COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP919 **Cir. Ct. No. 2010FA124**

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

IN RE THE MARRIAGE OF:

DAWN MARIE JISKRA,

PETITIONER-RESPONDENT,

V.

CRAIG ALLEN JISKRA,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Craig A. Jiskra appeals a judgment of divorce from Dawn M. Jiskra entered by the Clark County Circuit Court. On appeal, Craig

challenges the court's orders on physical placement, maintenance to Dawn, denial of maintenance to Craig, and argues that the court's errors of law and the denial of his disqualification motion result in what Craig describes as "result[-]oriented bias." For the reasons that follow, we affirm the court's orders and reject Craig's argument of bias requiring recusal.

BACKGROUND

¶2 Dawn Jiskra and Craig Jiskra married in November 1993. Dawn and Craig have four children, whom we will refer to as J.D., K.M., M.J., and J.J. At all times pertinent to this appeal, J.D. was an adult, K.M. was eighteen years old and attending high school, and M.J. and J.J. were minors. In 2010, Dawn filed a petition for divorce.

¶3 In 2012, the court granted a judgment of divorce. The issues of maintenance for Dawn, child support, custody, and placement were left open.

¶4 In May 2013, Craig filed a motion asking the judge to recuse himself pursuant to SCR 60.04(1)(g)1., SCR 60.04(4), and WIS. STAT. § 757.19(2)(g) (2013-14).[1] As support for this motion, Craig pointed to a Sheriff's Department memo sent to Dawn and the court that Craig did not receive. Craig argued in support of his motion that the court failed to provide notification of this ex parte communication to the parties in violation of SCR 60.04(1)(g)1.b., which created the appearance of partiality in violation of § 757.19(2)(g). The judge denied the

[1] All references to the Wisconsin Statutes and Supreme Court Rules are to the 2013-14 version unless otherwise noted.

motion without a hearing, stating that he did not read the memo and that the judicial assistant destroyed it because it was an ex parte communication.

¶5 In October 2013, the court held hearings on the issues of child custody and placement, as well as maintenance. In preparation for the hearing, the court received reports from both the guardian ad litem (GAL), Daniel S. Diehn, and the author of a custody study, Mary Christensen. Both reports indicate that Craig engaged in child abuse and domestic abuse toward Dawn. For example, both reports detail an altercation between Craig and Dawn that resulted in battery, stalking, and disorderly conduct charges against Craig. The GAL report explains that following this incident, "Craig pled guilty to Disorderly Conduct . . . and received a withheld sentence on the Stalking charge" and that "[h]e was also convicted at the same time of Knowingly Violating a Domestic Abuse Restraining Order from an unrelated incident." In addition, both reports detail an incident between Craig and K.M. that resulted in Craig being convicted of disorderly conduct with a charge of physical abuse of a child being dismissed and read-in. The GAL report also indicates that, at various times, Dawn, K.M., and M.J. each received injunctions against Craig.

¶6 Both reports provided the court with placement recommendations. The GAL report recommended that Dawn be awarded physical placement of M.J. and J.J. and recommended that J.J. be placed with Craig every other weekend during the school year and every other week during the summer months. In regard to M.J., the GAL recommended that M.J. receive counseling to "work towards re-establishing some type of relationship with Craig" and suggested that "[n]o periods of physical placement shall be awarded to Craig until recommended by the Counselor." The custody study concluded that Dawn should receive primary placement of M.J. and J.J. and recommended a placement schedule for J.J. similar

to the recommendation of the GAL. In regard to M.J., the custody study recommended that M.J. and Craig "have supervised visits once family counseling starts."

¶7 Following the hearing, the court awarded Dawn sole legal custody and primary physical placement of the two minor children. The court ordered placement of the minor children with Craig every other weekend for alternating lengths of time, plus a two week consecutive period over the summer. The court ordered J.J.'s placement with Craig to take effect immediately; however, for M.J. the court ordered graduated placement in accordance with approval from M.J.'s counselor. In its order, the court explained the graduated placement of M.J. through incremental levels of contact, starting with phone calls and progressing to overnight placement. The court explained that each level of contact, including the initiation of phone conduct, required approval from M.J.'s counselor. As to maintenance, the court originally ordered Craig to pay $130 per month to Dawn.

¶8 After the circuit court entered a judgment of divorce, Dawn filed a motion for clarification of the court's physical placement and child support orders. As to child support, Dawn explained that child support was to be calculated based on three children, rather than just two as the court ordered. In response to Dawn's motion, Craig argued that if the court increases his child support obligation to Dawn, the court should grant Craig maintenance to equalize the parties' incomes. The court denied Craig's suggestion that he receive maintenance. However, the court changed the amount of maintenance it awarded to Dawn from $130 per month to $1 per month, in order to "maintain jurisdiction over this issue."

¶9 Craig appeals the court's orders on placement and its award of maintenance to Dawn, as well as his purported request for maintenance. In addition, he alleges judicial bias.

DISCUSSION

¶10 Craig makes numerous arguments in challenging the circuit court's placement orders as well as the order granting Dawn maintenance and denying Craig maintenance. In addition, based on his argument that the court erroneously exercised its discretion in its placement and maintenance determinations and that it mishandled an ex parte communication, Craig submits that the court's orders were the product of what he describes as "result[-]oriented bias." In response, Dawn largely argues that Craig has not preserved these issues for appeal. Alternatively, she argues that the court did not deny Craig periods of physical placement of M.J. and that it did not abuse its discretion in its placement and maintenance determinations. Finally, she argues that the judge did not err when it denied Craig's recusal motion.

¶11 We agree with Dawn that Craig forfeited a portion of his maintenance claim as well the argument, as it relates to M.J.'s placement, that the court improperly delegated its duty to determine placement to M.J.'s counselor. Although we disagree that Craig has forfeited his ability to raise the remaining arguments related to placement, maintenance, and judicial bias, we conclude that the court did not erroneously exercise its discretion or commit error as to any finding or determination. Accordingly, we affirm the circuit court's decision.

1. Placement

¶12 A circuit court has discretion when determining the placement of minor children. We have stated that "[c]ustody and placement decisions are committed to the trial court's discretion, and we sustain them on appeal when the court exercises its discretion based on the correct law and facts of record, and employs a logical rationale in arriving at its decision." ***State v. Alice H.***, 2000 WI App 228, ¶18, 239 Wis. 2d 194, 619 N.W.2d 151.

¶13 Aside from Craig's arguments that the circuit court erroneously exercised its discretion in ordering placement, there is a question of whether all of Craig's arguments have been preserved for appeal. We will deem that a party has forfeited an argument or issue if it could have been made at the circuit court, but is instead raised at the appellate level for the first time. *See* ***State ex rel. Olson v. City of Baraboo Joint Review Bd.***, 2002 WI App 64, ¶23, 252 Wis. 2d 628, 643 N.W.2d 796 ("To preserve an issue for appeal, the circuit court must be apprised of a party's objection and the basis for it."). We apply this rule when the circuit court has not had the opportunity to "pass" on the issue. ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977).

A. M.J.'s Placement.

¶14 Craig challenges M.J.'s placement order in three respects. First, he argues that the circuit court impermissibly delegated its duty to determine placement to M.J.'s counselor. Second, he asserts that the court denied him placement with M.J. without making the required findings under WIS. STAT. § 767.41(4)(b). Finally, he contends that the court erred when it denied his motion for a psychological evaluation of M.J. Without a psychological evaluation, Craig

argues, the court lacked the required information on M.J.'s mental health and essentially acted as its own expert witness to deny him placement.

¶15 Craig's first argument, that the court improperly delegated its placement duty to M.J.'s counselor, is a legal issue that could have been raised before the circuit court. Therefore, we first address whether Craig properly preserved this argument for review. We then address his remaining arguments.

¶16 Craig does not argue that he objected at the circuit court level to the involvement of M.J.'s counselor in the graduated placement order as an impermissible delegation of the court's duty to determine placement. Instead, he asserts that he was not required to do so, because the court's error in delegating its duty to determine placement is not the type of "manifest error[] which must be raised on a post-judgment motion for reconsideration in order to be preserved," but was instead error "beyond the pale of rudimentary error or error which could be corrected by simple mechanical adjustment to the judgment." This argument entirely misses the mark. Craig fails to explain why the circuit court should not have had a chance to address this impermissible delegation argument in the first instance. This is the ordinary circumstance, in which "questions which are not properly presented to the trial court will not be considered for the first time on appeal." *See* ***Hasley v. Black, Sivalls & Bryson, Inc.***, 70 Wis. 2d 562, 569, 235 N.W.2d 446 (1975).

¶17 Craig had ample opportunity to object to the involvement of M.J.'s counselor in the graduated placement. In his report to the court, the GAL recommended that graduated placement be based on recommendations by M.J.'s counselor. Craig could have objected to this recommendation prior to the court's decision on this topic. However, he did not. In addition, the court detailed the

counselor's involvement in its order and then asked whether the parties had "[a]ny other questions or clarifications." Craig asked no clarifying questions in regard to the counselor and did not object to the counselor's involvement. Furthermore, the record does not indicate that Craig made any attempt to argue that the court improperly delegated its duty to determine placement to M.J.'s counselor following the court's order. Therefore, Craig has forfeited his ability to bring this argument on appeal.

¶18 Next, Craig argues that the circuit court denied him placement with M.J. without making the requisite findings under WIS. STAT. § 767.41(4)(b).[2] While there may be merit to Dawn's argument that Craig forfeited this argument as well, we do not address her forfeiture argument because it is readily apparent that Craig's argument rests on a false premise. Craig was not denied placement. As we previously explained, the court ordered graduated placement for M.J. with Craig, which included a transition period. Graduated placement is not a complete denial of placement. Since the court did not deny Craig placement, it was not required to make findings under § 767.41(4)(b).

¶19 Finally, Craig makes several arguments in regard to the court's denial of his motion that M.J. undergo a psychological evaluation. Although difficult to follow, the focus of these arguments appears to be that without the findings of a psychological study the court did not have sufficient evidence of M.J.'s mental health to deny placement. Craig also contends that the court acted as its own mental health expert in this context.

[2] WISCONSIN STAT. § 767.41(4)(b) provides, "A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health."

¶20 To the extent that Craig argues that the court erroneously exercised its discretion when it denied his motion for a psychological evaluation, we are not convinced. The determination that a psychological examination is necessary is within the discretion of the trial court. *See* ***Zirngibl v. Zirngibl***, 165 Wis. 2d 130, 141, 477 N.W.2d 637 (Ct. App. 1991). Here, the court gave its reasoning for denying Craig's request for the psychological evaluation. It stated that it was "satisfied with the process … typically used in Clark County." It then referenced the other reports before the court and concluded that a psychological evaluation would not add a significant amount of information to the record.

¶21 In addition, the record contains sufficient evidence for the court to determine placement without the results of a psychological evaluation. The court carefully explained its placement order and detailed each factor that it used to determine placement. The court's careful analysis reflects its reliance on the reports from GAL Diehn and Mary Christensen, the author of the custody study. Both reports indicate that Craig committed child abuse and domestic abuse against Dawn. Both reports also indicate that M.J. had no interest in repairing the relationship with Craig and that M.J. did not want to have any contact with Craig because of his past actions. The GAL's report stated that M.J. was "vehemently opposed to visitation" with Craig and that immediate placement of M.J. with Craig would have "disastrous effects." In addition, Craig testified that he had not had any contact with M.J. for approximately three years, which the court could reasonably find justified the need for graduated placement.

¶22 While the custody study and the GAL's report took different approaches than the court took to the initiation of contact between M.J. and Craig, the record contains ample evidence to support the court's exercise of discretion in implementing a graduated placement schedule for M.J, without need for a

psychological evaluation. Therefore, we are satisfied that the court did not improperly exercise its discretion in its placement decision or in denying Craig's motion for a psychological evaluation.

B. J.J.'s Placement

¶23 Craig appears to make three arguments in regard to J.J.'s placement. First, he appears to assert that the court erroneously exercised its discretion when it failed to follow the shared recommendation of the GAL and the custody study that J.J. should have 50/50 placement with Craig and Dawn during the summer months. Second, he questions whether the court provided an adequate rationale when it issued its February 11, 2014 clarification of J.J.'s placement. Finally, he contends that the court erroneously exercised its discretion when it ordered that J.J. could not be left alone for more than thirty minutes until he reached age fifteen.

¶24 Both the GAL report and the custody study, separately, recommended that Craig and Dawn share equal placement of J.J. during the summer months. The circuit court did not adopt this recommendation. Instead, the court ordered and then clarified that J.J.'s summer placement with Craig would be "every other weekend, for alternating lengths of time, plus a period of two consecutive weeks." Insofar as Craig challenges this aspect of the court's placement order as an erroneous use of discretion, we hold that the court properly exercised its discretion in determining J.J.'s summer placement with Craig.

¶25 As we have previously indicated, the circuit court was well aware of Craig's troubling behavior toward his family. It also recognized that both Craig and Dawn had manipulated the children against the other parent, but it found Craig's behavior to be more troubling. These considerations support the circuit

court's discretionary decision to order J.J.'s summer placement with Craig to be every other weekend as opposed to shared equally with Dawn.

¶26 Next, Craig appears to argue that the circuit court did not properly explain the potential conflict between its oral decision and written order in regard to J.J.'s placement when it issued its February 11, 2014 clarification. We disagree with Craig that the court was unclear or that it committed any error when it clarified J.J.'s placement. Dawn's motion for clarification pointed to portions of the trial transcript that arguably created confusion as to whether J.J. would spend every weekend with Craig during the summer or every other weekend. In its clarification order, the court stated, "[t]he court intended, but did not clearly state, that respondent's summer placement is every other weekend, for alternating lengths of time, plus a period of two consecutive weeks." We see no lack of clarity or improper exercise of discretion here.

¶27 Finally, as to the court's order that J.J. could not be left alone for more than thirty minutes until age fifteen, the court heard testimony regarding Craig's demanding work schedule as well as Dawn's concerns that Craig would not adequately supervise J.J. After considering the parties' work schedules and supervision concerns, the court ordered that J.J. could not be left unsupervised for more than thirty minutes by either party until he reached age fifteen. We are satisfied that this decision is supported by the record and is a proper exercise of the court's discretion.

2. Maintenance

¶28 Craig challenges the court's award of maintenance to Dawn and its conclusion that he "waived"[3] any claim of maintenance from Dawn. First, he argues that the circuit court erred when it stated that he had forfeited his claim to maintenance payments from Dawn. Second, he argues that the court's reliance on its finding that Dawn was a stay-at-home mom in awarding Dawn permanent maintenance was clearly erroneous because, according to Craig, the record shows that Dawn also worked during the marriage. Both arguments are unconvincing.

¶29 According to our review of the record, the first time Craig raised the possibility that he should receive maintenance was in response to Dawn's motion for clarification after the judgment of divorce was entered. In his response, Craig merely stated that "if child support is adjusted then Craig Jiskra would not only not be paying maintenance, but would need to receive maintenance, so the parties' income is equalized."

¶30 This was merely a theoretical concept and one that Craig floated only *after* judgment was entered. Craig failed to request maintenance in an appropriate manner at an appropriate time, thereby forfeiting any claim of maintenance.[4]

---

[3] Both Craig and the circuit court use the term "waiver" when, in fact, the correct term is "forfeiture." "Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (quoting ***United States v. Olano***, 507 U.S. 725, 733 (1993)). Therefore, we will utilize the term "forfeiture."

[4] Craig quibbles with the circuit court's finding that he forfeited maintenance. Craig appears to argue that because he never affirmatively stated he forfeited maintenance, the court (continued)

¶31 Finally, we reject Craig's argument that the circuit court's finding that Dawn was a stay-at-home mom in support of its decision to award her maintenance is clearly erroneous. We first observe that the court made this finding in the context of addressing Dawn's earning capacity. The record supports the court's finding. In its findings on the "[e]arning capacity of the party seeking maintenance," the court stated that Dawn "had been a 'stay at home mom' for approximately 15 years." Then in a footnote it explained that Dawn "did testify that she offered day care services at least part of this time. However, the evidence on this point was not sufficiently developed to show that this has increased her earning capacity." Craig does not dispute that the record supports the court's finding that Dawn provided in-home day care services for most of the time that the parties were married. Craig also does not challenge the court's implication that Dawn's earning capacity was not improved by her day care business. We are satisfied that the court's finding that Dawn was a stay-at-home mom included her employment as a day care provider. Therefore, this finding was not clearly erroneous.

3. Judicial Bias

¶32 Craig contends that the circuit court exhibited objective bias, which is reflected in the court's rulings and decisions, discussed above. Specifically, he argues that the sum total of the court's rulings and decisions were, as he stated, a product of "result[-]oriented bias unsupported by law or competent evidence" and

---

was mistaken in saying that he did. Craig is playing a game of semantics. What is abundantly clear from the record is that Craig also never affirmatively requested maintenance from Dawn, at least not until after Dawn filed her motion for clarification. And Craig does not assert that he broached the topic of potential maintenance payments to him until Dawn's motion was filed.

based on the court's "own perceptions of what he thought M[.]J[.]'s placement should be and his dislike of Craig." Craig bases his "result[-]oriented bias" argument on the errors that he contends the court committed in determining placement and maintenance, discussed above, as well as comments the court made on the record and its denial of Craig's recusal motion. Dawn argues that Craig has not preserved his bias argument and that the only appealable issue is whether the court erred in denying Craig's recusal motion.

¶33 "The right to an impartial judge is fundamental to our notion of due process." ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Whether a judge was biased is a question of constitutional fact that we review de novo. When we review a claim of judicial bias, we presume that the judge acted fairly, impartially, and without bias. ***Id.*** However, this presumption may be rebutted by showing either subjective or objective bias. ***Id.*** Subjective bias relates to the judge's own determination of whether he or she can act impartially. *See* ***State v. Pirtle***, 2011 WI App 89, ¶¶34-35, 334 Wis. 2d 211, 799 N.W.2d 492. Objective bias occurs when the appearance of bias exists, or when there are objective factors showing that the judge treated a party unfairly. ***Goodson***, 320 Wis. 2d 166, ¶9.

¶34 We conclude that Craig has forfeited his objective bias argument. Craig fails to explain why he did not raise this argument to the circuit court and the court should have had a chance to address it.

¶35 Moreover, we observe that, even if we were to conclude that he had not forfeited this bias argument, based on our prior discussion of the record and our holding that the circuit court did not erroneously exercise its discretion when it determined maintenance and placement, and our discussion below that the court

did not mishandle the memo, it is very easy to conclude that a reasonable person would not find that any decision of the circuit court was the result of bias.

¶36 As to the memo, Craig's argument that the court should have notified him of an ex parte communication is based upon an incomplete reading of SCR 60.04(1)(g)1.a.-b. That section reads:

> (1) In the performance of the duties under this section, the following apply to adjudicative responsibilities
>
> ....
>
> (g) A judge shall accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law. A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding except that:
>
> 1. A judge may initiate, permit, engage in or consider ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits if all of the following conditions are met:
>
> a. The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.
>
> b. When the ex parte communication may affect the substance of the action or proceeding, the judge promptly notifies all of the other parties of the substance of the ex parte communication and allows each party an opportunity to respond.

SCR 60.04(1)(g)1.a.-b. Under these provisions, in limited situations a court may consider ex parte communication if it meets certain requirements, including a notification requirement.

¶37 However, here, the court stated that it had not considered the communication and that the judicial assistant had destroyed it. Craig points to

nothing in the record that brings the court's statement into question. Furthermore, Craig does not argue that the court initiated, permitted, or engaged in any ex parte communications that would have triggered the notification requirement. Since the notification requirement was not triggered, the court did not mishandle the memo by simply having the court's copy destroyed without reading it.

¶38 Based on the reasons we explained above, we affirm.

By the Court.—Judgment affirmed.

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