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DISTRICT I

April 26, 2022

To:

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Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
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Sophia Bierman
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You are hereby notified that the Court has entered the following opinion and order:

2021AP500 Sophia Bierman v. Jon Paul Levenhagen (L.C. # 2008FA1549)

Before Brash, C.J., Dugan and Gundrum, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Sophia Bierman, *pro se*, appeals an order entered on February 25, 2021, denying her post-divorce motion for modification of her child support arrearage and for reimbursement of the $31,222.26 that she paid as child support to her former husband, Jon Paul Levenhagen. Based upon our review of the briefs and record, we conclude at conference that this matter is

appropriate for summary disposition.[1] *See* WIS. STAT. RULE 809.21. We are satisfied that: Levenhagen timely requested a *de novo* hearing in circuit court following entry of a decision by an assistant family court commissioner; the circuit court properly declined to offset Bierman's support obligation to Levenhagen with the Social Security disability benefits that the parties' adult children received; Bierman forfeited her claim for attorney's fees; and Bierman's remaining allegations do not provide a basis for relief. Accordingly, we summarily affirm.

The parties divorced in 2009. Levenhagen was awarded legal custody and primary placement of the couple's minor son and daughter, E.L. and H.L. Bierman was required to pay child support. The support orders were largely based on imputed income because she was not working and was instead pursuing a claim for Social Security disability benefits. From the time of the divorce until 2019, Bierman paid Levenhagen $7,066.27, most of which was money withheld from an income tax refund and from a personal injury settlement. In late 2018 or early 2019—the precise date is not in the record—the Social Security Administration (SSA) determined that Bierman was disabled as of October 2010, and eligible for disability benefits as of June 2011. The SSA's determination included a finding that Bierman was owed $96,000 in past-due benefits. In light of Bierman's child support arrearages, however, the SSA withheld certain sums from the back benefits it paid to her, and from those sums, Levenhagen received

[1] In her reply brief, Bierman asks that we strike Levenhagen's respondent's brief, apparently because she believes that Levenhagen used too large a typeface. Bierman misunderstands the rules governing the formatting of an appellate brief. *See* WIS. STAT. RULE 809.19(8)(b) (2019-20). Regardless, requests for procedural orders should not be inserted into a reply brief. Such requests should be proffered in a motion under WIS. STAT. RULE 809.14, thereby allowing the opposing party an opportunity to respond. Accordingly, we deny Bierman's request to strike the respondent's brief. All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted

disbursements totaling $24,155.99, representing Bierman's delinquent child support and accrued interest.

The SSA also determined that E.L. and H.L. were entitled to child's benefits based on Bierman's disability. *See* 42 U.S.C. § 402(d). The children, however, were no longer minors. E.L. had his eighteenth birthday in May 2016, and, by letter dated May 1, 2019, the SSA notified E.L. that it would disburse child's benefits of $14,519 directly to him. H.L. had her eighteenth birthday in March 2018, but she is disabled and was placed under a guardianship when she reached adulthood. Her institutional guardian received her child's benefits, the precise amount of which was not disclosed to the circuit court and is not in the record.

In January 2020, Bierman moved for modification of her child support arrears and for reimbursement of the $31,222.26 in child support that Levenhagen received on her behalf. She claimed that the child's benefits that the SSA paid to each of her adult children satisfied the entirety of her obligation to pay child support. On June 2, 2020, an assistant family court commissioner conducted a hearing on Bierman's claims and entered an order that retroactively held open her support obligation effective October 1, 2010. As to reimbursement, the commissioner certified that issue to the circuit court.

On June 24, 2020, Levenhagen requested *de novo* review by the circuit court. Bierman challenged the timeliness of his request, claiming that the filing deadline fell on June 17, 2020, but the circuit court rejected the challenge. Following a series of hearings, the circuit court denied Bierman's claims for relief, and she appeals.

Bierman first renews her claim that Levenhagen made an untimely request to the circuit court for *de novo* review of the court commissioner's decision. Where the facts are undisputed,

the determination of whether a party met a filing deadline is a question of law that we review independently. *See* ***Lippstreu v. Lippstreu***, 125 Wis. 2d 415, 416, 373 N.W.2d 53 (Ct. App. 1985).

Bierman relies on form language in the court commissioner's June 2, 2020 order stating: "either party has 15 days from the date this order is signed to seek *de novo* review before the assigned judge pursuant to WIS. STAT. § 757.69(8) and local court rules." The applicable local court rules provide that a request for *de novo* review of a family court commissioner's order must be filed "no later than 15 business days after the date of the order ... to be reviewed, or, if the order ... is delivered to the parties by mail rather than in person, no later than 18 business days after the date of mailing of the order[.]" *See* Milwaukee Cnty. Ct. R. 5.31(B). In this case, the court commissioner conducted the June 2, 2020 hearing remotely via Zoom, and Levenhagen, who represented himself at that hearing, received his copy of the order by mail. Levenhagen sought *de novo* review on June 24, 2020, a date sixteen business days after entry of the order.[2] Accordingly, his request for *de novo* review was timely filed.

Bierman next contends that the circuit court improperly denied her request to adjust her child support obligation. She seeks: (1) credit against her accrued child support based on the child's benefits that the SSA disbursed to her adult children; and (2) an order that Levenhagen reimburse her for all of the $31,222.26 that he received from her as child support. A circuit court has discretion to grant credit against a child support arrearage under the limited circumstances set forth in WIS. STAT. § 767.59(1r). *See* ***Barbara B. v. Dorian H.***, 2005 WI 6, ¶15, 277 Wis. 2d

[2] We may take judicial notice of the days of the week. *See* ***State ex rel. Shimkus v. Sondalle***, 2000 WI App 262, ¶13, 240 Wis. 2d 310, 622 N.W.2d 763.

378, 690 N.W.2d 849.[3] We affirm a circuit court's exercise of discretion if the circuit court "examined the evidence before it, applied the proper legal standards and reached a reasoned conclusion." ***Rottscheit v. Dumler***, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525 (citation omitted). If the circuit court makes factual findings in arriving at its decision, we accept those findings unless they are clearly erroneous. *See* ***Hokin v. Hokin***, 231 Wis. 2d 184, 190, 605 N.W.2d 219 (Ct. App. 1999). If the circuit court interprets a statute or regulation in making a decision, we review that analysis *de novo*. *See* ***Weis v. Weis***, 215 Wis. 2d 135, 138, 572 N.W.2d 123 (Ct. App. 1997).

Under WIS. STAT. § 767.59(1r)(d), the circuit court has discretion to grant credit to a child support payer for past due support if "[t]he payer proves by documentary evidence that, for a period during which unpaid support accrued, the child received benefits under 42 USC 402(d) based on the payer's entitlement to federal disability insurance benefits[.]" In exercising discretion, however, the circuit court is limited by WIS. ADMIN. CODE § DCF 150.03(5)(a) (Dec. 2021), which states, in pertinent part: "The court may consider a child's benefit under 42 USC 402(d) based on a parent's entitlement to federal disability or old-age insurance benefits ... and adjust a payer's child support obligation by subtracting the amount of the child's benefit received by the payee."[4] Thus, if a child support payee receives child's benefits under 42 U.S.C. § 402(d) based on the payer's entitlement to disability insurance, the Wisconsin regulation permits the

[3] In ***Barbara B. v. Dorian H.***, 2005 WI 6, ¶15, 277 Wis. 2d 378, 690 N.W.2d 849, our supreme court discussed WIS. STAT. § 767.32(1r) (2001-02). The statute was renumbered as WIS. STAT. § 767.59(1r) and amended by 2005 Wis. Act 443, §151.

[4] All references to WIS. ADMIN. CODE § DCF 150.03(5)(a) are to the version published in December 2021. Although that version reflects amendments that went into effect after the circuit court's February 2021 decision in this matter, they do not affect the language we cite or the applicable analysis.

circuit court to credit the payer with those federal payments. The circumstances here, however, do not fit within the parameters set by § DCF 150.03(5)(a).

As Bierman acknowledges, she is asking "the Court [to] recognize that [she] fulfilled [her] child support obligation by virtue of *the children's receipt* of Social Security dependent benefits." (Emphasis added.) Bierman thus requests credit for the amount of benefits received directly by her adult children, not by the child support payee. We agree with Levenhagen that the circuit court properly declined to proceed in a way that is not countenanced by WIS. ADMIN. CODE § DCF 150.03(5)(a).

Further, as the circuit court correctly determined, Bierman's requests—to be credited with the money that the SSA paid to the children and reimbursed for the support that Bierman paid to Levenhagen—are, in effect, requests to retroactively modify Bierman's child support obligation to zero. Such a modification is barred by WIS. STAT. § 767.59(1m), which provides: "the court may not revise the amount of child support ... 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." The law is well-settled that this provision means that retroactive modifications of a child support award are not permitted except to correct mathematical mistakes. *See* ***Zimmer v. Zimmer***, 2021 WI App 40, ¶¶7-8, 398 Wis. 2d 586, 961 N.W.2d 898.

Moreover, were we to conclude that Wisconsin law permits the relief that Bierman seeks, we would nonetheless conclude that the circuit court properly exercised its discretion by denying that relief. The circuit court's analysis began with findings that Levenhagen did not receive any of the children's benefits that the SSA disbursed and that "the check [for such benefits] went to

the adult children or the guardian." Bierman appears to disagree with those findings, but they are supported by the record; indeed, Bierman conceded in circuit court that E.L. received a check for $14,255 directly, and that H.L.'s institutional guardian received retroactive child's benefits in an unknown amount on H.L.'s behalf. Accordingly, we will not disturb the circuit court's findings regarding the recipients of the children's benefits. *See* ***Hokin***, 231 Wis. 2d at 190.

The circuit court then concluded that Levenhagen was not required to reimburse Bierman the $31,222.26 that he received as child support based on money that the adult children received. The circuit court emphasized that Levenhagen "was the one who was supporting the children," while they were minors and that requiring him to reimburse Bierman for her share of their support was "not equitable" under the circumstances.

Bierman suggests that the circuit court erred in light of our decision in ***Paulhe v. Riley***, 2006 WI App 171, 295 Wis. 2d 541, 722 N.W.2d 155, which allowed a child support payer who was disabled to receive credit for delayed child's benefits paid retroactively by the SSA. We reject that suggestion. In ***Paulhe***, we took into account that "[child's] benefits are not paid directly to the child, but rather to the child's representative payee," namely, the payer's former wife. *See* ***id.***, ¶17. We also emphasized that the payer "was current in all of his child support obligations." *See* ***id.***, ¶12. We considered the equities of the case and recognized that, absent credit, the payer "would be paying his child support obligation twice: first by his initial support payments paid directly to [the former wife], and second, by the subsequent social security benefits paid to [her] on [the child's] behalf." ***Id.***, ¶21. In other words, the former wife would receive a double payment: one from the payer directly and then a second payment from the SSA. *See* ***id.***, ¶13.

Here, by contrast, Levenhagen received only the amounts of child support that the circuit court ordered: a small portion primarily in the form of intercepts from Bierman's tax refund and civil litigation; and the remainder from Bierman's disability benefits. The children's benefits that the SSA disbursed as a result of Bierman's disability determination did not reach Levenhagen. Moreover, Bierman did not suffer any deprivation as a result of SSA's payments to her adult children, because she had no claim to the children's benefits.

.In light of the facts summarized above, we conclude that the circuit court properly exercised its discretion in rejecting Bierman's requests for credit and reimbursement on the ground that they would lead to an inequitable result. We observe that, although the situation in this case appears uncommon, courts from other jurisdictions that have considered the issue have similarly balanced the equities and reached a similar conclusion.[5] *See, e.g.*, ***Grays v. Arkansas Off. of Child Support Enf't***, 289 S.W.3d 12, 14, 17-18 (Ark. 2008)(holding that the circuit court properly exercised its discretion in denying credit to a disabled payer for disability benefits paid to an adult child for whom support is owed because the payment "did nothing to relieve the inequities borne by [the custodial parent])"; ***Attorney Gen. of Tex. v. Stevens***, 84 S.W.3d 720, 721, 725 (Tx. App. 2002) (holding that the Texas statutory scheme barred credit to a payer for a lump sum payment made directly to the payer's adult child but adding that equity also favored denying credit because payments to the adult child do not reimburse the custodial parent); *see also* ***Jenerou v. Jenerou***, 503 N.W.2d 744, 745-46 (Mich. Ct. App. 1993) (concluding that a

[5] Bierman includes a list of five out-of-state cases in her reply brief and asserts that they support her claim for relief. She fails to provide any analysis or argument regarding how the cited authorities aid her position. Nonetheless, we have examined the cases she cites. It appears that none of them involve payments of child's benefits to the adult offspring of a child support payer who was disabled.

payer was not entitled to credit for disability benefits paid directly to an adult child and explaining that adult offspring receive such benefits not because the federal government has assumed a parent's child support obligation, "but only because the child is determined to be eligible for the benefits under federal law"); ***Tarbox v. Tarbox***, 853 A.2d 614, 620 (Conn. App. Ct. 2004) (following ***Jenerou***).

Before we leave this issue, we observe that Bierman includes an allegation in her reply brief that a decision against her would give rise to an equal protection violation. Her contention is conclusory and undeveloped. Accordingly, we will not address it. *See* ***Wisconsin Conf. Bd. of Trs. of the United Methodist Church, Inc. v. Culver***, 2001 WI 55, ¶38, 243 Wis. 2d 394, 627 N.W.2d 469 (explaining that raising the specter of a constitutional claim in an undeveloped argument is not sufficient to earn an appellate court's response).

Bierman next argues that she should receive an award of attorney's fees. We agree with Levenhagen that Bierman forfeited this claim. At the outset of the circuit court's oral ruling, the circuit court summarized the pending issues, stating that they involved Bierman's requests for modification of her support arrears and reimbursement of $31,222.26. The circuit court also observed that Bierman had included a request for attorney's fees in her original motion, but had not presented any argument on that issue or otherwise pursued it. The circuit court then asked whether any party disagreed with its summary, and neither Bierman nor her counsel responded. Accordingly, the circuit court did not address attorney's fees further. After ruling from the bench, the circuit court asked if either party wished to state anything for the record, and Bierman's trial counsel said "no." We deem the forgoing to constitute a forfeiture of the attorney's fees issue. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155) (citation omitted) (stating that "the 'fundamental' forfeiture inquiry is whether a

legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the circuit court").

Bierman next suggests that the circuit court was unprepared and was biased against her. The record does not support Bierman's claims. Indeed, her allegations that the judge was unprepared point us to portions of the record that reveal a judge conscientiously ensuring that she would resolve the parties' disputes only after she had reviewed the law and the arguments presented. As to allegations that the judge was subjectively biased, such allegations are for the judge to consider and resolve personally. *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 182-83, 443 N.W.2d 662 (1989). When, as here, the circuit court was not asked whether it could proceed without bias, we may assume that, by presiding, the circuit court implicitly determined that it could act impartially. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31. We add that nothing in the record supports an inference of bias; the remarks that Bierman alleges were "discriminatory" merely reflect the judge's efforts to clarify the parties' positions and to understand the facts.

Finally, we note that Bierman's briefs include allegations regarding purported misstatements by the circuit court and opposing counsel in regard to a host of matters, including Bierman's ownership of a piece of real estate, the placement of the children during their minority, and federal and state resources that may have been available to assist Levenhagen while raising the couple's minor children without regular child support payments from Bierman. She fails to show that her allegations are relevant to the decision under review and, accordingly, we decline to address them. "An appellate court is not a performing bear, required to dance to every tune played on an appeal." *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). For all the foregoing reasons, we affirm.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals