COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2628 **Cir. Ct. No. 00-FA-96**

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

IN RE THE MARRIAGE OF:

DARLA L. GEBHARD,

PETITIONER-RESPONDENT,

V.

KELVIN G. GEBHARD,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 DYKMAN, J. Kelvin Gebhard appeals from post-divorce maintenance, child support, and property division orders, as well as denial of his

recusal and overtrial motions. We affirm the trial court's denial of the recusal and overtrial motions. We remand the maintenance and child support orders with directions to reconsider the tax consequences of the awards. We do not reach the issue of the property division order.

I. BACKGROUND

¶2 On June 8, 2001, Darla Gebhard and Kelvin Gebhard divorced after almost eighteen years of marriage. The parties' children were sixteen and seventeen years old. The trial court awarded physical placement of the children to Darla and ordered Kelvin to pay child support.[1] The court also ordered maintenance for Darla until 2010. It found that Kelvin had provided over 70% of the family's income working at John Deere as a Senior Test Technician. Each year for the past three years, he received a bonus of approximately $5,000 and in May of 2000, he received a 3% raise in his salary. Since 1997, however, he cannot get overtime pay without company approval. Currently, Darla is an Assistant Supervisor at Swiss Colony S.C. Data Service. The trial court found that she was primarily responsible for caring for the children and home. Throughout

[1] The trial court child support order reads:

> Pursuant to DWD 40, child support shall be followed. 25% of petitioner's gross income shall be paid as child support until the eldest child has reached the age of majority, or up to age 19 if he is actually pursuing a high school diploma or its equivalency. When the oldest child reaches age 19 or graduates from high school, child support shall then immediately decrease to 17% without further order and continue likewise until the youngest child has reached the age of majority or is likewise less than 19 but pursuing a high school diploma or its equivalency. Child support shall end immediately, or upon his 19th birthday, or when he graduates from high school, whichever occurs first.

the marriage, she also held a variety of clerical jobs. Prior to marriage, Darla was a legal secretary and receptionist at Kopp, McKichan & Geyer for three years.

¶3 The court ordered Darla to make a $33,702 equalization payment to Kelvin over ten years, in monthly installments. The court divided the remainder of the marital property equally between the parties, except for two life insurance policies and two certificates of deposit. The court found that the parties stipulated to awarding those items to the children.

II. ANALYSIS

A. Recusal

¶4 WISCONSIN STAT. § 757.19(2)(g) (1999-2000)[2] requires a judge to disqualify himself if he determines he cannot, or it appears he cannot, act in an impartial manner. The supreme court has held that this determination is subjective. ***State v. Harrell***, 199 Wis. 2d 654, 664, 546 N.W.2d 115 (1996). Appellate review is limited to determining whether the judge made a subjective determination. ***Id.*** at 663-64.

¶5 Kelvin argues that the trial judge did not make a sufficient subjective determination as to his impartiality. He also claims the judge's facial conclusions contradict the substance of his analysis. The trial judge concluded that he could be fair to both parties irrespective of his prior contact with Darla. His opening remarks acknowledged that Darla was an old friend. Over twenty years ago, she had worked as a secretary at the law firm where he was an associate lawyer. He

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

had only minimal contact with Darla within the last twenty-two years, however, and had no knowledge of her family or financial condition. Because the trial judge made a subjective determination of his impartiality, he satisfied the requirements of WIS. STAT. § 757.19(2)(g).

¶6 Kelvin argues that an objective test still exists under WIS. STAT. § 757.19(2)(g). He relies upon Justice Abrahamson's concurrence in ***State v. Harrell***, discussing the importance of retaining some objective assessment for judicial review of a judge's determination under § 757.19(2)(g). ***Harrell***, 199 Wis. 2d at 666 (Abrahamson, J., *concurring*). In that case, the supreme court declined "to provide an objective standard of review for the initial subjective decision by a judge not to disqualify himself or herself." ***Id.*** at 664. We apply the holding of ***Harrell***, not its concurring opinion, because we are bound by the majority opinion of the supreme court. ***Dane County Hosp. & Home v. LIRC***, 125 Wis. 2d 308, 320 n.4, 371 N.W.2d 815 (Ct. App. 1985). We affirm the trial court's decision denying Kelvin's motion to recuse.

B. Child Support and Maintenance Orders

¶7 Kelvin argues that the court failed to consider that a family support order would save about $200 each month in taxes. A court must consider tax consequences when ordering child support or maintenance. WIS. STAT. §§ 767.26(7) and 767.25(1m)(h). There is no statutory requirement, however, for a court to implement support awards that avoid the most income tax. We affirm support orders when a trial court makes a rational, reasoned decision and applies the correct legal standard to the facts of record. ***Sellers v. Sellers***, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). We accept the trial court's findings of fact that support its exercise of discretion unless they are clearly erroneous. ***Id.***

¶8 The divorce judgment determined that the tax benefits of family support were minor. The trial court anticipated that Kelvin would want to reduce child support once one or both of his children reach majority. Because the sons were sixteen and seventeen years old at the time of the divorce, the court implemented a self-executing order that required no further judicial review. Essentially, the court found that the advantages of a self-executing order outweighed the taxes saved while the children were still minors. This finding is not clearly erroneous. Kelvin would have saved approximately $150 a month for not more than two years. This savings does not clearly outweigh the cost of a second hearing.

¶9 Kelvin also argues that the child support and maintenance orders inequitably divide the parties' earned income. Before taxes, the child support and maintenance orders divide the income 45% to Kelvin and 55% to Darla. After taxes, Darla receives 66% of the disposable income.[3] Kelvin argues that, at the very least, he should receive 45% of the net earned income. At trial, Darla proposed that she receive 55% of the disposable income and Kelvin asked the court to equalize the net income. Both parties based their calculations on disposable net income. The trial court, the divorce judgment, and the record do not explain why the court split the net earned income 34% / 66%. Discretionary determinations must have a basis. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306

[3] Together, Darla and Kelvin have gross monthly income of $7,449. Assuming a support payment of $2,262.50 is subtracted from Kelvin's monthly gross income ($5,450), and added to Darla's ($1,999), there is a 45/55 division of gross income. If Kelvin pays $1,339 in taxes and Darla only pays $599.33, as calculated in Kelvin's brief, he ends up with net income of $1,849 while Darla has $3,553 per month. Thus the after-tax assignment of income is 34% / 66%.

N.W.2d 16 (1981). We remand for further consideration of the tax consequences of the child support and maintenance orders.

¶10 Kelvin claims that the trial court erred by considering only Darla's standard of living in setting the child support and maintenance orders. He also argues that the court failed to evaluate the relevant statutory factors such as Kelvin's health problems when setting the length of the maintenance award. Since Kelvin's arguments depend upon the terms of the child support and maintenance orders, which we have remanded, we need not consider those issues.

¶11 Finally, Kelvin claims that the court erred by requiring him to live off his property division, while not requiring Darla to do so. Kelvin's purported need to live off his property settlement might depend upon the terms of the child support and maintenance orders. But we cannot ascertain if that is true because Kelvin's briefs provide no explanation to support this argument. We decline to explore this undeveloped issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

C. Kelvin's Bank Account

¶12 The trial court included the parties' bank accounts in its calculation of the marital estate. Kelvin claims the balance of his bank account was a negative $760, not $760 as the court determined. The evidence supports Kelvin's claim and no evidence contradicts it. We may reverse clearly erroneous mathematical errors by a trial court. ***Schinner v. Schinner***, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988). If an appellant did not bring a post-trial motion to correct the error, we have discretion to construe this failure as a waiver of the right to appeal the manifest error. ***Id.*** Although Kelvin failed to move for reconsideration, we will not invoke waiver here because we have remanded other related issues, and

this issue can be easily addressed with the other remanded issues. We therefore remand for further consideration of this issue.

D. Award to Children

¶13 Kelvin claims the court erred by awarding property to the children. Unless stipulated otherwise, a court shall divide property between the parties. WIS. STAT. §§ 767.255(1) and (3). The court found that the parties had stipulated to giving two life insurance policies and two custodial bank accounts to the children. This finding was clearly erroneous because the parties disagreed on how to dispose of these assets, and did not stipulate as to the bank accounts. At trial, Darla wanted to give these assets to the children. In her brief, she argues that the custodial accounts were not marital property. Her argument, however, lacks sufficient explanation or legal authority; we do not know whether she contends this is a matter of fact or law. Because we may decline to consider undeveloped arguments, we will not explore this issue further. *See* ***Pettit***, 171 Wis. 2d at 647. At trial, Kelvin asked the court to award the assets to him, so he could ensure the money funded the children's education. Absent a stipulation, the trial court has discretion to set aside a portion of the property in a separate trust for the education of the children. Section 767.255(1). Alternatively, the court may divide the assets between the parties of the divorce. Section 767.255(3). We remand so the trial court may exercise its discretion as to the disposition of the accounts.

E. Calculation of Income

¶14 Kelvin raises several questions about the court's calculation of his income. We conclude that the trial court based its calculation of Kelvin's earned income on his 2000 tax return. Kelvin claimed his income was $62,640 in 2000. He received a 3% raise in May of 2000. The court determined his gross income

to be $65,400.[4] Although not exact, the support order predicts future income, including future raises. This calculation is not clearly erroneous.

¶15 Kelvin argues that the court based the child support and maintenance orders on his earning capacity. A court should consider earning capacity when a spouse's employment decision is voluntary and unreasonable. ***Sellers***, 201 Wis. 2d at 587. The court did not find that either party had unreasonable employment. The court entitled paragraph twenty-two of the Findings of Fact "Earning Capacity" and listed each party's gross earned income for the past four years. The "Earning Capacity" section, however, did not analyze either party's earning capacity. Neither Kelvin's brief nor the record demonstrates that the court used earning capacity to calculate Kelvin's income. We need not consider this issue further.

¶16 Kelvin also argues that the court expected his future income to include overtime. But neither the divorce judgment nor the record indicates that the court relied upon Kelvin's salary in 1997, which was the last year he received overtime payments. This argument is without merit.

¶17 Finally, Kelvin contends that the court believed that his 2000 tax return excluded his bonus. It is irrelevant, however, whether the trial court misunderstood the 2000 tax return. It was not clearly erroneous for the court to use the 2000 tax return, which included a bonus to calculate Kelvin's 2001 and 2002 income because there was no evidence that the bonuses would cease. We

[4] This amount is $881 more than 1.03% of Kelvin's 2000 income.

conclude that the 2001—3% salary raise justifies the trial court's income calculation.

F. Overtrial

¶18 Kelvin argues that the court erred by not finding that Darla overtried this case and by not awarding him attorney's fees. Whether excessive litigation occurred is a question of fact reserved for the discretion of the trial court. ***Zhang v. Yu***, 2001 WI App 267, ¶11, 248 Wis. 2d 913, 637 N.W.2d 754. We conclude that the trial court properly exercised its discretion in finding that neither party clearly over litigated the case nor advanced frivolous issues or claims. Each party called two witnesses, presenting all of the evidence in less than two days. There was one temporary hearing and one motion hearing. The court's finding was not clearly erroneous.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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