COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 96-2898

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

IN RE THE MARRIAGE OF: ANNA M. RASMUSSEN,

PETITIONER-RESPONDENT,

V.

LARRY D. RASMUSSEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Jefferson County: J. R. ERWIN, Judge. *Affirmed.*

Before Eich, Vergeront and Frankel,[1] JJ.

EICH, J. Larry Rasmussen appeals from a judgment divorcing him from Anna Rasmussen, and from various orders of the circuit court issued in

[1] Judge Frankel is sitting by special assignment pursuant to the Judicial Exchange Program.

connection therewith. He challenges the judgment and orders in several respects, claiming that the trial court erred in: (1) setting the effective date of his child-support obligation and basing its determination on his earning capacity, rather than his actual earnings; (2) denying his request to hold his claim for maintenance open indefinitely; (3) failing to consider the tax consequences of a property-division "balancing payment" ordered by the court; (4) failing to consider the economic effect of its allocation of dependency tax exemptions; and (5) failing to exclude the custody-related testimony of various social workers and a court-appointed psychologist. In an addendum to the brief not joined by his attorney, Rasmussen argues that the court erroneously exercised its discretion in ruling that the parties' farm was not exempt from division and appointing a guardian *ad litem* whose fee was $70 per hour without attempting to locate a guardian willing to serve at a lower rate. Finally, Anna Rasmussen seeks to recover costs and attorney fees on grounds that Larry's appeal is frivolous.

We affirm the judgment and orders in all respects and deny Anna's request for frivolous-appeal fees.

(1) Child support. Anna argues first that Larry waived his right to seek review of the trial court's award of child support, as well as several other issues he raises in his brief, on grounds that the notice of appeal—which he filed *pro se* prior to retaining an attorney—states that he is appealing "from [sic] custody, property division and the maintenance portions of the … judgment." The argument is brief and unsupported by citations to legal authority, and we have often said that we do not consider such arguments. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). The issue has been briefed by the parties and we consider it on the merits.

The underlying facts are difficult to ascertain from the briefs. It appears that, after the action was commenced in early 1993, a temporary order was issued requiring Larry to pay family support of $423 per week, or $1833 per month, based on the family court commissioner's findings, among other things, that his annual income was $47,448 and Anna's $16,570. Anna has primary custody of their two minor children. In January 1994, Larry moved to revise the temporary order and also sought an order requiring Anna, who was then working part-time as a licensed practical nurse, to seek full-time employment. The commissioner denied the motion to reduce support, but granted Larry's work-order request, at least in part, by ordering Anna to seek work on the alternate weekends when the children were with Larry. Both parties sought *de novo* review in circuit court, but before the matter could be heard the court remanded the matter to the commissioner in light of the parties' acknowledgment that their circumstances had changed since the commissioner's decision.

At the second hearing before the commissioner, in November 1994, Larry argued that his support obligation should be reduced not only because Anna was employed full time but also because he was earning a much lower wage than before, having quit his position as a union electrician (with an annual income of approximately $48,000) to become self-employed. He claimed he did so because of physical disabilities, among other reasons. The commissioner rejected the argument, found that Larry's job change was unreasonable under the circumstances, and calculated support on an "imputed" income of $41,000 per year. Apparently in light of Anna's increased income, however, Larry's support obligation was reduced to $165.69 per week or $718 per month, effective as of October 31, 1994, the date the commissioner would have ruled on the matter had the hearing not been postponed at Larry's request. Larry again sought a *de novo* hearing in circuit court, arguing that

the commissioner had erred in finding that he had unreasonably changed his employment. The court rejected the argument, although it did "impute" a slightly lower income ($39,606) to Larry and calculated his support at $143 per week—a few dollars lower than the commissioner's figure. The court maintained the commissioner's October 31, 1994, effective date of the lowered support, and that forms the basis of Larry's complaint. He argues the order should be effective as of the date he filed his first support-reduction petition with the court commissioner—January 4, 1994.

His argument on the issue comprises: (1) an assertion—unsupported by any reference to the record—that "full-time work had been available to [Anna] since at least June, 1993," and "based upon her earning capacity, she was really, as a matter of law, not entitled to [spousal support] at all"; and (2) an unexplained citation to ***Schulz v. Ystad,*** 155 Wis.2d 574, 595, 456 N.W.2d 312, 320 (1990), which, at the cited page, does no more than refer to a statute, § 767.32(1m), STATS., which provides: "In an action under [§ 767.32] sub. (1) to revise a judgment providing for child support … the court may not revise the amount of child support … due prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations."[2]

[2] Larry's argument, in its entirety, is as follows:

> In reducing appellant's support obligation by more than $1100 per month in November, 1994, the … Commissioner, and later the Trial Court in its August, 1995, decision on the motion for hearing de novo, erred in failing to make the reduction retroactive to January 4, 1994, the date appellant filed his motion for reduction and for a seek-work order for respondent. [citing ***Schulz v. Ystad***] In fact, the evidence at trial demonstrated that because full-time work had been available to respondent since at least June, 1993, her less-than-full-capacity work effort had been purely voluntary and unreasonable on her part and, based upon

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First, as to Larry's unsupported factual assertions, we have said many times that we do not consider arguments based on factual assertions that are unsupported by references to the record. *See*, *e.g.*, ***Dieck v. Antigo Sch. Dist.***, 157 Wis.2d 134, 148 n.9, 458 N.W.2d 565, 571 (Ct. App. 1990). Beyond that, Larry does not tell us how ***Schulz***, or the statute it discusses, advances his position on this appeal. We might infer his argument to be that the order should have been retroactive to the date he filed the original petition, because his initial motion before the court commissioner sought a seek-work order for Anna and she eventually obtained additional employment. But he offers no legal authority for the proposition that the trial court erred in adopting the effective date of the commissioner's order. He has not persuaded us that any error occurred in this regard.[3]

Larry also claims the trial court erred in basing its child-support award on his earning capacity, rather than his actual earnings. He points to the testimony of a "vocational expert" who testified that Larry's decision to forsake his union-electrician position to go out on his own was reasonable in light of his "increasing disability." He says the expert's testimony was credible and

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> her earning capacity, she was really, as a matter of law, not entitled to maintenance at all.

[3] He attempts to amplify the argument somewhat in his reply brief, stating—again without reference to legal authority: "It is fundamental that, upon modifying a support order, the court must address the issue of the effective date of the modification and weigh the equities in doing so." The assertion adds nothing to his argument. There is no indication, for example, that he ever asked the court to exercise its discretion in this regard, and we have long abided by the rule that an erroneous exercise of discretion will not be found where it appears that the complaining party failed to ask the trial court to exercise discretion. *See* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 917 (Ct. App. 1983). Another long-standing rule of appellate practice is, of course, that arguments raised for the first time in a reply brief in violation of the Rules of Appellate Procedure will not be considered. ***Northwest Wholesale Lumber v. Anderson***, 191 Wis.2d 278, 294 n.11, 528 N.W.2d 502, 508 (Ct. App. 1994).

uncontradicted in the record and the court could not legally ignore it. Anna correctly points out that here, too, Larry cites no legal authority for the underlying premise of his argument: that a trial court is required to accept unconverted expert testimony. Indeed, the cases hold just the opposite—that the factfinder is not required to accept an expert's opinion, even where it is uncontradicted. ***State v. Fleming***, 181 Wis.2d 546, 561, 510 N.W.2d 837, 842 (Ct. App. 1993). *See also* ***Pautz v. State***, 64 Wis.2d 469, 476, 219 N.W.2d 327, 330-31 (1974) (because it is the function of the trier of fact to determine the credibility of the witnesses, and the weight to be accorded their testimony, "the opinion of an expert, even if uncontradicted, is not required to be accepted") (quoted sources omitted).[4]

Based on all of the evidence—including evidence that no "sudden change" in Larry's physical condition had occurred—the court determined that "[c]hanging jobs was not a medical necessity." Larry has not satisfied us that the court erred in concluding that his job change was unreasonable so as to justify basing child support on his earning capacity rather than his actual earnings. *See* ***Sellers v. Sellers***, 201 Wis.2d 578, 587, 549 N.W.2d 481, 484 (Ct. App. 1996) (court may consider party's earning capacity, as opposed to actual earnings, when it determines that an employment decision leading to income reduction, though well intended, was "both voluntary and unreasonable under the circumstances").[5]

[4] The record indicates that the trial court properly exercised its function in this regard, for it stated as follows: "Larry's vocational expert opined that the job change was reasonable in light of physical limitations, job skills and aptitude. Her opinion did not consider [his] earning capacity, family obligations, other job options or anticipated business net [income]." The record supports the trial court's exercise of discretion in this regard. The witness conceded that, in concluding the job change was reasonable, she did not consider Larry's marital status, his duty to support his children, or the fact that his support-reduction petition was pending. Nor did she consider the demand for electrical contractors in the area or the availability of other union jobs.

[5] Indeed, the court's exposition of its reasoning is a textbook example of trial court decisionmaking:

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(2) Larry's request for maintenance. The trial court's decision indicates that Larry had requested that maintenance be held open for him indefinitely. After noting that Larry's argument was wholly undeveloped—that he was arguing only that it should be held open "for obvious reasons" without backing up the argument with any reference to legal authority that would even hint at a basis for the argument—the court concluded that even if it could develop an argument for him it would be to no avail because of Anna's current and projected inability to pay maintenance. Accordingly, the court stated that holding maintenance open for Larry would "serve[] no purpose," and denied his request.

Awarding maintenance is discretionary with the trial court. ***Brabec v. Brabec***, 181 Wis.2d 270, 277, 510 N.W.2d 762, 764 (Ct. App. 1993). And, as we noted above, *supra* note 3, where a party seeking the benefit of a discretionary ruling offers no reason or basis to the court for exercising its discretion, he or she cannot be heard to argue an erroneous exercise. We agree with Anna that Larry's

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> The evidence is that certain jobs available through the union hall created health problems for Respondent: those requiring significant climbing and those out of doors in cold weather. However, instead of declining such jobs, an option available to a union member with certain restrictions, the respondent opted for self employment. Mr. Rasmussen is now doing the same kind of work that is electrical contracting; he is not managing others this time …; The court must be concerned, however, that Respondent undertook this change of employment without the benefit of market analysis and is now experiencing not only the significant decrease in income due to job change but decreasing income from the contracting business.
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> There is not immediacy to Respondent's need to change jobs. [His] long-term interest in his own … business may reasonably have been acted upon by him. However, it must be done in a manner which would provide the children with reasonable financial support. [His] leap into self employment without reason to believe that he could adequately provide for his children in the face of the availability of selective employment with the union, is not reasonable.

undeveloped and unfocused argument was in itself adequate grounds to deny his request.[6]

(3) Tax consequences of the "balancing payment." As part of the property division—in which, at Larry's request, he was awarded the parties' homestead—the trial court ordered him to make a cash payment to Anna in the amount of $86,115. Larry argues that the court erred as a matter of law in refusing to consider the tax consequences of "the sale of all or a part of [the property]," which, he says, the court's order "contemplated."

In its decision on one of Larry's post-judgment motions, the trial court rejected a similar argument, noting that Larry's claim that its orders contemplated sale of the property was "contrary to the written decision [and] contrary to the judgment of divorce." The court explained that it had denied Anna's request that the property be sold and granted Larry's that it be awarded to him because Larry had asserted to the court that "he had a lender's assurance that he could refinance the [property]." The court reasoned that because Larry, by his own admission, was not contemplating selling the property, no sales expenses were anticipated. Again, we see no error.

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[6] On appeal, Larry claims that the court made a "serious error of fact" regarding Anna's income that warrants overturning its decision to deny his maintenance request. He refers to the court's statement in its analysis—which, as we have indicated, the court gratuitously undertook despite the absence of a focused argument on the point—that Anna's "current income" was "approximately $29,000 per year," which the court said was "adequate to support herself and the children … but not to contribute to [Larry]'s household as well." Larry asserts that, contrary to the court's statement, Anna reported "$37,140 in annual gross income … in her financial disclosure statement.." We agree with Anna that Larry "overstates his case." The statement does indicate that, as of September 16, 1995, she had earned slightly more than $27,000. It also indicates, however, that her salary was $29,100, and the record indicates that the September 16 figure was based on substantial overtime. And Anna correctly points out that there is no evidence in the record regarding overtime work in the future in her job. We see no error in the court's denial of Larry's request that maintenance be held open for him indefinitely.

(4) The dependency tax exemptions. Larry contends that the trial court's decision to permit him to claim his son as an exemption on his income tax returns only if he is current in child support represents a "per se abuse" of the court's discretion. To the extent the argument suggests that such a "conditional" order is improper, we note that it is expressly sanctioned by WIS. ADM. CODE § HSS 80.03(6). As to the court's decision, Larry argues that it "failed to analyze the consequences of its order … in the overall context of the economic impact of its orders for support, custody and placement, including travel expenses, out-of-pocket payments for the children, entitlement to the head of household credit, the taxability to [him] of the child support, and the like." That is the extent of his argument on the point.

The trial court's memorandum decisions during and after the ten-day trial reveal that the court was indeed aware of Larry's income and his child support obligations, as well as the travel involved in visiting the children. It was also aware that Larry was obligated to pay approximately $9,880 per year at most for child support, while Anna was spending more than $7,620 per year on child care alone, in addition to household expenses. The record supports the trial court's decision to apportion the dependency exemptions equally between the parties.

(5) Social worker/psychologist testimony. Larry complains that three witnesses—two social workers called by the guardian *ad litem* and a court-appointed psychologist—should be "disqualified" as witnesses because they "acted in concert to surgically extract [Larry] from his potential placement position of [sic] his children." He asserts that the witnesses "were not truthful and candid with the court" and that "[t]heir testimony was tainted by collusion and, therefore, incredible and biased as a matter of law." The "argument"—which is

wholly unsupported by legal analysis or citation to the record but simply refers us to a motion filed in the trial court[7]—is scurrilous and unworthy of consideration. Furthermore, it serves no purpose, since Larry is not arguing custody on this appeal.

(6) Larry's *pro se* arguments. Larry argues first that the court erred in failing to exclude the farm from the property division because "it was purchased for his daily living needs." He offers no authority for either the legal proposition underlying the argument—other than an unargued, general reference to ***Pfeil v. Pfeil,*** 115 Wis.2d 502, 341 N.W.2d 699 (Ct. App. 1983), which he does not attempt to relate to his claim—or the quoted assertion. We need not address the argument further. *See* ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988) (appellate court need not address arguments that are unexplained or undeveloped, or unsupported by citations to authority or references to the record).

He next argues that the court erred "when it failed to hold a hearing prior to hiring [the guardian *ad litem*] at $70 an hour prior to attempting to locate an attorney that [sic] was willing to serve … at statutory rates." He claims:

> This practice violates [his] due process rights… The Guardian ad Litem is subject to the political power of the … judge who make[s] the appointment. If the GAL displeases [the judge], he [or she] will not get future appointments or get his [or her] bills approved for payment. This practice encourages GAL's [sic] to make recommendations that favor the judge's agenda and not protect their clients [sic] best interest. The Jefferson

[7] We consider such "for-reasons-stated-elsewhere" arguments to be inadequate and we decline to consider them. *See* ***Calaway v. Brown County***, 202 Wis.2d 736, 750-51, 553 N.W.2d 809, 815 (Ct. App. 1996).

> County selection of Guardian ad Litem [sic] is unconstitutional.

For the reasons just stated, we also reject this unsupported argument.

(7) Anna's motion for frivolous-appeal costs and fees. Anna contends that Larry's appeal is frivolous within the meaning of RULE 809.25(3)(c)(2), STATS., and that he or his attorney knew or should have known that it lacked any reasonable basis in law or equity. She claims that several of the issues are not cognizable because they were not specifically mentioned in the notice of appeal—an argument we rejected earlier in this opinion as unsupported by citations to legal authority. She also claims several of Larry's arguments were not properly raised in the trial court and were thus waived. Recognizing that the waiver rule is one of administration, not jurisdiction, *see* ***Bauer v. Murphy***, 191 Wis.2d 517, 526, 530 N.W.2d 1, 4 (Ct. App. 1995), we have considered most if not all of the issues Larry raised. It follows that we must therefore deny Anna's motion, for, as we said in ***Nichols v. Bennett***, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831, 834h (Ct. App. 1994), RULE 809.25(3) "does not allow us to find that individual arguments in a brief are frivolous." While Larry's arguments on this appeal are meritless in varying degrees, the rule, as interpreted, does not permit a finding of frivolousness.

By the Court.–Judgment and orders affirmed.

Not recommended for publication in the official reports.