COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3191 **Cir. Ct. No. 2005FA696**

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

IN RE THE MARRIAGE OF:

DAVID J. BALDWIN,

PETITIONER-APPELLANT,

V.

TANA M. BALDWIN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 PER CURIAM. David Baldwin appeals from a judgment of divorce and argues that the maintenance, child support, and property division

determinations are the product of an erroneous exercise of discretion. We reject David's claims and affirm the judgment.

¶2 David and Tana were married in October 1980. The divorce action was commenced in June 2005. David is a career member of the United States Navy and has been living in San Diego, California since November 2004. Three children were born to the marriage but only one was a minor, age seven, when this action was commenced. Throughout the years of the marriage Tana remained in Wisconsin raising the children and working when she could while David served at various naval stations in the United States and Japan.

¶3 The parties agreed to joint legal custody and primary placement of their minor child with Tana. David's child support obligation was set at seventeen percent, or $945 monthly. David was ordered to pay Tana $1000 monthly maintenance until she is eligible at age sixty-six for social security benefits.[1] Tana was awarded the parties' home and required to make an equalizing payment to David of $23,784 when their minor child reaches age eighteen or graduates from high school, whichever is later. That amount bears simple interest at five percent annually.

¶4 David first argues that the statement in the circuit court's written decision that David "resides in a state of concubinage with a woman to whom he has apparently presented an engagement ring," reflects bias and prejudice against David which permeated the court's decision. A claim of judicial bias is evaluated

[1] Tana was forty-six at the time of trial in December 2005. The judgment also directs that the amount of maintenance be adjusted when David retires and begins to draw on his military pension, which was split pursuant to a Qualified Domestic Relations Order. David testified that he would be done with his naval service in September 2008.

in both a subjective and an objective light. *See* ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). There is a presumption that a judge is free of bias and prejudice. ***Id.*** at 414. To overcome the presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is prejudiced or biased. *See* ***id.*** at 415. David fails to meet this burden.

¶5 Although colorful, the circuit court's reference to "concubinage" was not inaccurate. David himself advances a definition of "concubinage" as the "cohabitation of persons not legally married." That accurately describes David's living situation. David testified that he lives with a woman and shares some living expenses with her. There is no implied judgment that David was in an immoral or illegal living arrangement because the label was accurate. Moreover, David's living arrangement was relevant to the financial issues since he was sharing expenses with someone. Reference to his living situation was not, as David contends, wholly unnecessary for the decision. There is nothing to suggest that David was treated unfairly because of his living arrangement and bias did not exist. *See* ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298 (objective facts demonstrating judicial facts requires that the judge actually treated the defendant unfairly).[2]

¶6 Maintenance, child support and property division determinations are entrusted to the discretion of the circuit court, and are not disturbed on review unless

[2] David did not raise a claim of bias in the circuit court following the entry of the written judgment and has thus deprived this court of the judge's own determination of whether he was able to act impartially—the subjective component of the required analysis. *See* ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). In the absence of any objection, we assume that, by presiding, the judge believed that he could act in an impartial manner. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31.

there has been an erroneous exercise of discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. A discretionary decision is upheld as long as the 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.'" ***Id.*** (quoting ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995)). We accept all findings of fact made by the circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2005-06).[3]

¶7 The two primary objectives of a maintenance award are "to support the recipient spouse in accordance with the needs and earning capacities of the parties" and "to ensure a fair and equitable financial arrangement between the parties." ***King v. King***, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999) (citation omitted). With these goals in mind, the circuit court must apply the factors listed in WIS. STAT. § 767.56, to the facts of the case to determine whether maintenance is appropriate. *See* ***King***, 224 Wis. 2d at 249. The weight to be given to the relevant factors under the maintenance statute is committed to the circuit court's discretion. ***Metz v. Keener***, 215 Wis. 2d 626, 640, 573 N.W.2d 865 (Ct. App. 1997).

¶8 David contends that maintenance for twenty years is punitive considering the years the parties lived apart. He cites ***Schmitt v. Schmitt***, 2001 WI App 78, 242 Wis. 2d 565, 626 N.W.2d 14, as illustrating that it is appropriate to deviate from the presumption of a fifty-fifty division of income at the termination of a long-term marriage where the parties have lived separate lives in the years

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

preceding the divorce. In ***Schmitt***, the husband sought to equalize the parties' income by requesting maintenance of $2533 per month. ***Id.***, ¶11. The circuit court awarded him $500 per month, discounting the length of the marriage because of the parties' actual living arrangements and noting that the husband was underemployed. ***Id.***, ¶12. The wife had testified that for more than the last half of their thirty-eight-year marriage the couple lived separate lives, physically and financially.[4] ***Id.***, ¶5. The maintenance award was affirmed as a proper exercise of discretion considering the parties' separate finances, different standards of living, and the apparent lack of any contribution by the husband to the wife's earning capacity. ***Id.***, ¶17. The court held: "It was not impermissible for the court to consider the current and long-standing living arrangements and lifestyles of the parties." ***Id.***, ¶18.

¶9 This is not a ***Schmitt*** case. In ***Schmitt***, the parties maintained separate finances for more than fifteen years preceding the divorce. Here, although David was stationed away from the home during much of the marriage, the joint financial aspect of the marriage remained intact with the parties sharing their earnings to sustain their family. Although each had their own credit card, David handled the family finances when he was available to do so. He sent money to Tana on a regular basis to pay the mortgage on the home. Tana paid off a home equity loan incurred by the parties jointly. At best, only in the year preceding the divorce trial did David and Tana operate with wholly separate finances. The start and dismissal of two previous divorce actions does not change the fact that the

[4] The wife testified that the two lived in the same house, but on different levels, did not sleep together, had separate bank accounts, from which they made purchases at will, and shared some expenses. ***Schmitt v. Schmitt***, 2001 WI App 78, ¶5, 242 Wis. 2d 565, 626 N.W.2d 14.

parties operated as a financial unit.[5] This was a twenty-five year marriage and an equal division of the total income was the proper starting point. *See* ***Wikel v. Wikel***, 168 Wis. 2d 278, 282, 483 N.W.2d 292 (Ct. App. 1992) (when a couple has been married many years an equal division of total income is a reasonable starting point in determining maintenance).

¶10 David appears to argue that Tana is underemployed because she "conveniently" changed to a lower paying job on the "eve of trial." The circuit court found that Tana was employed at her earning capacity. That finding is not clearly erroneous. Tana was a high school graduate but did not complete her associate's degree at technical college because of health problems. She was out of the job market or only available for part-time employment during the years she served as the primary caretaker for the parties' children and because she suffered some health problems. As the circuit court noted, Tana continues to have child care responsibilities.[6] Tana explained that her income in the years preceding the divorce trial was boosted by overtime pay. That job was being eliminated when she secured new employment, albeit at a lower wage and with fewer overtime hours. Tana testified that she continues to look for work at her former hourly wage. There was no evidence that she was shirking.

[5] David suggests that the prior divorce actions were dismissed only so Tana could receive medical insurance after being married twenty years to Navy personnel. The reason for dismissal of the prior actions doesn't negate the length of the marriage.

[6] David suggests that Tana should put their youngest child in post-school activities and some hours of daycare so she can work longer hours. We reject the suggestion that more income could be imputed to Tana on this basis. She testified that she was working full-time and overtime in her current job was limited. Moreover, the decision to utilize daycare and other activities to allow more work hours is a decision to be made by the parent with primary placement.

¶11 An overall review of the maintenance award leads to the conclusion that it is a proper exercise of discretion. The circuit court considered the long-term nature of the marriage, the parties' respective ages, their earning capacities and job security, including David's anticipated retirement from the Navy, Tana's health issues, that the property division was limited to the home and David's pension, and the tax consequences of alternating the child dependency exemption. The amount of maintenance adjusts when David begins to draw on his pension. The duration of maintenance is tied to Tana's ability to draw social security benefits. A reasonable basis exists for the award and we affirm it.[7]

¶12 David argues the circuit court should have deviated downward from the child support standard because he will incur extraordinary travel expenses in exercising visitation with his youngest child. He also claims that child support should be waived during the periods of time the child spends with him.

¶13 It is presumed that child support established pursuant to the percentage standard is fair. ***Abitz v. Abitz***, 155 Wis. 2d 161, 179, 455 N.W.2d 609 (1990). The court may deviate from the percentage standards if it finds by the greater weight of the credible evidence that the use of the standard would be unfair to the child or the party requesting deviation. ***Mary L. O. v. Tommy R. B.***, 199 Wis. 2d 186, 193, 544 N.W.2d 417 (1996); WIS. STAT. § 767.511(1m). Extraordinary travel expenses incurred by one parent in exercising visitation is a

[7] David requests that we remand for a new evidentiary hearing to consider the current income of the parties and other current facts that have occurred since the trial in December 2005. That is not the function of this court. Current circumstances are relevant only to the extent they constitute a change of circumstances supporting a motion for modification of maintenance.

factor to be considered when determining fairness of the percentage standard. § 767.511(1m)(em).

¶14 The circuit court found that David's estimated annual costs of $2400 for visitation travel "is quite excessive." Although David's appellant's brief indicates that the child will fly out to California several times a year for at least three years, at trial he outlined expenses incurred for flights, hotels and rental cars when he has come to Wisconsin to visit the child. His trips to Wisconsin facilitate visits with his adult children as well. The circuit court rejected the notion that David's budget should include travel expenses he chooses to incur to travel to Wisconsin to visit his adult children since Tana continues to incur expenses related to their adult children.[8] This is a reasonable determination that David's travel expenses for visitation would not be extraordinary or otherwise render the application of the percentage standard unfair to David.

¶15 David's request that his child support be suspended for periods when the child is with him is raised for the first time on appeal. Except in rare circumstances that are not present here, we will not address an issue that an appellant raises for the first time on appeal. ***Greene v. Hahn***, 2004 WI App 214, ¶21, 277 Wis. 2d 473, 689 N.W.2d 657. Application of waiver here is appropriate because by not raising the issue in the circuit court, we are without findings on the amount of time David will be able to exercise visitation.[9] *See* ***id.***, ¶21 ("This case aptly demonstrates why we will generally invoke the waiver rule in order to

[8] The two adult children reside with Tana.

[9] Tana argued at the start of the divorce trial that it was difficult to determine how often David would really be able to spend with the child because of unknown time that David's ship might be at sea.

prevent the waste of judicial resources in both the circuit court and this one."). The issue is waived and we do not address it.[10]

¶16 With respect to the property division, David argues that it is undisputed that a large screen television was paid for with money gifted to him by his mother. He thinks the television should not have been counted as a marital asset. He acknowledges that the value of the television is de minimus. He simply argues that the circuit court's rejection of his uncontroverted testimony as unconvincing demonstrates the court's unfounded bias and prejudice against him. We do not agree. The circuit court's rejection of David's testimony that he paid for the television with money from his mother was a function of its role as the fact finder in weighing the credibility of witnesses. A witness's statement need not be contradicted by other evidence in the record as a condition precedent to the circuit court's review of the witness's credibility. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶28, 246 Wis. 2d 648, 630 N.W.2d 752. Since the parties agreed that personal property in their possession was of equal value and the value of the television as either a marital or nonmarital asset is de minimus, we do not address David's argument further. *See* ***Laribee v. Laribee***, 138 Wis. 2d 46, 51, 405 N.W.2d 679 (Ct. App. 1987) (we will not reverse a circuit court's decision if the difference would be de minimus).

¶17 David complains that in allowing Tana ten years to pay the equalizing payment to him no thought was given to the fact that he remains personally liable on each of the mortgages on the homestead. However, Tana

[10] David again requests a remand for a determination based on current circumstances, particularly Tana's 2006 gross earnings and what efforts she has made to improve her job and earnings. Only a motion to modify support can explore possible changed circumstances.

reports in her respondent's brief that since entry of the judgment she has refinanced the home mortgage and is solely responsible now. David does not object to this information coming to the court and concedes that it moots this one complaint about the property division.

¶18 David's other contention is that the delay of possibly ten years in receiving his equalization payment is unfair and he has no security for the payment. The later point is actually fleshed out for the first time in David's reply brief. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). David should take his request that he be provided security for the equalization payment to the circuit court if there is a change of circumstances supporting such a request.

¶19 We are not persuaded that the delay in payment is an erroneous exercise of discretion. The "desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time" is an appropriate consideration in property division. WIS. STAT. § 767.61(3)(h). By linking the equalization payment to the youngest child's graduation from high school or eighteenth birthday, the circuit court was making the family home available to the parent with primary physical placement. David is compensated for the delay by the provision for interest. We also note that in arguing against an unequal division of property, David specifically suggested that Tana could stay in the house if she was granted the right to delay the equalization payment, plus interest, until the child reached majority. David cannot now complain about a provision in the judgment that he suggested. *See* ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (where a party

has induced certain action by the trial court, he or she cannot later complain on appeal).

By the Court.—Judgment affirmed.

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