

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0260**

In re the Marriage of:  
Michael D. Werner,  
petitioner,  
Appellant,

vs.  
Judy R. Werner,  
Respondent.

**Filed January 15, 2008  
Affirmed  
Klaphake, Judge**

Dakota County District Court  
File No. F8-05-3647

Harvey N. Jones, Harvey N. Jones, P. A., 1350 South Frontage Road, Hastings MN 55033 (for appellant)

Patricia M. Buss, Sarah E. Grimsrud, Buss Law Office, P. A., 2412 117th Street East, Burnsville MN 55337 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Worke, Judge.

## UNPUBLISHED OPINION

**KLAPHAKE**, Judge

Appellant Michael D. Werner challenges the district court's confirmation of an arbitration award, arguing that the arbitrator showed evident partiality. Because appellant failed to establish facts that would create a reasonable impression of partiality, the district court did not err in confirming the arbitration award. We therefore affirm the district court's order.

## DECISION

This court must use an extremely narrow standard of review and exercise every reasonable presumption in favor of an arbitration award's finality and validity. *Aaron v. Illinois Farmers Ins. Group*, 590 N.W.2d 667, 669 (Minn. App. 1999). A court may vacate an arbitration award only upon one of the grounds listed in Minn. Stat. § 572.19 (2006). *See id.* Appellant asserts that the award should be vacated due to evident partiality by the arbitrator under Minn. Stat. § 572.19, subd. 1(2). The determination of evident partiality is a legal question to be reviewed de novo by this court. *Aaron*, 590 N.W.2d at 669.<sup>1</sup> “The party challenging the award must establish facts that create a reasonable impression of partiality.” *Id.* (quotation omitted).

---

<sup>1</sup> Although respondent urges us not to consider appellant's claim of evident partiality for failure to raise the issue before the district court, a review of the record establishes that there are no disputed facts and there is no factual basis for appellant's claim of evident partiality. *See Pirsig v. Pleasant Mount Mut. Fire Ins. Co.*, 512 N.W.2d 342, 344 (Minn. App. 1994). When there are no unaddressed factual disputes, we may evaluate the argument based on facts existing in the record. *See Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 522-23 (2007).

Appellant claims that evident partiality is shown by the arbitrator's determination of spousal maintenance. Appellant argues that the arbitrator was biased against him because of his remarriage prior to the arbitration hearing. Appellant presumes this bias based on the arbitrator's reduction of his living expenses by half as part of the determination of net income available for spousal maintenance. An arbitration award "will be vacated only upon proof of one or more of the grounds stated in Minn. Stat. § 572.19 . . . and not because the court disagrees with the decision on the merits." *AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299-300 (Minn. 1984). Appellant argues that evident partiality is obvious from the award itself, and no further proof is necessary.

Appellant admits that a court cannot vacate an arbitration award, in general, due to a mistake of law or fact. *See Indep. Sch. Dist. No. 279 v. Winkelman Bldg. Corp.*, 530 N.W.2d 583, 586 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). However, appellant believes the arbitrator "crossed the line" from making a mistake of law or fact to being evidently partial to respondent. Appellant argues that an analysis of the factors used to determine an award of spousal maintenance demonstrates that the arbitrator acted with evident partiality in making the award because it was so inconsistent with Minnesota law.

Minn. Stat. § 518.552 (2006) lists the relevant factors a court must consider when setting the amount and duration of maintenance. Minn. Stat. § 518.552, subd. 2(g), requires the court to consider "the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance." In determining

the ability of appellant to meet his own needs, the arbitrator considered contribution from appellant's new wife for the support of their joint residence.<sup>2</sup>

The statute does not address whether or not the income of a payor's new spouse, if any, can be considered by the court. Such is precluded only in modification of support motions.

The income of a payor's new spouse should, at a minimum, affect the living expenses claimed by the payor. A share of those expenses, shared equally or in proportion to income, should be attributed to the new spouse or roommate, if not married.

Martin L. Swaden & Linda A. Olup, 14 *Minnesota Practice*, § 8.11(J) (1992) (footnote omitted). In *Wagstrom v. Wagstrom*, 394 N.W.2d 841, 844 n.3 (Minn. App. 1986), *review denied* (Minn. Nov. 26, 1986), this court acknowledged that although the district court could not consider the present spouse's income to establish the maintenance award, it could consider such income with respect to the maintenance obligor's monthly expenses attributable to both the obligor and present spouse, such as rent and food. This court noted that the district court did not err when it considered the obligor's total monthly family income as it pertained to total monthly family expenses when modifying the maintenance award. *Id.* Therefore, the arbitrator's consideration of appellant's new spouse's income in reducing his living expenses is neither a mistake of law or fact, nor such a clear disregard of the law that it resulted in an award of spousal maintenance that demonstrated bias or partiality.

---

<sup>2</sup> Although no oral testimony as to appellant's new wife's income was admitted during arbitration, the record contained a copy of a residential loan application establishing her income as \$97,000 per year and setting forth a declaration of monthly income and combined housing expenses for appellant and his new spouse.

“Evident partiality” exists when there has been some communication or contact by a neutral arbitrator with either a party or another arbitrator, or conduct by the arbitrator that might create an impression of possible bias. *Aaron*, 590 N.W.2d at 669. There are no facts in this record that demonstrate partiality. We therefore affirm the district court’s order confirming the arbitration award.

**Affirmed.**