COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1467 **Cir. Ct. No. 2007FA874**

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

IN RE THE MARRIAGE OF:

JENNIFER OTTLIE DORDEL,

PETITIONER-RESPONDENT,

V.

ALAN D. DORDEL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed*.

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Alan D. Dordel appeals a divorce judgment. He contends the trial court erroneously exercised its discretion: (1) when its decision on placement was not in the best interest of the children; (2) in determining child

support and maintenance; and (3) in ruling on the effect of Jennifer Dordel's bankruptcy on property division and in dividing the marital property. We affirm.

BACKGROUND

¶2 The Dordels were married in February 1994 and had three children: Bradley, born December 11, 1996; Alexander, born March 24, 2002; and Alysen, born December 26, 2005. In December 2007 Jennifer filed for divorce. In July 2010, the Dordels presented their ***Keller***[1] agreement to the court determining custody and placement issues, and the trial court adopted it in an October 2010 order. As material here, all three children were placed with Jennifer on an October 2014 schedule with Alan having them overnight every Wednesday night and every other weekend.

¶3 The trial court granted the divorce judgment in November 2013 and decided the remaining issues at a hearing on January 16, 2014, with a written judgment filed in March 2014. In the written judgment, the trial court:

1) Found no substantial change of circumstances as a result of Bradley's decision to spend 100% of his time with Alan, and ruled the ***Keller*** agreement should remain in full force and effect with a few minor adjustments not at issue on appeal.
2) Adjusted child support to reflect Bradley's change in placement by ordering that it reflect Bradley is with Alan 66% of the time; the trial court also ordered Bradley and Jennifer to attend counseling.

[1] *See* ***Keller v. Keller***, 214 Wis. 2d 32, 571 N.W.2d 182 (Ct. App. 1997).

3) Ordered Jennifer to pay Alan $200 monthly maintenance for seven years, but because Alan was in arrears in child support payments, $100 of the $200 each month would go to offset the arrears until paid off and then Alan would receive the full $200 monthly maintenance.
4) Adopted Jennifer's property division exhibit with modifications awarding each of the Dordels "the property in their column. If an item is marked one half each, then each of the parties shall receive one half of that asset or debt."
5) Determined the guardian ad litem fees incurred when Alan sought restraining orders to keep Jennifer's father away from the children were not a marital debt.

Alan appeals from the judgment. Additional facts will be discussed as needed throughout this opinion.

DISCUSSION

¶4 Alan raises issues relating to the trial court's decisions as to child placement, child support, maintenance, and property division. Except for whether there was a substantial change of circumstances, we review these issues under the erroneous exercise of discretion standard and will not reverse if the trial court applied the correct legal standard to the pertinent facts and reached a reasonable determination. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789; ***Hughes v. Hughes***, 223 Wis. 2d 111, 119-20, 588 N.W.2d 346 (Ct. App. 1998). "The determination of whether there has been a substantial change of circumstances sufficient to warrant a modification of maintenance or child support presents a mixed question of fact and law." ***Benn v. Benn***, 230 Wis. 2d 301, 307, 602 N.W.2d 65 (Ct. App. 1999). "A circuit court's findings of fact regarding what

changes have occurred in the circumstances of two parties will not be disturbed unless they are clearly erroneous." ***Id.*** "However, the question of whether those changes are substantial is a question of law which we review de novo." ***Id.*** "In addition, if a modification of maintenance or child support is warranted, the circuit court has discretion to determine the amount of the modification." ***Id.*** We conclude the trial court applied the correct law and properly exercised its discretion.

A. *Child Placement*.

¶5 Alan first complains the trial court's decision on placement was not in the best interests of the children. He argues a substantial change in circumstances occurred when Bradley decided to stay 100% of the time with Alan, and he argues the guardian ad litem's recommendation that Alexander be placed 66% of the time with Alan, based on some school and anxiety issues, was also a substantial change.

¶6 When addressing this issue, the trial court considered the pertinent law, WIS. STAT. § 767.451 (2011-12),[2] which governs the revision of legal custody and placement orders and provides in relevant part:

> (b) *After 2–year period.* 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
>
> a. The modification is in the best interest of the child.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.
>
> 2. With respect to subd. 1, there is a rebuttable presumption that:
>
> a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
>
> b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

¶7 The trial court ruled it would not let Bradley's refusal to obey the court order dictate a change in circumstances and ordered Bradley and Jennifer to attend counseling to resolve the conflict between them. The trial court also rejected the guardian ad litem's recommendation as to Alexander based on the evidence that Bradley and Alexander did not get along and putting them together would escalate the problems rather than resolve them, and it would reduce the time Alexander and Alysen spent together. In making this decision, the trial court relied on the testimony of an expert on placement issues from Winnebago County Family Court Counseling who did the custody studies in this case. The custody study expert witness interviewed Jennifer, Alan, and the children, and observed each parent's home. He recommended continuing to follow the placement schedule from the ***Keller*** agreement because this would be in the children's best interests. The trial court also observed it had "many, many years of contact with the Dordel family," and was familiar with the ***Keller*** agreement.

¶8 We are satisfied the trial court considered the proper facts, applied the correct law, and reached a reasonable determination on placement. WISCONSIN STAT. § 767.451(1)(b) allows the trial court to change a placement order, which has existed after two years *only* when a party shows both it is in the

child's best interest *and* there is a substantial change in circumstances. The statute sets up a rebuttable presumption that keeping the current order is in the best interest of the child. WIS. STAT. § 767.451(1)(b)2. Here, Alan failed to show either a substantial change in circumstances or overcome the presumption that it was in the best interests of the children to keep the existing order. Finding a substantial change in circumstances based on a child's refusal to follow a court order on placement because of an argument with his mother would set a dangerous precedent which would allow a child's wants to trump a court's order. The trial court did what was reasonable. It adjusted the support order, and ordered Jennifer and Bradley to attend counseling, with the hope Bradley would spend some time with his mother. The trial court's decision is supported by the expert's analysis and recommendations.

B. *Child Support and Maintenance*

¶9 Next, Alan contends child support should not be based on Bradley being with Jennifer 34% of the time when in reality Bradley is with Jennifer 0% of the time. He also complains the trial court ordered $100 of Jennifer's $200 monthly maintenance payment to be applied toward his child support arrears, leaving him with maintenance of only $100 each month.

¶10 WISCONSIN STAT. § 767.511 sets forth the guidelines for ordering child support. Generally, it requires the trial court to order child support based on the "percentage standard established by the department under s. 49.22(9)." WIS. STAT. 767.511(1j). However, the statute allows the trial court to deviate from the percentage standard if following it would be unfair to the parties or children. *See* WIS. STAT. § 767.511(1m). Section 761.511(1m)(i) permits the trial court to deviate from the percentage standard and order child support based on: "Any

other factors which the court in each case determines are relevant." ***Id.*** That is what the trial court did here.

¶11 The current placement order required all three children to be with Jennifer 66% of the time and to be with Alan 34% of the time. The percentage standard based on this current placement order would result in Jennifer paying Alan child support of $264.81 per month. The trial court recognized, however, that Bradley was actually spending all of his time with Alan in violation of the placement order. The trial court ordered Bradley and Jennifer to attend counseling to resolve any issues with the hope Bradley would spend at least some time at his mother's home. Given these facts, the trial court decided to adjust child support so Jennifer would pay Alan a sum calculated on Bradley being with Alan 66% of the time. This increased Jennifer's monthly child support obligation to $758 per month. The trial court's discretionary decision based on the unique facts in this case was reasonable. Although Bradley was at the moment spending 100% of his time with Alan, he was doing so in direct violation of the court's order and the trial court anticipated, with counseling, Bradley would in the near future spend some time at his mother's home. We affirm the trial court's decision on child support.

¶12 WISCONSIN STAT. § 767.56 addresses maintenance. It provides:

> **(1c)** FACTORS TO CONSIDER FOR GRANTING. Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time, subject to sub. (2c), after considering all of the following:
>
> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.

> (c) The division of property made under s. 767.61.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.
>
> (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (i) The contribution by one party to the education, training or increased earning power of the other.
>
> (j) Such other factors as the court may in each individual case determine to be relevant.

¶13 Alan argues the $200 maintenance award, which would be reduced by $100 to pay his child support arrears each month until the arrears were paid in full, violated the guidelines of WIS. STAT. § 767.56 because the award does not satisfy the support or fairness objectives of maintenance. He complains this amount would not support him and was not fair based on the fact he became disabled, lives on disability income, and Jennifer makes substantially more money.

¶14 The trial court addressed each of the WIS. STAT. § 767.56 factors in its oral decision. Most significant, it found both parties have master's degrees, and

despite Alan's disability, he could become "self-supporting at a comparable standard of living." The court noted that before Alan's accident, he "was able to earn substantial income as a successful financial planner, that is a sedentary job and there's been no evidence submitted as to why the respondent cannot work in that field anymore." In setting the amount and duration of maintenance, the court commented it "feels the need to provide for the support of [Alan] but to also provide the motivation to [Alan] to pursue his options for improved employment in the future." As noted, the court ordered Jennifer to pay Alan monthly maintenance of $200 for seven years. However, Alan owed Jennifer $4,500 in back child support and when addressing how to handle repayment, *Alan's* attorney suggested to the court that half of the maintenance payment each month go to pay the arrears owed.

¶15 The trial court properly exercised its discretion on maintenance. It applied the pertinent facts in this case to the proper statutory factors and reached a reasonable determination. The maintenance award satisfies both the support and fairness factors. *See* ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987). The trial court found Alan capable of continuing to work at his financial planning job despite his disability and this would allow him to increase his annual income. It would be unfair to Jennifer to order more maintenance if Alan is capable of working to support himself but chooses not to work. *See* ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶32, 269 Wis. 2d 598, 676 N.W.2d 452 (Fairness objective must focus on "what is fair to both parties, not just one party.").

¶16 Further, Alan cannot complain on appeal about the $100 of the $200 monthly maintenance payment going to pay off his child support arrears. He openly agreed to this procedure at the January 16, 2014 hearing, even suggesting it

to the trial court. *See* ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (When a trial court performs an act because of the position taken by a party, that party cannot be heard to take a different position on appeal.).

C. *Bankruptcy/Property Division*

¶17 Alan complains the trial court failed to determine the effect of Jennifer's bankruptcy filing on the property division and their property was not reasonably divided. Specifically, he complains the trial court did not address the "wasted" assets relative to Jennifer's bankruptcy, it did not address the personal property items on Alan's list because it used Jennifer's list, and it should have ordered Jennifer to pay half of the guardian ad litem's fees relating to the motion he filed about keeping Jennifer's father away from the children. The issue of property division is a discretionary one for the trial court, and we will not reverse its decision unless the trial court erroneously exercised its discretion. *See* ***LeMere***, 262 Wis. 2d 426, ¶13. We determine the trial court properly exercised its discretion on property division.

¶18 With respect to Jennifer's bankruptcy, Alan argues her bankruptcy schedule showed that more than $40,420.00 in marital assets were turned over to her trustee because these assets exceeded the exemption limits. The trustee sold those assets for $20,797.20, resulting, as Alan contends, in a waste of property. He reasons the court should have accounted for this loss in their property division. However, the record shows that a large share of these proceeds were used to pay their joint outstanding federal and state income taxes. Additionally, Alan declined the option of joining Jennifer in the bankruptcy and had he done so, additional exemptions would have been available to reduce or eliminate the need to sell these marital assets. Consequently, we fail to see how the trial court failed to reasonably

exercise its discretion when not specifically addressing the effect of Jennifer's bankruptcy on the property division.

¶19 This was not a simple divorce. This divorce proceeding lasted over six years. During that time, both Jennifer and Alan filed for bankruptcy, disposing of many of their marital assets. With respect to the personal property remaining, the parties went to mediation and agreed on how to divide many items of their personal property, leaving a list of the items in dispute and their retirement plans. Neither party provided appraisal values of the property to the trial court. Also during the time this case was pending, Alan pursued child abuse restraining orders against Jennifer's father, resulting in a stipulation prohibiting unsupervised visits between Jennifer's father and the children for a period of two years.

¶20 At the trial court's oral ruling on January 16, 2014, it addressed the division of property:

> As to property division, I did adopt the amended -- an amended, the marital balance sheet as submitted by [Jennifer's Attorney]. And I'll hand you each a copy of it so you can follow along. And it wasn't that I was picking one over the other for any reason other than there were a lot more items that were included on [Jennifer's] than on the balance sheet that [Alan's attorney] used. So what is on that document is my order.

¶21 The trial court proceeded to go through each item, line by line, addressing who got what, and divided the retirement accounts equally. It then addressed the items on the mediation agreement still in dispute:

> What the Court is going to order is that parties and counsel are to meet and the parties will be given the opportunity to go back and forth each taking a turn to choose an item on the list. And the parties will begin by coin toss to determine who should go first.

¶22 At the end of the oral ruling, the trial court asked both parties if there was anything further they needed to address on the record. Alan's attorney answered, "No, Your Honor."

¶23 Based on our review, we determine the trial court properly exercised its discretion on property division. The record shows the trial court addressed the pertinent factors and applied the relevant law found in the property division statute, WIS. STAT. § 767.61, when it made its decision. Its property division decisions were reasonable and its decision on how Jennifer and Alan should divide the remaining items on their list by taking turns was also reasonable.

¶24 Further, Alan did not object when the trial court indicated it was going to use the property list submitted by Jennifer because it appeared to be more complete. The trial court never had a chance to address the items Alan claims were exclusive to his list because he did not raise this concern with the trial court. If there were items on Alan's list that did not appear on Jennifer's, Alan should have brought those items to the court's attention either at the time the trial court explained why it was using Jennifer's list, or when the trial court finished addressing the last item on Jennifer's list, or when the trial court asked if there were any additional issues that needed to be put on the record. Alan has forfeited his right to raise this issue by waiting to make this argument on appeal. *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.").

¶25 Finally, with respect to the guardian ad litem fees incurred as a result of Alan's motion to keep Jennifer's father away from the children, the trial court specifically found this was not a marital debt. This finding is not clearly

erroneous. Jennifer was not involved in Alan's pursuit of restraining orders against her father. The fees were incurred solely as a result of Alan's belief Jennifer's father should not be around the children. The trial court's decision to leave this debt off the marital debt list was reasonable.[3]

By the Court.—Judgment affirmed.

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

[3] We note that after the appeal was filed in this case, Alan filed a motion in the trial court seeking relief from the judgment based on new evidence, claiming that the property division was not fair because some of the items awarded to Alan were sold in Jennifer's bankruptcy. Additionally, he argued that some items were not considered by the trial court because they were purchased by Jennifer after she filed for divorce and not included on Jennifer's property list the trial court used when it ruled on property division. We allowed the record to be supplemented with the post-appeal trial court proceedings because Alan represented it would be helpful to this court for resolution of this appeal. This, however, does not change our decision on property division. Our review of the trial court's decision on property division is limited to what was before the trial court at the time the decision was made. *See* ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979) (In general, our review is limited to the information that was before the court at the time of its decision.).