COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP326 **Cir. Ct. No. 2013FA697**

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

IN RE THE MARRIAGE OF:

JILL A. DUDAS,

PETITIONER-RESPONDENT,

V.

DAVID G. DUDAS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN ZAKOWSKI, Judge. *Modified and, as modified, affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. David Dudas appeals from a divorce judgment. He argues the circuit court erred by declining to award him periods of physical

placement with his three minor children without first finding that such placement would endanger the children's physical, mental, or emotional health. He also argues the circuit court erroneously exercised its discretion with respect to property division, maintenance, and child support. We reject each of David's arguments. We modify the divorce judgment to correct an apparent oversight and, as modified, affirm.

BACKGROUND

¶2 David and Jill Dudas were married in July 1989. During the course of their marriage, they had five children. David worked as a civil litigation attorney and owned a law firm in Appleton. Jill primarily stayed home to care for the parties' children, although she sometimes worked as a dance instructor.

¶3 David was arrested following an incident at the parties' home on July 21, 2013. Jill alleged that David physically and sexually assaulted her on that date and on multiple other occasions during the marriage. In April 2014, David was convicted following a jury trial of twenty-eight felonies and two misdemeanors related to his sexual and physical abuse of Jill.[1] One of the misdemeanor counts was for intimidating a witness, specifically, one of the parties' minor sons. In July 2014, David was sentenced to thirty years' initial confinement, followed by ten years' extended supervision. He has been incarcerated at the Dodge Correctional Institute in Waupun since that time. His appeal from his criminal convictions is currently pending.

[1] The jury acquitted David of one count of strangulation and suffocation, contrary to WIS. STAT. § 940.235(1) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Jill filed for divorce in September 2013, during the pendency of the criminal case against David. Three of the parties' children were minors at the time of filing. The parties agreed that Jill should be awarded sole legal custody of the minor children. However, they disagreed regarding physical placement of the minor children, child support, maintenance, and property division.

¶5 On October 9, 2015, following a four-day final hearing, the circuit court issued a thirty-eight-page written decision addressing the disputed issues. The court awarded primary physical placement of the minor children to Jill. Although David had asked the court to award him periods of physical placement at least once per month while he was incarcerated, the court declined to "order placement or specific time with the father at this time based upon the evidence." Instead, the court held that the children "should have control with the option of whether they want to see their father. If they want to see their father in prison, there are family members who can transport them, there are facilities appropriate to accommodate them and a father who is more than willing to see them." The court further explained:

> The children are to be in counseling and it is the court's expectation that the counseling may help determine if the children really want to see their father. The court will not put a timeframe on when they can see their father. We do not know how long the appellate process will take. The children can see their father sooner rather than later if they choose to do so.

The court also concluded that David could write to the children, but Jill would review that correspondence and decide whether to let the children see it.

¶6 With respect to the property division, after considering the factors set forth in WIS. STAT. § 767.61(3), the circuit court determined it was appropriate to deviate from an equal division and awarded the vast majority of the parties'

property to Jill. This included the parties' residence, which was valued at $745,000 with $602,237 in equity, and a rental property valued at $154,000, which the court awarded to Jill "in view of David's maintenance obligation."

¶7 As for child support, the circuit court determined David had an annual earning capacity of $120,000. Using the standard guidelines for a high-income payer, the court determined that David's total child support obligation, calculated until the parties' youngest child graduated from high school, was $340,680. The court concluded the present value of that amount was approximately $270,000. In order to fund David's child support obligation, the court ordered David's share of an account his law firm held at BMO Harris Bank transferred into a segregated account at the same bank. The court also ordered the majority of the personal property awarded to David in the property division to be sold and the proceeds placed in the segregated account. The court specified Jill was to access the segregated account "only for the purposes of monthly child support."

¶8 Finally, after considering the factors set forth in WIS. STAT. § 767.56(1c), the circuit court determined Jill was entitled to maintenance for a period of twelve years at a total value of $80,325. The court noted it had already awarded Jill the parties' rental property, "[g]iven David's maintenance obligation." The court did not order David to make any additional maintenance payments to Jill, nor did it award her any other property in lieu of maintenance. However, recognizing that a review of maintenance might be necessary if David succeeded in his criminal appeal, the court held maintenance open for two years.

¶9 A final judgment of divorce was entered on December 28, 2015. David now appeals. Additional facts are included in the discussion section as necessary.

DISCUSSION

¶10 "The division of property, calculation of child support, and determination of maintenance in divorce actions are decisions entrusted to the discretion of the circuit court, and are not disturbed on review unless there has been an erroneous exercise of discretion." ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We similarly review a circuit court's decision regarding physical placement under the erroneous exercise of discretion standard. ***Helling v. Lambert***, 2004 WI App 93, ¶7, 272 Wis. 2d 796, 681 N.W.2d 552. We will uphold a circuit court's discretionary decision if the court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a reasonable conclusion. ***LeMere***, 262 Wis. 2d 426, ¶13. We independently review any questions of law that may arise during our review of a discretionary decision. ***Id.***, ¶14. However, we accept the circuit court's factual findings unless they are clearly erroneous. ***Hokin v. Hokin***, 231 Wis. 2d 184, 190-91, 605 N.W.2d 219 (Ct. App. 1999).

I. Physical placement

¶11 Courts "have no power in awarding placement other than that provided by statute." ***Wolfe v. Wolfe***, 2000 WI App 93, ¶17, 234 Wis. 2d 449, 610 N.W.2d 222. The allocation of physical placement is governed by WIS. STAT. § 767.41. Subsection (4) of the statute states, in relevant part:

> (a) 1. Except as provided under par. (b), if the court orders sole or joint legal custody under sub. (2), *the court shall*

> *allocate periods of physical placement between the parties in accordance with this subsection.*
>
> 2. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5) (am), subject to sub. (5) (bm). *The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent*, taking into account geographic separation and accommodations for different households.
>
> (b) *A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.*

(Emphasis added.)

¶12 In ***Wolfe***, we explained that WIS. STAT. § 767.24(4) (1997-98), the predecessor to the current WIS. STAT. § 767.41(4), "unambiguously require[d] that before a court may deny all placement or contact with a parent, it must find that the placement or contact would endanger the child's physical, mental or emotional health." ***Wolfe***, 234 Wis. 2d 449, ¶11. "Absent that finding, the statute requires the court to allocate periods of physical placement between the parents utilizing the best interest of the child to guide its decision." ***Id.*** We explained the statute embodied a legislative determination that, absent a finding of endangerment, "some contact or placement is in the child's best interest." ***Id.***, ¶12.

¶13 Based on WIS. STAT. § 767.41(4) and ***Wolfe***, David argues the circuit court erroneously exercised its discretion by declining to award periods of physical placement with him without first finding that such placement would endanger his children's physical, mental, or emotional health. This argument fails because the circuit court did not, in fact, decline to award the children physical placement with David. Rather, the court indicated it was empowering the children

to make their own decisions about whether to have contact with David. In other words, the court recognized the children are entitled to periods of physical placement with David and "allocate[d]" periods of physical placement between the children and David, *see* § 767.41(4)(a)1., as the children saw fit to exercise it.

¶14 The circuit court's decision regarding physical placement was consistent with the recommendations of both the guardian ad litem (GAL) and Beth Young-Verkuilen, a marriage and family therapist who the court appointed to assess the parties' children and offer opinions as to whether they should have contact with David. In her written report, Young-Verkuilen opined it was not in the children's best interest to have contact with David, either by mail or in person. She opined contact should occur "[o]nly in adulthood, and at [the children's] initiation."

¶15 In support of her opinions, Young-Verkuilen noted she had met with each of the minor children three times, she had met with Jill once, and she had spoken with David once by telephone. She described the parties' five-year-old daughter as "a friendly five[-]year[-]old girl who exhibited no signs of separation anxiety." Young-Verkuilen noted the child had "a clear understanding of where her father is and why," accurately stating, "He is in jail because he hurt my mom." When asked, the child indicated she missed David and "would want to see him." However, Young-Verkuilen observed that "[w]hen she said this … she appeared anxious." Young-Verkuilen noted she "did not witness any other periods of anxiety" in her three sessions with the child.

¶16 As for the parties' eight-year-old son, Young-Verkuilen described him as "a somewhat anxious and serious young man for his age." She stated he "tends to be quieter and more sensitive" and "was clearly less comfortable with

the sessions than was his sister." Young-Verkuilen noted the eight-year-old child "tends to use avoidance and or repression to deal with unpleasant emotions and memories." For example, she observed that, although Jill reported the child knew his father was incarcerated and why, the child told Young-Verkuilen he did not know where his father was, he did not know why he was coming to see Young-Verkuilen, and he had limited memories of the night that led to his father's arrest.

¶17 Young-Verkuilen reported that, during one session, the eight-year-old child "verbalized, when asked, that he missed his father." He told her "that he might want to see his father but it depended on what he [the child] was doing at the time." For instance, if he were playing a game or doing something fun he would not want to see David, but if he were "just stuck at home with nothing to do," then he would. The child told Young-Verkuilen he usually does not think about David unless he is "really bored" or it is the child's birthday.

¶18 Young-Verkuilen described the parties' sixteen-year-old son as "a bright, well[-]spoken and polite young man who has strong convictions." Young-Verkuilen wrote that the sixteen-year-old child

> talks openly about his father and his feelings about him. He reports having been aware that there were issues between his parents, both on the night of the assault and before that. He talked about the events of that night with clarity and detail. He was mortified to see the extent of his mother's injuries the day after the assault. He clearly was fearful of his father and appeared agitated recounting the events of that evening.

According to Young-Verkuilen, the sixteen-year-old child was "very clear" that he did not want to have any contact with David. In fact, Young-Verkuilen reported the child

> is indignant that there might even be a possibility he would be required to have contact with [David]. He states that he

> has no interest in ever having a relationship with him, but that sometime, many years in the future, he may visit his father so he can tell him how he feels about him and then leave. He denies missing his father and believes that the family is better off without [David] in their lives. … He states that they don't have to walk on eggshells anymore like they did when his father was in the home.

¶19 Ultimately, Young-Verkuilen described the Dudas family as "one of the most traumatized" families she had worked with in her twenty-eight-year career. She stated she is "very concerned" about how the assaults on Jill have impacted the children, especially the parties' eight-year-old son. Young-Verkuilen opined that the children have strong bonds with Jill, who has done "a respectable job of not over[-]sharing about the assault events and legal matters" and has not spoken negatively to the children about David. In contrast, Young-Verkuilen stated the children "appear to have limited bonding with [David] at this time." Young-Verkuilen also observed that, to her knowledge, David had not "accepted his responsibility for the assault and his incarceration." During her telephone conversation with David, "he did not express concern or remorse for how his actions have impacted his children or estranged wife."

¶20 Young-Verkuilen's testimony at the final hearing was consistent with her report. On cross-examination, Young-Verkuilen was asked what harm the children would suffer if they maintained a relationship with David and visited him in prison. She responded the parties' sixteen-year-old son was "terrified" of David, and it would be "extremely traumatic" for him to have contact with David. In addition, Young-Verkuilen observed the parties' sixteen-year-old son was the victim of the witness intimidation offense for which David was convicted. With respect to the parties' eight-year-old son, Young-Verkuilen stated, "[M]y concern is the level of denial or repression in him. He's not in any position at this time to

have contact with his father until [he] starts to make sense of what's happened in his family." Regarding all three of the minor children, Young-Verkuilen testified:

> My concern is that their primary bonding at this time is with [Jill], and I think all consideration needs to be given to keeping that bonding intact. They've already largely lost one parent, and the last thing I'd want to have—see happen is anything done to disparage their mother in their eyes at this point. They need to have a strong bond with the parent that they have left. And my concern is that if [David] is not accepting responsibility for his part in the events that happened, and he is conveying that [Jill] was, maybe, equally at fault, that's going to harm the children.

¶21 Young-Verkuilen testified she did not object to David sending the children cards and letters, provided the content was appropriate. However, because of the trauma the children had experienced as a result of David's actions, she emphasized that the children "need to have some sense of control about, do they choose to read those or open[] those."

¶22 The GAL, in turn, recommended that David have no contact with the parties' minor children until at least the completion of his pending criminal appeal. The GAL stated, "It would be my hope, then, at that point that the children [will have] had further counseling, that [David] may have had some counseling. Those efforts and those possible experts would be very helpful to this Court, and to make a determination at that time about reasonable contact." Noting that Jill had previously indicated she would not object to David sending the children cards and letters, the GAL stated, "I would have no objection to that if [Jill] is still in the same frame of mind as to agreeing to cards and letters in the event the children wish to receive them, and they are of appropriate content and have been reviewed."

¶23 As noted above, the circuit court ultimately determined, after considering the factors set forth in WIS. STAT. § 767.41(5), that it should be up to the children to decide whether they want to have contact with David. In reaching that conclusion, the court specifically relied on Young-Verkuilen's opinion that the children should be "empowered" to determine the extent of their relationship with their father. The court determined David could send correspondence to the children, but Jill would screen that correspondence and decide whether to forward it to the children, and the children could then decide whether to read it.

¶24 These rulings were amply supported by Young-Verkuilen's opinions and the GAL's recommendation, and they constitute a proper exercise of the circuit court's discretion. Although the court did not expressly frame its conclusions regarding placement in terms of the children's "best interest," *see* WIS. STAT. § 767.41(5)(am), it is clear from context the court determined the children's best interest would be served by allowing them to decide whether to have contact with David. Moreover, the court's rulings on placement are consistent with § 767.41(5)(bm), which provides that, if the court finds a parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse, "the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody and periods of physical placement."

¶25 David argues Young-Verkuilen's opinions do not support the circuit court's placement decision because her belief that he might convey negative impressions to the children regarding Jill is "pure speculation." We disagree. Young-Verkuilen formed her opinion to that effect after speaking with David, Jill, and all three of the parties' minor children. Those interviews, along with Young-Verkuilen's training and experience, formed a reasonable basis for her opinion.

The weight and credibility of expert witness testimony are uniquely within the province of the fact finder—here, the circuit court. ***Bloomer Housing Ltd. P'ship v. City of Bloomer***, 2002 WI App 252, ¶12, 257 Wis. 2d 883, 653 N.W.2d 309. Young-Verkuilen's opinion that David might convey negative information about Jill to the children was not incredible as a matter of law, and the circuit court therefore had a right to rely on it. *See* ***State v. Lombard***, 2003 WI App 163, ¶21, 266 Wis. 2d 887, 669 N.W.2d 157, *aff'd*, 2004 WI 95, 273 Wis. 2d 538, 684 N.W.2d 103.

¶26 David also argues that, in reliance on Young-Verkuilen's opinion, the circuit court based its decision regarding placement on an improper factor—namely, David's failure to accept responsibility for his actions. He contends that, by relying on that factor, the court ignored that David "is and at all times relevant has been a criminal defendant who has exercised his Fifth Amendment rights against self-incrimination." David argues the court "put [him] in the unenviable position of having to choose between his freedom and his children, as the only way the court would seem to have ordered placement was if David had pled guilty to the criminal allegations."

¶27 There are two problems with David's argument. First, although Young-Verkuilen emphasized David's failure to take responsibility for his actions, she clarified during her testimony at the final hearing that she understood David may have been directed by his criminal attorneys not to make any admissions of guilt. She explained, "I don't fault him for that, but I think that there is, also, a way to convey concern for your children, and how they're doing as a result of events that have happened without admitting guilt, and I did not get that sense from him."

¶28 Second, while David asserts the circuit court adopted Young-Verkuilen's opinion regarding David's failure to accept responsibility, nothing in the court's written decision indicates it relied on David's failure to accept responsibility as a basis for its rulings on placement. The court did suggest that, when writing to the children, David might want to start by saying "'I am sorry' for this current situation." However, recommending that David apologize "for this current situation" is a far cry from requiring David to waive his Fifth Amendment right against self-incrimination and does not indicate the court based its placement decision on David's failure to do so. Instead, the court's comment appears to echo Young-Verkuilen's opinion that David's apology would convey his concern for the children and their current situation, regardless of David's guilt or innocence.

¶29 Finally, David argues the circuit court's rulings regarding physical placement "deprived [him] of a fundamental right to have relationships with his children without due process." This argument is based solely on David's contention, which we have already rejected, that the court erred by denying the children physical placement with him. Simply reframing that unsuccessful argument in terms of due process adds nothing to David's position. Rather, for all of the reasons explained above, we conclude the circuit court properly exercised its discretion with respect to physical placement of the parties' minor children.

II. Property division

¶30 David next argues the circuit court erroneously exercised its discretion by awarding virtually all of the parties' property to Jill, without requiring her to make an equalization payment. As David correctly notes, WIS. STAT. § 767.61(3) sets forth a presumption that most property is to be divided equally at divorce. However, a court may deviate from an equal division after

considering the factors listed in § 767.61(3)(a)-(m). We recognize the property division in this case was vastly unequal. Nevertheless, under the unique circumstances of this case, we conclude the circuit court did not erroneously exercise its discretion.

¶31 The circuit court properly considered the relevant statutory factors when dividing the parties' property. The court's primary concern was allowing Jill—the party with primary physical placement of the children—to remain in the family home. *See* WIS. STAT. § 767.61(3)(h). The court expressly found that allowing the children to remain in the family home would be in their best interest, crediting Jill's testimony that the children "for their healing … needed to take the house back and let it be theirs and their home." The court reasoned, "Given the turmoil surrounding Jill and the children over the past several years, it is important that the children retain as much stability and support as possible, including remaining in the only homestead they have known."

¶32 However, the circuit court recognized that, given the large amount of equity in the residence, awarding it to Jill would result in her having to make a large equalization payment to David. The court observed, "Under the current circumstances, such a scenario would be impossible for Jill and would require the house to be sold, thereby creating a hardship for the family." Nevertheless, the court concluded it could award Jill the residence without requiring her to make an equalization payment, based on other statutory factors.

¶33 In particular, the circuit court relied on the catch-all factor, WIS. STAT. § 767.61(3)(m), which permits a court to consider "[s]uch other factors as the court may in each individual case determine to be relevant." Under that factor, the court stressed that, due to his own voluntary actions, David would be

incarcerated for thirty years. The court noted that, while it could not consider "misconduct that causes the failure of the marriage" when dividing the parties' property, it could consider "destruction (or waste) of marital assets." *See* ***Anstutz v. Anstutz***, 112 Wis. 2d 10, 13, 331 N.W.2d 844 (Ct. App. 1983). The court reasoned, "By effectively placing himself in prison for the duration of the younger children's childhood, David has significantly depleted marital assets—i.e.[,] the earnings that would have been used to care for Jill and the children including making payments on the marital residence." The court emphasized, "David is not being punished for whatever tortious conduct that may have been committed; rather the court's decision is based upon the realization he has wasted assets by his voluntary actions which led to his being incarcerated in the system for 30 years."

¶34 The circuit court also cited other statutory factors in support of its decision to divide the parties' property unequally. For instance, the court observed that Jill had brought a $100,000 inheritance to the marriage, which the parties put toward their home, contributing to its equity. *See* WIS. STAT. § 767.61(3)(b). The court stated allowing Jill to remain in the residence without an equalization payment was "a way to give some credit" for that $100,000 contribution.

¶35 The circuit court also noted that, while David was the primary wage earner during the marriage, Jill "significantly contributed by being largely a stay-at-home mother for five children." *See* WIS. STAT. § 767.61(3)(d). Turning to the parties' physical and emotional health, *see* § 767.61(3)(e), the court observed that Jill suffered from "potential post-traumatic stress disorder," along with "chronic post[-]traumatic headaches associated with moderate to severe head injury, insomnia, detachment in her left eye, nightmares, pain disorder, chronic migraines and associated co-morbidities," as well as "adjustment disorder with anxiety." Although the court acknowledged the possibility that Jill would eventually recover

from her physical and mental ailments, it credited the testimony of her vocational expert that, due to those ailments, she "is unable to have gainful employment at the present time." The court concluded Jill had an annual earning capacity of $16,512, whereas David had a much higher annual earning capacity of $120,000. *See* § 767.61(3)(g).

¶36 The circuit court also considered the other economic circumstances of the parties, *see* WIS. STAT. § 767.61(3)(j), observing that, due to his incarceration, David would "have all of his needs paid as a ward of the State in the corrections system." The court agreed with Jill that "the practical effect of David's situation is that the State of Wisconsin … will be providing lodging, food, medical assistance and entertainment for David while he is incarcerated. David will be in effect living rent free while his children will need a place to live with their mother."

¶37 In addition, the circuit court determined two other considerations were relevant under the catch-all factor, WIS. STAT. § 767.61(3)(m). First, the court noted that David's father had previously assisted in paying the parties' two oldest sons' college expenses, but as of the final hearing, he had withdrawn that assistance. While the court acknowledged David had no obligation to support his adult children, it reasoned it had discretionary authority to consider the adult children's educational expenses when dividing the parties' property. *See* ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶38, 269 Wis. 2d 598, 676 N.W.2d 452. The court explained that, given David's testimony regarding his love, commitment, and support for his children,

> [i]t is only logical for the court to conclude that if he was not incarcerated due to his voluntary decisions, he would be contributing to the payment of his children's educational costs. The court finds it important that there be some

> ability for Jill to help pay the college expenses, and this factor has been considered in the court's decision to deviate from a 50/50 property division.

Second, the court observed that, although the minor children had medical insurance through Badger Care, David would be unable to contribute to their uninsured medical and dental expenses.

¶38 Turning to the parties' other property, the circuit court awarded the majority of the personal property to Jill, specifically noting that many of the items were used by the children or naturally belonged with the residence, and also observing that David had no use for some items because he was in prison. These were proper considerations under WIS. STAT. § 767.61(3)(j) and (m). The court also awarded Jill a rental property the parties owned, in lieu of ordering David to make maintenance payments. *See* § 767.61(3)(i). In addition, the court awarded Jill the bulk of an IRA with a pre-tax value of $382,504, to help her pay expenses associated with the marital residence and rental property. *See* § 767.61(3)(h) and (m).

¶39 As the preceding summary shows, before ordering an unequal property division, the circuit court conducted a detailed analysis of the factors set forth in WIS. STAT. § 767.61(3). The court applied the appropriate legal standard to the relevant facts and used a rational process to reach a reasonable conclusion. *See* ***LeMere***, 262 Wis. 2d 426, ¶13. David asserts he will be released from prison sooner or later, depending on the outcome of his criminal appeal, and the circuit court's property division has left him with no assets with which to support himself or pay back a $200,000 note to his father that he incurred to pay for his criminal defense. However, those circumstances do not change the fact that, at present, David is in prison, having his basic needs paid for by the State of Wisconsin,

while Jill is responsible for supporting herself and the parties' minor children. Under the unique circumstances of this case, we reject David's argument that the unequal division of the parties' property was "excessive."

¶40 David also argues the circuit court erred by treating one of his law firm's corporate accounts as both an asset to be divided in the property division and income for purposes of calculating child support and maintenance. The argument fails because the circuit court did not use David's actual income when setting child support and maintenance. Rather, it attributed to him an earning capacity of $120,000, due to the fact that he was incarcerated as a result of his own voluntary actions and thus would not be earning any income in the foreseeable future. As a result, the court did not impermissibly treat the corporate account as both an asset and income.

¶41 David also argues the circuit court erroneously exercised its discretion by awarding two of the parties' vehicles—a 1999 Ford F-250 and a 2002 Jeep Liberty—to their adult children. Contrary to David's assertion, however, the court did not award those vehicles to the parties' adult children. It awarded them to Jill, with the understanding that, by doing so, the adult children could continue to use the vehicles.

¶42 David nevertheless argues this was an erroneous exercise of the circuit court's discretion because a parent has no obligation to support his or her adult children. *See* ***Resong v. Vier***, 157 Wis. 2d 382, 391, 459 N.W.2d 591 (Ct. App. 1990) (holding circuit court erred by considering child's potential educational expenses during adulthood when setting child support because "the law does not require any parent to support his or her adult children"). He asserts,

"Whether adult children could use one of their parents' assets is not one of the factors set by the legislature to be considered in property division."

¶43 However, in ***Rohde-Giovanni***, our supreme court held that a circuit court may exercise its discretion to consider a parent's contribution to the educational expenses of an adult child when setting maintenance. ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶38. Based on ***Rohde-Giovanni***, the circuit court concluded it could also consider the parties' adult children's educational expenses when dividing the parties' property, under the statutory "catch-all" factor, WIS. STAT. § 767.61(3)(m). David does not develop any argument on appeal that the circuit court's reliance on ***Rohde-Giovanni*** with respect to the property division was improper. Jill asserted the court should award the 1999 Ford F-250 and the 2002 Jeep Liberty to her, for the adult children's use, because those vehicles "were in fact for the use of the adult children each of whom needs a car for their jobs." Jill further asserted the children "need the jobs in order to pay off their school loans which are due as a result of [David's father's] termination of the payment of tuition." On these facts, the court reasonably awarded the two vehicles to Jill for the adult children's use, as that use allowed them to keep the jobs necessary to pay their educational expenses.

¶44 Lastly, David argues the circuit court's property division was "improperly punitive," in that it was motivated by the court's impermissible consideration of the conduct underlying his criminal convictions. *See* WIS. STAT. § 767.61(3) (stating court shall presume most property is to be divided equally at divorce but may alter that distribution "without regard to marital misconduct" after considering factors listed in the statute). We disagree. The court made it clear in its written decision that its unequal division of the parties' property was not motivated by a desire to punish David for his criminal conduct. Rather, the court

appropriately considered the fact that, due to his voluntary actions, David would be incarcerated for a substantial period of time and therefore would not earn any income from which child support or maintenance could be paid. A court's "authority to consider the contribution of each party to the marriage allows it to consider destruction or waste of the marital assets by either party," and "[t]he prohibition against considering marital misconduct does not prevent consideration of a party's depletion of marital assets." ***Anstutz***, 112 Wis. 2d at 13.

¶45 For the foregoing reasons, we reject David's contention that the circuit court erroneously exercised its discretion when dividing the parties' property. We observe, however, that one aspect of the final divorce judgment appears to require correction. In its October 9, 2015 decision and order, the circuit court stated the 1999 Ford F-250 was to be sold and the proceeds placed in a segregated account that was created to fund David's child support obligation. David subsequently moved for clarification of various aspects of the court's decision, including its division of the parties' vehicles. In its oral ruling on the motion for clarification, the circuit court specified the Ford F-250 was awarded to Jill for use by one of the parties' adult sons. The court did not, however, incorporate that ruling into the final judgment of divorce that it subsequently issued on December 28, 2015. Instead, consistent with the October 9 decision and order, the final judgment stated the Ford F-250 "shall be sold and the proceeds placed in the child support account." This appears to have been an oversight, as the circuit court clearly stated in its oral ruling that the Ford F-250 was awarded to Jill. When there is a conflict between an unambiguous oral ruling and a written judgment, the oral ruling controls. *See* ***State v. Lipke***, 186 Wis. 2d 358, 364, 521 N.W.2d 444 (Ct. App. 1994). We therefore modify the final judgment to reflect that the circuit court awarded Jill the Ford F-250.

III. Child support and maintenance

¶46 Finally, David argues the circuit court erroneously exercised its discretion with respect to child support and maintenance. First, he contends the court did not acknowledge that his share of the equity in the parties' home satisfied the present value of his child support obligation. He therefore argues the court erred by awarding Jill other items in the property division as "in kind" child support.

¶47 This argument fails because the court did not order an unequal property division in lieu of child support. Rather, the court determined David's child support obligation, pursuant to the appropriate guidelines. Because David was incarcerated and had no income, the court then ordered certain assets that were awarded to David in the property division to be placed in a segregated account to fund his child support obligation. The court awarded other assets to Jill, such as the family home and the majority of a substantial IRA, based on the factors set forth in WIS. STAT. § 767.61(3). The court awarded other personal property to Jill on the basis that the property either logically belonged with the home or was used primarily by the children. Those items were not, however,

awarded in lieu of child support.[2] That David's share of the equity in the parties' home—or other assets awarded to Jill—would have satisfied his child support obligation is therefore irrelevant.

¶48 David also argues that, although the circuit court specified Jill was to access the segregated account only for purposes of monthly child support, the court erred by failing to set other "safeguards or limits to ensure her compliance with that order." Due to this failure, he asserts there is nothing to prevent Jill from prematurely depleting the account. However, David fails to specify on appeal what "safeguards or limits" he believes the court should have imposed. Moreover, as Jill points out, the use of the segregated account in this case was specifically authorized by statute, *see* WIS. STAT. § 767.76, and a recipient of child support can use those funds for the children's needs without accounting to the payer.

¶49 Turning to maintenance, David notes the circuit court reduced the total value of his child support obligation to its present value, but it failed to do the same with respect to his maintenance obligation. He then observes the court seemed to concede that David's share of the equity in the parties' rental property

[2] In the section of its written decision addressing maintenance, the circuit court stated that, because there were not enough assets to fund David's child support and maintenance obligations, the court was required to "look towards an unequal property division to insure in-kind support to prevent additional hardship to Jill and the children." However, reading the court's decision as a whole, and particularly the section discussing the property division, it is clear the court did not award Jill any assets as "in kind" support or in lieu of child support. To be sure, one factor the court implicitly relied on when dividing the parties' property was the undisputed fact that the funds placed in the segregated child support account would be insufficient to meet David's total child support obligation. However, the court's consideration of that factor does not mean that other property awarded to Jill in the property division was awarded as "in kind" child support. Rather, independent of child support, the court awarded certain property to Jill in order to prevent additional hardship to the children. Moreover, as noted above, the court properly considered when dividing the parties' property that David would be unable to pay for any uninsured medical or dental expenses the children might incur.

would "take[] care of the maintenance." However, he asserts the court nevertheless "inexplicably" held that his maintenance obligation remained unsatisfied.

¶50 David's arguments regarding maintenance are undeveloped. He does not tell us what the present value of his maintenance obligation was at the time the circuit court issued its written decision. In addition, he does not explain why the circuit court's statement that he had not satisfied his maintenance obligation entitles him to relief. David does not argue the court erred by awarding Jill the parties' rental property in lieu of maintenance. Even if David is correct that the award of that property to Jill satisfied his maintenance obligation, the court did not order David to make additional maintenance payments or award Jill any other assets in lieu of maintenance. Under these circumstances, we reject David's claim that the court erroneously exercised its discretion with respect to maintenance.

By the Court.—Judgment modified and, as modified, affirmed.

Not recommended for publication in the official reports.