COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1076 **Cir. Ct. No. 2009FA1979**

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

JEFFREY S. BORCHERT,

PETITIONER-APPELLANT,

V.

HEATHER BECKER F/K/A HEATHER R. MARR,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Jeffrey Borchert appeals a circuit court order directing that he pay child support to Heather Becker. Borchert asserts that the court erred in relying on "inaccurate expert opinions" and "inaccurate numbers" in determining Borchert's income for purposes of calculating child support. Separately, Borchert asserts that, because Becker did not plead a substantial change in circumstances, the court erred in making the child support order effective as of the date Becker filed her motion to modify child support.

¶2 We conclude that the first argument is undeveloped, but that even if it were developed it is without merit, and that the second argument was not preserved in the circuit court, but that even if it had been preserved it is without merit.

¶3 Becker moves that we determine this appeal to be entirely frivolous. We grant this motion.

¶4 Accordingly, we affirm and remand this matter to the circuit court to determine the costs, fees, and reasonable attorney's fees, to be paid entirely by counsel for Borchert and not by Borchert, and awarded to Becker.

BACKGROUND

¶5 The following undisputed facts are taken from documents in the record and from the circuit court's findings.

¶6 Borchert and Becker have a child in common, born in 2006. In 2008, an Iowa County court entered an initial order determining child support. Venue was subsequently transferred to Dane County. At one point before 2015, the parties stipulated to a "significant reduction" to the amount of child support initially ordered, due to a reduction in Borchert's income.

¶7 In January 2015, Becker filed motions to modify both placement and child support. The court decided to first resolve the placement issue. Resolution occurred in February 2016, with a stipulation between the parties awarding Becker 53% placement and Borchert 47%. At that time, the parties stipulated that Becker was reserving her right to pursue her pending motion to modify child support.

¶8 After delays that resulted in a court commissioner imposing sanctions against Borchert for Borchert's significant delays in providing court-ordered financial disclosures, the commissioner held a hearing on the child support issue in February 2017.[1] After hearing testimony that included expert opinions on both sides, the commissioner found that Borchert's annual income for purposes of calculating child support is $644,102, and ordered that Borchert pay Becker support, according to the shared placement formula, of $4,044 per month. Borchert filed a motion for a de novo hearing with the circuit court.

¶9 At the de novo hearing, Becker's income was undisputed. However, Borchert's income was disputed. Both Becker and Borchert presented expert reports and testimony in support of their respective positions as to what the court should determine Borchert's income to be for purposes of calculating child support.

¶10 Borchert is the sole owner of a construction business that is organized as a Subchapter S corporation. The expert called by Becker testified that, because Borchert is the sole owner of the business, Borchert's income has

[1] Borchert did not challenge these sanctions at the de novo hearing before the circuit court and no detail regarding the substance of Borchert's conduct and resulting sanctions matters to any issue on appeal.

three components: salary, rental income, and S corporation income. This expert calculated Borchert's income based on an average of 2015 and 2016, using extrapolated numbers for fourth quarter 2016, because those figures were not yet available. Using this average, Becker's expert opined that "Borchert's total income from all sources available for child support" was $664,691. Given how close that number was to the income determined by the court commissioner, Becker said that she would accept the slightly lower figure of $644,102 calculated by the commissioner.

¶11 The expert called by Borchert testified that Becker's expert should not have relied on estimated figures for fourth quarter 2016, because this approach inaccurately inflated the income. Instead, he opined, Borchert's income should be calculated as the sum of the net of Borchert's wage income and the net book income of the business, for a total of approximately $440,000. At the same time, Borchert's expert acknowledged that, in 2016, distributions from the business to Borchert totaled $517,000 and that his wage income was approximately $115,000. The circuit court observed that adding the distributions and wages, as calculated by Borchert's expert, to rental income of approximately $11,000 results in an income of roughly $644,000, which is the amount that the court commissioner calculated.

¶12 The circuit court also considered relevant a financial statement prepared by Borchert's accounting firm, dated December 23, 2015. The financial statement was explicitly based on information obtained from Borchert, and estimates his "current" annual income as $836,709.

¶13 In its oral ruling, the circuit court thoroughly reviewed the competing expert testimony. The court explicitly relied on all of the following

sources and considerations: the competing reports of the experts and the report prepared by Borchert's accounting firm; the undisputed fact that Borchert, as the sole owner of the business, has discretion in making distributions; the persuasive authority of an unpublished decision from this court regarding how to treat income from S corporations for child support purposes; and the significant growth of Borchert's business in 2015 and 2016.

¶14 In particular, the circuit court explained that it found persuasive the approach used by Becker's expert of determining income based on an average two years of financial data, which accounted for Borchert's ability to control his income each year by making decisions on topics that include distribution amounts. The court also concluded that the pass-through income of the business should be considered available to pay child support. In light of significant growth in the business over the previous two years, the court explicitly rejected Borchert's position that, if an average was to be used, the average should be of more than two years. Based on all of these considerations, the court concluded that, for purposes of calculating child support, Borchert's annual income is approximately $644,000. The court explicitly rejected Borchert's request for a deviation from the application of the standard child support formula. This resulted in a support award of $4,044 per month.

¶15 Regarding the timing of the support modification, the circuit court ordered that the new amount was effective as of February 1, 2015, because Becker's motion to modify placement and child support, filed in January 2015, was filed based on Becker's "understanding that Mr. Borchert's circumstances had significantly changed," providing him with "a great deal more ability to pay support in 2015 when she filed" the motion, and Becker's understanding proved

correct. The court also concluded that Becker should not be deprived of support payments due to court delays not caused by Becker. Borchert appeals.

DISCUSSION

¶16 Borchert asserts that we should remand this matter to the circuit court "for a new trial and determination on [two] issues": the amount of annual income that should be used to determine Borchert's child support obligations, and the effective date of the new child support order. Becker responds that the court's determinations as to both issues are amply supported by the record and the law. She also argues that this appeal is entirely frivolous and seeks reasonable fees, costs, and attorney's fees as a result. After setting forth the appropriate standard of review for determinations of child support awards, we explain why we agree with Becker on all issues, including the frivolous appeal issue.

Standard Of Review

¶17 The calculation of child support is committed to the circuit court's discretion. ***Modrow v. Modrow***, 2001 WI App 200, ¶9, 247 Wis. 2d 889, 634 N.W.2d 852. Therefore, we review a child support determination under the erroneous exercise of discretion standard. ***Tierney v. Berger***, 2012 WI App 91, ¶8, 343 Wis. 2d 681, 820 N.W.2d 459. As our supreme court has explained:

> "A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." An appellate court will affirm a circuit court's discretionary decision as long as the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach."

Franke v. Franke, 2004 WI 8, ¶54, 268 Wis. 2d 360, 674 N.W.2d 832 (quoted sources omitted).

¶18 In addition, valuation of a closely held business is a question of fact for the circuit court to determine, which we will not disturb unless it is contrary to the great weight and clear preponderance of the evidence. ***Schorer v. Schorer***, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993) (citation omitted). The circuit court is the ultimate arbiter of the weight and credibility of expert witnesses. ***Id.***

Determination Of Borchert's Income

¶19 Borchert asserts that the circuit court relied on "inaccurate expert opinions" and "inaccurate numbers" when determining Borchert's income for purposes of calculating child support, but fails even to begin to develop a supported argument to this effect, and we reject the argument on this ground. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (explaining that we generally do not consider arguments that are unsupported by references to pertinent legal authority). Further, even if we were to reach the merits, it is clear that we would sustain the decision, because the record shows that the circuit court carefully weighed competing expert testimony and employed a rational deliberative process to reach its income determination.

¶20 We first address the lack of development. Borchert fails to state the applicable standards of review. In fact, his attorney gives no sign that he is aware of the correct standards, because he frames his arguments as if we are to act as the finders of fact and as if we are to exercise our discretion in setting the support amount, contrary to the long-established standards that we have summarized.

¶21 Further, Borchert provides no supporting legal authority. Apart from the statute governing general appellate briefing requirements, Borchert does not cite a single Wisconsin statute or case, controlling or persuasive, in either his principal brief or his reply brief. In fact, he cites to only one opinion in his briefing, and it is completely off topic: a 1996 federal district court opinion addressing the lack of scientific validity of a plaintiff's expert's proposed testimony that plaintiff suffered from a disease purportedly caused by exposure to radiation from defendants' refining byproduct.

¶22 For these reasons, Borchert's argument fails.[2]

¶23 Second, we observe that there is no apparent basis on which Borchert could attack the circuit court's decision. Based on our review of the testimony and the exhibits from the de novo hearing, it is apparent that the record contains ample evidence to support the circuit court's determination, and that the court explicitly considered all of the evidence presented at the hearing, including all significant points made by both experts. It is sufficient to note that the court specifically credited certain aspects of the testimony of Borchert's expert, but fully explained why it concluded that the testimony of Becker's expert provided a more accurate representation of Borchert's income and ultimately found the testimony of Becker's expert to be more credible.

[2] We provide further support for our conclusion that Borchert fails to develop an argument on the first issue below, in our discussion of the motion for sanctions.

Determination Of Effective Date For Modified Support Order

¶24 To repeat, the circuit court made the child support order retroactive, effective February 2015, because that was the first full month after Becker filed the motions to modify the placement and child support orders. If Borchert used the correct standard of review in challenging the court's decision, Borchert would apparently argue that the court erroneously exercised its discretion, because in her 2015 motion Becker did not explicitly move for modification of child support *based on claim of a substantial change in circumstances*, but instead first asserted a substantial change in circumstances in February 2016, when the parties stipulated regarding a placement schedule.

¶25 One problem with this argument, however, is that it is new, raised for the first time on appeal. That is, as explained further below, our review of the record shows that Borchert never raised in the circuit court his current failure-to-allege-substantial-change-in-circumstances argument and, therefore, Borchert forfeited this argument. Moreover, Borchert provides no good reason to address the issue despite his failure to preserve it.

¶26 Explaining the factual background further, Borchert argued to the circuit court at the de novo hearing that, although it had been "reasonable" for the court to hold off on making a child support calculation until after the parties resolved the placement issue—as they did through stipulation in 2016—Becker was responsible for delays in reaching the placement stipulation. Borchert did *not* argue to the circuit court, at any time, that an effective date of February 1, 2015, would be inappropriate because Becker had not based her 2015 motion on a substantial change in circumstances. Borchert did make an argument as to when the revised support order should commence, but it is not the argument he makes

on appeal. Borchert argued to the court that, based on "fairness," the new order should "be effective immediately," which would have been as of April 2017, not 2016, as he now argues.[3]

¶27 For these reasons, we deem forfeited the argument that Borchert now makes regarding the circuit court's determination of the effective date. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶¶23-27, 338 Wis. 2d 114, 808 N.W.2d 155 (this court generally does not consider arguments raised for the first time on appeal). Borchert fails to provide us with any reason to conclude that declining to consider this forfeited argument is not appropriate and we decline to consider the argument on appeal.

¶28 We pause to observe that, even if we had not concluded that Borchert forfeited the failure-to-allege-substantial-change-in-circumstances argument he now makes, we would reject this argument on its merits. The circuit court did not erroneously exercise its discretion in setting child support effective February 1, 2015. Pursuant to WIS. STAT. § 767.59(1m) (2015-16), the circuit court may revise support as of the date of filing of a motion requesting the change, and has discretion to determine the effective date.[4] ***Id.*** To repeat, the court found that Becker's January 2015 motion was filed based on Becker's understanding that

[3] Borchert now takes issue, pointlessly as far as we can discern, with a statement of the circuit court indicating that Becker had filed two separate motions in January 2015—one seeking to modify placement and another seeking to modify child support—when, Borchert contends, Becker filed a single motion seeking to modify both placement and support. However, Borchert failed to raise any challenge to this statement in the circuit court and fails to explain why the court's reference to the motions to modify both placement *and* child support as separate was inaccurate or why it should matter to our analysis.

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Borchert's income had increased. The court found that, as of the date of the motion, Borchert's income had increased to a degree that his income "would have permitted him to pay increased support as of the time she filed the motion." The court concluded that Becker should not be deprived of support payments due to court delays, that the earlier date was fair, and that it matches "what was available to Mr. Borchert and when it was available." We discern no potential argument that the court's effective date determination is not reasonable, based on the law and the relevant facts.

Frivolous Appeal

¶29 Becker has moved this court for costs, fees, and attorney's fees, pursuant to WIS. STAT. RULE 809.25(3)(a), because the appeal is frivolous. We agree.

¶30 As pertinent here, an appeal is frivolous if "[t]he party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c)2. "'To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous.'" ***Schapiro v. Pokos***, 2011 WI App 97, ¶20, 334 Wis. 2d 694, 802 N.W.2d 204 (quoted source omitted). "'Whether an appeal is frivolous is a question of law.'" ***Id.*** (quoted source omitted).

¶31 Regarding the first issue, as we have explained, Borchert's would-be challenge to the circuit court's discretionary decisions is undeveloped on multiple levels. Moreover, as we now briefly explain, there are significant problems even beyond what we have noted above.

¶32 Borchert's argument relies on incomplete and misleading excerpts from portions of the trial transcript and mischaracterizes the circuit court's factual findings and analysis. We provide one example, but there are others, no less troublesome. Borchert argues: "The Court made an assumption that the first quarter of 2016 was also a weaker quarter. There was *no evidence* to support this assumption, it was a *made up fact* by the Court." (Emphasis added). However, this allegation that the court "made up" a fact is incorrect. The circuit court relied on testimony by Borchert's expert in reaching this conclusion, explaining that "we did hear [Borchert's expert] say that the summer is the peak time. So, I think we could infer that the first quarter would also be a weaker quarter."

¶33 Regarding the second issue, as we have explained, Borchert presents an argument never raised at the circuit court level and therefore not preserved for appeal. It is true that parties occasionally seek review of unpreserved arguments, and such an argument is not necessarily frivolous. However, four facts push the briefing on this issue into the frivolous category.

¶34 First, when Becker makes a supported forfeiture argument, Borchert responds by arguing in his reply brief, *inaccurately*, that he did raise the argument with the circuit court. We are not in a position to determine whether this inaccuracy is the product of intentional misrepresentation or instead of inattentive advocacy, but it is hard to see how it is excusable either way. Second, while this court will consider reasonable arguments that we should take up the merits of unpreserved arguments, Borchert does not even attempt to offer such an argument. Third, as we have explained, there is no merit to the argument Borchert now makes. Fourth, Borchert has nothing of substance to say in response to Becker's well-argued frivolous appeal motion. Instead, in lieu of a substantive response,

Borchert merely directs us to his reply brief, which as we have noted includes inaccurate and unsupported argument.

¶35 For all these reasons, we conclude that Becker has met the requirements of WIS. STAT. RULE 809.25(3)(c)2. Further, pursuant to RULE 809.25(3)(b), we conclude that the onus for the frivolous appeal should fall entirely on Borchert's attorney and that, therefore, fees should be assessed in toto on the attorney and not even in part to Borchert. We see no reason to think that any shortcoming that we have summarized was the result of any act of Borchert, as opposed to acts of his attorney. Accordingly, we grant Becker's motion, and remand this matter to the circuit court to determine the costs, fees, and reasonable attorney's fees to be awarded to Becker and paid by the attorney.

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

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