COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP252-FT **Cir. Ct. No. 1996FA311**

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

IN RE THE MARRIAGE OF:

JAMI L. CARROLL, PREVIOUSLY KNOWN AS JAMI L. VAN BOXTEL,

PETITIONER-APPELLANT,

V.

BRENT F. VAN BOXTEL,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.[1] Jami L. Carroll appeals an order determining property division, child support and physical placement issues. Jami argues: (1) the circuit court failed to order her ex-husband Brent Van Boxtel to pay 12% interest on the division of a retirement account not timely paid; (2) certain language in the divorce judgment did not constitute a child support order; and (3) the court considered improper factors and failed to consider proper statutory factors regarding placement. We disagree and affirm.

¶2 The parties were divorced on June 19, 1998. One minor child was born to the parties and, at the time of the final divorce hearing, the child was three years old. Hearings were held on October 22 and 24, 2008, concerning placement, child support arrears, current child support, and property division issues, among other things. Jami now appeals from the circuit court determinations.

¶3 Jami argues the circuit court was inconsistent in its decision with regard to the payment of interest.[2] The 1998 divorce judgment specifically provided for interest on the equalization payment. Because the equalization payment was not paid timely, the court subsequently ordered interest at 12% from the date of divorce. The divorce judgment also provided for a qualified domestic relations order (QDRO) to be prepared for the pension plan. Apparently, there

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Jami utilizes the phrase "abused its discretion." The Wisconsin Supreme Court changed the terminology used in reviewing a circuit court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion" in 1992. ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). Jami's brief also refers to "Petitioner-Appellant (hereinafter 'Appellant')" and "Respondent-Respondent (hereinafter 'Respondent')." We remind counsel that WIS. STAT. RULE 809.19(1)(i) requires "[r]eference to the parties by name, rather than by party designation, throughout the argument section."

was no follow-up on the QDRO. However, the record contains correspondence from the plan administrator dated July 18, 2008, stating:

> [W]e feel there will be difficulties in determining the Alternate Payee's benefit based upon the Assignment Date noted in the QDRO. Since 1998, there have been two record keepers for the Plan and the Plan was not daily valued until 1999; therefore the ability to retrieve the necessary account information along with investment earnings gains and losses would be difficult to obtain. We recommend that the QDRO be rewritten providing an assignment to the Alternate Payee in a flat dollar amount as of a current date.

This resulted in the court subsequently ordering a lump sum 401(k) payment to Jami of $4,524.41, representing one-half the 1998 value of the retirement account, with no interest from the date of divorce on the unpaid amount.

¶4 However, unlike the provisions regarding the equalization payment, there was no provision in the divorce judgment specifying 12% interest on the division of retirement accounts. Moreover, as the court correctly observed, Jami's share of the 401(k) account would have been subject to market conditions and may have increased or decreased in value since the divorce judgment. The court therefore found interest would be "speculative."

¶5 Jami cites ***Washington v. Washington***, 2000 WI 47, 234 Wis. 2d 689, 611 N.W.2d 261, and insists that not awarding interest created an inequality of property division.[3] She also cites ***Modrow v. Modrow***, 2001 WI App 200, ¶25,

[3] Jami argues "there is a delay of payment of more than 10 years from the final hearing which results in an inequality in the property division if interest is not ordered." This argument is undeveloped and we will not abandon our neutrality to develop the argument. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

247 Wis. 2d 889, 634 N.W.2d 852, as recognizing "that it was proper to award interest for a delayed property payment."

¶6 Jami's case law is inapposite. In ***Washington***, the judgment "made no mention of interest or appreciation on either party's lump sum share of the pension or when or how payment of the federal pension was to be made." ***Washington***, 234 Wis. 2d 689, ¶6. Here, the judgment was not silent. The divorce judgment specifically stated Jami was entitled to her share of the retirement funds by QDRO. Her entitlement to the 401(k) funds was dependent on market conditions, not contract or judgment interest rates. Moreover, in ***Modrow***, we upheld an "innovative provision" assuring the payment of child support by an offset against the property division, and preserving the home as a residence for the minor children while the husband was incarcerated. ***Modrow***, 247 Wis. 2d 889, ¶25. We conclude the case-specific facts in ***Modrow*** do not apply to the present case.

¶7 Jami next disputes language in the divorce judgment regarding child support. Jami was ordered to pay child support at 12.75% with no minimum until the child entered kindergarten. At that time, her obligation was ordered to be a minimum of $29 per week. Jami argues this "represents the Court's finding of fact concerning future earning capacity, rather than a child support order." Jami contends the court retroactively modified the child support order in violation of WIS. STAT. § 767.59(1m).

¶8 The language of the divorce judgment regarding child support provided as follows:

> [C]hild support is set at 12.75% and no minimum amount is set. However, when [the child] enters kindergarten, the petitioner's obligation to pay child support shall be a

> minimum of $29.00 per week. This is based upon the court's feeling that the petitioner should be able to have at least a part time job earning $10.00 per hour.

We conclude the language, "shall be a minimum of $29.00 per week," constitutes an order. Jami was not working at the time of the final divorce hearing, and the child support obligation once the child entered kindergarten was a fixed minimum amount based on her potential income. Setting child support at a fixed minimum amount is within the discretion of the court. *See* ***Doerr v. Doerr***, 189 Wis. 2d 112, 129, 525 N.W.2d 745 (Ct. App. 1994).[4]

¶9 Finally, Jami argues the court considered improper factors and failed to consider proper statutory factors regarding placement. We disagree. The record clearly demonstrates the court considered the interaction and interrelationship of the child with his parents. The court also considered the amount and quality of time each parent spent with the child, and his adjustment to home, school and the community. The court considered the child's developmental and educational needs, as well as the need to provide predictability and stability for him. Further, the court considered whether the parents would likely unreasonably interfere with the child's continuing relationship with the other parent. *See* WIS. STAT. § 767.41(5)(am). The court's decision, as a whole,

[4] The child entered kindergarten in September 2000. Between September 1, 2000 and May 17, 2007, Jami owed child support in the amount of $11,100.33. Brent's motion to the circuit court did not seek a retroactive child support order. Rather, he sought to enforce the existing order by holding Jami in contempt for failing to make any child support payments since the divorce judgment, and also to revise the order from 12.75% to 17% in the future. Jami's argument also fails to recognize that even if the circuit court would not have considered the minimum of $29 weekly, the obligation was set at 12.75% and the court would have calculated support based on that percentage. Jami's position appears to indicate that she was not obligated to pay any support, which is clearly inconsistent with the divorce judgment.

examined the facts, incorporated appropriate factors and reached a reasoned and appropriate placement decision.

¶10 Jami insists the circuit court "added football as a factor when determining placement issues." Jami notes the court found it significant she did not know the position her child played on his eighth grade football team. Jami characterizes this concern as "arguably a sexist way of evaluating the Appellant."

¶11 We reject Jami's improper characterization of the circuit court. Jami testified she had a "very close and loving" relationship with her son, but the court stated, "The common theme that I heard from him is you don't have time for him." The court also commented on Jami's involvement with her son as follows:

> [T]he issue today is what is in [the child's] best interest ….
>
> ….
>
> I think it was crystal clear during the testimony here, Ms. Carroll you've done basically nothing in terms of spending time and getting to know your son. You were asked on the witness stand what position he plays, and you were unable to know that in football. You may not think that impacts him. It sure does.
>
> You were asked to name his teachers. You were able to name two teachers. You—I think you've had contact with his school one time …. You're just too busy for him ….

Jami's suggestion of sexism is disingenuous. The record demonstrates the circuit court was evaluating the parties' knowledge of their son and their involvement in his life.

¶12 Jami also insists the circuit court inappropriately "became an active participant interrogating the Appellant and making, what Appellant believes, were inappropriate statements and observations before all the evidence had been presented to the Trial Court." Jami contends the court "arguably abandoned its

role as decision-maker when it directly questioned the Appellant about her son, daughter and her daughter's significant other."

¶13 Jami fails to provide citation to legal authority to support her suggestion that a circuit court may not question witnesses during their testimony. We will not consider arguments unsupported by legal authority. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.[5] In any event, the parties' credibility was central to the court's consideration of the factors in this matter and the court did not act inappropriately. The record demonstrates the court questioned both parties in an effort to gather additional information and understand their actions and motivations.

¶14 We note the court prefaced its decision with the following comments:

> [I]t can't be more disappointing than to see what I've observed during the last two days in addition to, you know, the length of this file; the nature of the trial that went on seven, eight years ago; and the battle that the two of you just continue to do to each other.
>
> ….
>
> I will represent to you that I think both of you have lied to me today and on Wednesday on very important issues.

¶15 Given the obvious lack of amicability between the parties, the circuit court was given a difficult task. In this regard, we cite a statement in a case written nearly four decades ago: "Unfortunately, too many divorced parents 'allow the desire to nurture their personal animosities to overshadow the welfare

[5] It is also a cardinal rule of effective appellate advocacy to avoid disparaging the lower court. *See* ***State v. Rossmanith***, 146 Wis. 2d 89, 430 N.W.2d 93 (1988).

of the child ….'" ***Weichman v. Weichman***, 50 Wis. 2d 731, 736, 184 N.W.2d 882 (1971).

By the Court.—Order affirmed.

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