COURT OF APPEALS
DECISION
DATED AND FILED

January 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-2140
03-0745

Cir. Ct. No. 90FA000619

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

IN RE THE MARRIAGE OF:

JEFF P. BRINCKMAN,

PETITIONER-APPELLANT,

V.

MAURA (BRINCKMAN) WEHRENBERG,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for La Crosse County: WILLIAM D. DYKE, Judge. *Affirmed and cause remanded with directions*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Jeff Brinckman appeals two circuit court orders in this divorce case. At the outset, we note that Brinckman has raised over thirty separate arguments on appeal, many of which have sub-arguments. Brinckman

repeatedly engages in the practice of asserting facts without providing record cites. Several of Brinckman's arguments are so undeveloped or patently frivolous that they merit no express treatment by this court. Suffice it to say, we deem the arguments we do not address to be frivolous. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

¶2 Brinckman argues that the circuit court misused its discretion because it did not base his child support award on the monthly "base" salary he pays himself through his corporation. Brinckman is an attorney in solo practice and he operates his law practice as a service corporation. Brinckman decides what to pay himself monthly, and that amount does not correspond to the gross or net earnings of his corporation in a given month. It is well established that the circuit court may look beyond the structure of a service corporation to set child support. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 684-85, 492 N.W.2d 361 (Ct. App. 1992). The circuit court here properly exercised its discretion in ignoring Brinckman's corporate status when determining child support because Brinckman's actual income exceeds what he pays himself as an employee. Brinckman's argument that the circuit court should have only looked at his "base" salary is frivolous.

¶3 Brinckman argues that the circuit court erred when it calculated his child support payments based on a percentage of his income because the percentage method was repealed by the legislature in 2001. This argument badly misses the mark. The amendment to the child support statutes in 2001 required that the amount of support be *expressed* as a fixed amount in most cases. *See* WIS.

STAT. § 767.25(1)(a) (2001-02)[1] ("The support amount must be expressed as a fixed sum unless the parties have stipulated to expressing the amount as a percentage of the payer's income and the requirements under s. 767.10(2)(am)1. to 3. are satisfied."). The revision did not affect the use of percentage standards in *calculating* support. This argument is frivolous.

¶4 Brinckman contends that the circuit court erred when it imputed to him as income the value of contributions to his retirement account. However, under WIS. ADMIN. CODE § DWD 40.02(13)(a)7., "gross income" for purposes of calculating child support includes voluntary contributions to retirement accounts.

¶5 Brinckman also argues that imputing contributions to his retirement plan violates the equal protection clause of the United States Constitution because he is being treated differently than an employee who has a pension plan through an employer, such as the State of Wisconsin. *See* ***State v. Avila***, 192 Wis. 2d 870, 879-80, 532 N.W.2d 423 (1995) (the equal protection clause provides that similarly situated persons should be accorded similar treatment). However, Brinckman's equal protection argument is poorly developed. Brinckman does not even address the level of scrutiny we should apply to this situation. Moreover, Brinckman compares apples and oranges. He compares voluntary contributions with employer-determined contributions. Brinckman states that if he was a government employee making $31,613 per year and the government contributed $5,152 per year to a retirement plan, those contributions—over which he would have no control—would not be counted for purposes of child support. Brinckman

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

then argues that his similar voluntary contributions to a retirement plan should be treated the same way. Brinckman fails to discuss or explain why the difference between voluntary and non-voluntary is inconsequential. We think it obvious that this is a difference that does matter, and it is easily sufficient to account for the difference in treatment. Brinckman's hypothetical employee has no access to the employer contributions. Brinckman, however, could choose to increase his current income. It is *his* decision to defer the income. The Department of Workforce Development rule defining gross income reflects this obvious difference. Under the rule, gross income includes:

> Voluntary deferred compensation, employee contributions to any employee benefit plan or profit-sharing, and voluntary employee contributions to any pension or retirement account whether or not the account provides for tax deferral or avoidance.

WIS. ADMIN. CODE § DWD 40.02(13)(a)7.

¶6 Brinckman contends that the circuit court should not have imputed to him as income the value of a car lease that his corporation provides him. Under WIS. ADMIN. CODE § DWD 40.02(13)(a)10., the circuit court may consider "[a]ll other income." The circuit court's decision to include the value of the car lease is encompassed by this administrative code provision. Brinckman also maintains that the circuit court should have excluded half of the value of the car lease because he presented documentation that half of the car's use was for business purposes. We reject this argument. It does appear that the circuit court attributed to Brinckman as income the full amount of his auto lease. However, the documentation Brinckman points to does not show that half of the miles driven were for purposes of his law practice. The vast majority of these alleged business miles are for commuting to Brinckman's job as an instructor at UW-La Crosse.

Brinckman does not explain how teaching a law course in La Crosse is related to his law practice or why his commuting miles are a proper business expense. Accordingly, Brinckman's argument that the circuit court should have reduced his auto lease income by 50% is meritless. Because Brinckman makes no alternative argument on this topic, we address the matter no further.

¶7 Brinckman next argues that the circuit court should not have concluded that he has a child support arrearage for 2002 because the circuit court modified his child support in March 2003. He appears to argue that there was no order for him to violate because the initial order was modified by the subsequent order. This argument is frivolous. Brinckman did not seek a stay of the original order, and he failed to comply with it. In 2002, he paid only $8,799.96 in support, rather than $21,516 as ordered. The circuit court's subsequent order reducing his child support obligation, which the court applied retroactively, reduced the amount of his arrearage, but did not eliminate his obligation to pay support altogether.

¶8 Brinckman argues that the circuit court should have reduced his gross income by his state taxes before determining his child support obligation because the court reduced his gross income by the amount of his federal taxes. The circuit court was not required to reduce Brinckman's gross income by federal taxes in the first place. *See* WIS. ADMIN. CODE § DWD 40.03 (the court should use annual gross income in determining child support). The circuit court explained that it did so because Brinckman would face higher taxes as a self-employed person. The circuit court's allowance on this point in no way compelled the court to also exclude Brinckman's state taxes from his gross income for support purposes. This argument is frivolous.

¶9 Brinckman contends that the circuit court's 2003 order must be reversed because it states that his child support arrearage of $4,184.00 is for 2001 and the reference to the year 2001 is either "a typographical mistake or a clear error." We agree that the order contains an obvious typographical error. The circuit court's decision does not calculate an arrearage for 2001, but does for 2002. Indeed, following this calculation, the opinion expressly states that Brinckman "is in arrears for 2002 in the amount of $4,184.04." When the decision, one page later, states that Brinckman "has an arrearage on 2001 support payments of $4,184.00," the year is an obvious typographical error. We doubt there is any need to correct this error because it is unreasonable to read the order as imposing on Brinckman an arrearage for the year 2001. But even if there is a need to have this error corrected, there was no need to raise the issue on appeal. Brinckman could have moved the circuit court to direct the clerk to correct this error.

¶10 Brinckman next argues that he is not obligated to pay orthodontic expenses because, although the original marital settlement agreement provided that he pay one-half of "the children's medical, dental, orthodontic, drug, and related expenses not covered by … insurance," a subsequent order did not specifically list orthodontic expenses, but instead provided that he pay "one-half of all necessary medical and hospital bills … not covered by insurance." Orthodontic expenses are a subset of medical expenses and, based on our review of the lengthy record, we believe it is completely clear that when the subsequent order was entered there was no intent to eliminate Brinckman's obligation to pay orthodontic expenses. This is a transparent example of Brinckman looking for a technical loophole where none exists.

¶11 Brinckman next contends that the circuit court misused its discretion when it failed to put his year-end bonus payments into a trust fund for the children,

rather than give his ex-spouse Wehrenberg control over the money. "When a non-custodial parent seeks imposition of a trust …, that parent must demonstrate by substantial evidence that the trust, which substantially alters the custodial parent's decision making authority, is in the best interests of the children." ***Cameron v. Cameron***, 209 Wis. 2d 88, 105, 562 N.W.2d 126 (1997). As proof of Wehrenberg's poor financial management, Brinckman points to the fact that she has not saved any of the child support money for college expenses. Brinckman has not even attempted to demonstrate that he produced evidence, which the circuit court was compelled to accept as true, supporting the determination that his ex-spouse is a poor money manager. In the absence of such evidence, Brinckman's argument that the circuit court misused its discretion by not finding that his wife was a poor money manager and, thus, by not ordering bonus money into a trust fund is frivolous.

¶12 Brinckman next argues that the circuit court double-counted the amount of money he put into his retirement plan. Brinckman's argument on this topic, like several others, is difficult to understand. Brinckman states that the circuit court treated $6,000 of payments in 2002 as income and then double-counted that $6,000 in 2003 when the court "included all $16,000 paid in 2002, including the $6,000 already counted in the 2002 formula." Brinckman does not, however, relate these assertions to his tax returns or to the specific language of the court's order. Our review of Brinckman's business tax returns and the court's order reveals that Brinckman made a $16,000 retirement contribution in 2002, which the circuit court attributed to his 2002 income, and he made a $6,000 retirement contribution in 2001, which the circuit court attributed to his 2001 income. Thus, from this court's perspective, Brinckman's argument is either frivolous at its core or frivolous because it is undeveloped and obscure.

¶13 Brinckman also contends that the circuit court erred because it double-counted his vehicle lease payments. Once again, his argument is either meritless at its core or undeveloped. In either event, we deem it frivolous. Brinckman asserts that the circuit court used his 2002 auto lease payment (an amount the court considered to be income) for purposes of calculating his 2002 child support obligation. Brinckman asserts the court then used the *same* lease payment to calculate his 2003 child support obligation. As far as we can determine, the upshot, according to Brinckman, is that the court counted a $5,000 auto lease payment—part of a larger $16,692 payment—as income to him in both 2002 and 2003, thus double-counting the $5,000 amount.

¶14 Our first response is that Brinckman fails to provide record cites showing that the circuit court used the 2002 auto lease payment for purposes of calculating his 2002 child support obligation. Brinckman simply makes this assertion without explaining why it is true. Our second response is that our own review suggests that the circuit court looked at Brinckman's 2001 financial information when attributing the $5,000 amount to him. Brinckman testified that his corporation paid the net amount of $10,000 for a two-year automobile lease encompassing 2001. A reasonable inference from his testimony is that his corporation made this payment in the year 2000 for the years 2000 and 2001. This, of course, is distinct from the three-year $16,692 auto lease Brinckman asserts his corporation entered into and paid for in 2002. We conclude that this double-counting argument is frivolous.

¶15 The circuit court ordered Brinckman to pay a portion of Wehrenberg's attorney's fees. The amount, $3,442.25, related to work done in January and February 2003, culminating in a hearing on February 18, 2003. The

request for these fees was made orally at the end of the February 18 hearing. Brinckman makes several challenges to this part of the circuit court's order.

¶16 First, Brinckman complains that he was denied advance notice of the motion, as required by WIS. STAT. § 801.15(4) and (5). This argument is meritless. In any event, the argument is waived because Brinckman makes it for the first time on appeal. He states in his appellate brief that he objected at the time, saying: "There is no motion for attorney's fees." However, this statement to the circuit court did not advise the circuit court that Brinckman believed the motion was either improper or in violation of any statute. The only apparent complaint Brinckman had was this: "If [the attorney for Wehrenberg] would have filed one [earlier], I certainly would have filed one, and let me make the record on this." Also, Brinckman completely fails to demonstrate that § 801.15 requires advance notice of the particular motion at issue here. And, even if it does, the circuit court gave Brinckman six days to submit written argument on the topic.

¶17 Brinckman's next argument assumes that the circuit court awarded Wehrenberg attorney's fees under the "need and ability" test. *See* ***Ably v. Ably***, 155 Wis. 2d 286, 293, 455 N.W.2d 632 (Ct. App. 1990), and WIS. STAT. § 767.262(1)(a). Brinckman complains that the circuit court did not make the necessary findings to support application of the common law test or the statute. The problem with Brinckman's argument is that there is no indication that the circuit court awarded fees based on Wehrenberg's need. Wehrenberg did not ask for a contribution to her attorney's fees based on her financial situation, and her request was not a general request for a contribution. Instead, Wehrenberg requested attorney's fees relating to a specific part of the litigation, i.e., responding to the motions Brinckman filed while this case was briefly remanded to the circuit court. Wehrenberg testified that she had spoken with Brinckman about the

expense of the litigation, and Brinckman told her: "Then get rid of your attorney." Brinckman disputed this testimony and asserted that Wehrenberg either rejected a settlement offer or was never told about it. We think it evident that Wehrenberg's request was not based on her financial need, but on an allegation that Brinckman was abusing his ability to litigate *pro se* in an attempt to coerce Wehrenberg to give up representation. Accordingly, Brinckman should know that his arguments regarding the "need and ability" test and § 767.262(1)(a) are not pertinent.

¶18 Brinckman makes a series of arguments relating to the reasonableness of the amount of the attorney's fees. Here, Brinckman's problem is twofold. First, he had an opportunity to challenge the reasonableness of the fees—detailed in Exhibit 100 by date, time spent, activity, and billing rate—and he failed to do so. As noted above, the circuit court gave Brinckman six days to file a written response to the request for fees. Brinckman did nothing, and he has waived his argument for purposes of appeal. Second, Brinckman makes the absurd allegation that he was charged $3,412 for two hours of attorney time, the time Wehrenberg's attorney attended the February 18 hearing. However, the billing that was submitted plainly shows that most of the fees relate to reviewing Brinckman's motions and to preparatory work for the hearing.[2]

[2] Brinckman also complains about the hourly rate charged by Wehrenberg's attorney. Once again Brinckman's argument is undeveloped and unsupported. His factual assertions about billing rates in Crawford County are not based on evidence, but on his own unsworn in-court assertions. And, even if the circuit court accepted his assertions as true, those assertions obviously fail to establish that the rates charged by Wehrenberg's attorney are unreasonable. Rates among attorneys vary. More to the point, Brinckman has presented no legal analysis showing that the circuit court was required to accept his apparent assertion that the only reasonable rate is in the $85 to $100 per hour range.

¶19 Finally, Brinckman makes two arguments that are particularly troubling because they are groundless attacks on the integrity and fair-mindedness of the circuit court. Brinckman accuses the circuit court of relying on "old-fashioned notions" of gender roles when awarding Wehrenberg attorney's fees. Brinckman also accuses the circuit court of imposing the fees as a means of retaliation. Brinckman states: "Brinckman had challenged Judge Dyke in the Court of Appeals and it was clear to Brinckman that he was going to be punished for taking that appeal." We agree with Wehrenberg that there is not a speck of evidence to support these allegations. Brinckman points only to the result, and then engages in pure speculation regarding the circuit court's motivation. Needless to say, we deem these arguments frivolous.

¶20 In his reply brief, Brinckman belatedly addresses the obvious basis for the circuit court's attorney's fees order, namely overtrial. However, even here his argument is largely based on his assertion that the arguments he made before the circuit court were meritorious. Essentially, he presents a one-sided view of the litigation—without supporting record cites—calculated to persuade this court that he proceeded reasonably. We reject Brinckman's argument against overtrial for two reasons. First, overtrial was the obvious basis for the circuit court's order, and Brinckman's failure to address the topic in his brief-in-chief is inexcusable. His failure to challenge the order on that basis constitutes waiver, and raising the argument for the first time in his reply brief has denied Wehrenberg an opportunity to rebut his factual assertions. Second, Brinckman's argument fails to present a full and accurate picture of the litigation on remand. Moreover, to the extent Brinckman is repeating arguments he has already made, we have concluded that such arguments either are frivolous or are so underdeveloped that they merit no express attention.

¶21 Brinckman next contends that Judge Dyke should not have been assigned to replace Judge Robert Wing. Brinckman asserts that the assignment of this case to Judge Dyke appears to have been the result of "improper forum shopping" by Wehrenberg. Brinckman is referring to Wehrenberg's previous failed effort to obtain substitution of Judge Wing. Brinckman asks that we send this case back to Judge Wing pursuant to the ***Bacon-Bahr*** rule.[3] Brinckman's argument is frivolous because it is based on speculation that is completely unsupported by facts. Brinckman points to nothing indicating that Wehrenberg was involved in the assignment of the case to Judge Dyke.

¶22 Having disposed of Brinckman's arguments, we turn our attention to Wehrenberg's request that we declare this appeal frivolous and award her fees and costs of the appeal pursuant to WIS. STAT. RULE 809.25(3). Under this rule, we may only declare an appeal frivolous if every argument made by the appellant is frivolous. ***Manor Enters., Inc. v. Vivid, Inc.***, 228 Wis. 2d 382, 403, 596 N.W.2d 828 (Ct. App. 1999). We conclude that all of the arguments Brinckman makes on appeal are frivolous.[4] Therefore, we remand to the circuit court for a determination of fees and costs related to this appeal. *See* ***Zhang v. Yu***, 2001 WI App 267, ¶23 n.4, 248 Wis. 2d 913, 637 N.W.2d 754. Brinckman has also moved

[3] The ***Bacon-Bahr*** line of cases is a series of divorce cases decided between 1874 and 1977 beginning with ***Bacon v. Bacon***, 34 Wis. 594 (1874), and culminating with ***Bahr v. Galonski***, 80 Wis. 2d 72, 257 N.W.2d 869 (1977). The ***Bacon-Bahr*** rule provides that statutory substitution does not apply to certain proceedings, including motions to modify divorce judgments. *See* ***State ex rel. Parrish v. Kenosha County Circuit Court***, 148 Wis. 2d 700, 703, 436 N.W.2d 608 (1989).

[4] We have already acknowledged that Brinckman has identified a typographical error in one of the orders. However, we have also explained that it is dubious whether this is an error in need of correction and that there was no need to bring this appeal to have such an obvious typographical error corrected. Thus, as an appellate issue, we deem this argument frivolous.

for attorney's fees, arguing that Wehrenberg's responsive arguments are frivolous. In light of the above discussion, it is readily apparent that Wehrenberg's responsive arguments are far from frivolous and, therefore, we deny Brinckman's motion.

By the Court.—Orders affirmed and cause remanded with directions.

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