that the IRS would presume Craig's payments to be non-deductible child support. Many people are told that their tax plans, especially in the income tax area, may or may not survive a governmental audit. That does not make those plans "illegal." Whether Craig, like the petitioners in ***Shepherd*** and ***Hill***, could have rebutted the presumption was not and for our purposes, is not known. What is known is that

Leslie unilaterally decided to breach her agreement and disobey the court's order by failing to pay taxes on the § 71 payments she received. But the majority does not find Leslie's act to be "illegal."

¶35 Were I writing for the majority, I would abandon its new analysis. The majority's pronouncement that the parties' agreement was "illegal" does not make it so. Instead, I would conclude that the trial court was properly exercising its discretion when it assigned the cost of Leslie's violation of its order totally to her. I would look for reasons to sustain the trial court, rather than for reasons to reverse it. *See* ***Magyar v. Wisconsin Health Care Liability Ins. Plan***, 211 Wis. 2d 296, 305, 564 N.W.2d 766 (1997). A rational explanation for the trial court's discretionary decision is that the divorce litigant who causes an ex-spouse a loss as a result of violating a court order should bear the cost of that loss. Section 71 payments were invented to increase income to a payee while giving the payer the advantage of an income tax deduction. The trial court recognized the unfairness of Craig agreeing to increase his payments and then denying him the benefit he expected because his ex-spouse decided to breach their agreement. To me, this is a proper exercise of discretion. I therefore respectfully dissent from the majority's opinion concluding that it is not.

¶36 I would also affirm the trial court's decision to assess Leslie $1,750 for attorney's fees and costs for the hearing. Had Leslie obeyed the order requiring her to pay income taxes on payments she received, Craig would not have had to hire an attorney or expend costs. To me, requiring Leslie to pay for her violation of the court's order is a proper exercise of discretion. I therefore respectfully dissent from the majority's conclusion that it is not.