

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1797

Cir. Ct. No. 2006FA2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

SHAWN E. DREW,

PETITIONER-RESPONDENT,

V.

DAWN M. DREW,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Modified and, as modified, affirmed.*

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Dawn Drew appeals an order amending a divorce judgment that was entered following remand from a previous appeal that reversed

the circuit court's findings concerning pension and business valuations. We modify the pension valuation and also conclude that the court appropriately exercised its discretion concerning the valuation of the business.

¶2 In the prior appeal, we concluded that the circuit court did not properly exercise its discretion when it valued Dawn's retirement account at \$33,000. See *Drew v. Drew*, No. 2009AP3206, unpublished slip op. ¶12 (WI App July 28, 2011). We also concluded that the court did not base its valuation of Shawn Drew's business interest upon facts of record. *Id.*, ¶13. Accordingly, we remanded the matter for further findings.

¶3 On January 18, 2012, the circuit court held a hearing after remand. The parties agreed to "re-admit" the exhibits that had been admitted into evidence at prior proceedings, and further agreed that the court could take judicial notice of "the testimony provided at the earlier hearings." Shawn also sought to file a "Petitioner's Position as to Results to be Obtained on Remand," which appended a pension valuation by Shawn's expert witness, Grant Zielinski, valuing Dawn's retirement account at \$35,525. At the hearing, Dawn refused to stipulate to the admission of Zielinski's report, but the circuit court agreed to allow Zielinski to testify by telephone. However, prior to any testimony being taken, the court stated:

THE COURT: You [Shawn] have an opportunity here to say, Well, we'll agree with you, [Dawn], for the thirty-three; all right? Then we're done with the trial today. All argument after that.

[SHAWN'S ATTORNEY]: We'll agree to that.

....

THE COURT: ... Accomplished one thing: Got her retirement at thirty-three.

¶4 The court then turned to the issue of the value of Shawn’s business interest. Dawn sought to submit an appraisal report, but the court refused to allow the evidence due to sanctions the court had previously imposed when it forbid Dawn from calling any experts because she had failed to comply with the court’s scheduling order that included a deadline for naming expert witnesses. In the prior appeal, we upheld the court’s exercise of discretion in that regard.

¶5 After remand, the circuit court determined that its previous sanction forbidding Dawn’s expert testimony on the value of Shawn’s business interest survived the appeal. The court concluded that permitting Dawn’s expert to testify at the hearing on remand would constitute an end-around its prior sanctions. Dawn then submitted an offer of proof concerning the appraisal report and the court set forth a briefing schedule concerning the value of the business interest.

¶6 The circuit court subsequently entered an order dated January 30, 2012, which stated:

On January 18, 2012, the Court convened for the purpose of dealing with the remand in the above entitled action from the Court of Appeals. Both parties appeared in person and by counsel. The Court accepted the offer by the petitioner that the correct value of the respondent’s interest in the Wisconsin Retirement System was \$33,000.00 and the Court determined to value the same at that figure with the consent of the respondent.

¶7 In addition, the circuit court’s January 30 order memorialized the briefing schedule on the issue of the value of Shawn’s business interests, which the court stated was to be argued “from the evidence already in the record.” The parties subsequently filed briefs discussing solely the issue of the valuation of Shawn’s business interests.

¶8 On June 7, 2012, the circuit court issued a Decision On Remand.

The court stated:

The Court of appeals remanded this matter to take evidence on Respondent's (Dawn) pension and Petitioner's (Shawn) business interest. The first item was no longer an issue between the parties on remand and the Court corrects the value of Dawn's pension Wisconsin Retirement System to be \$35,525.00.

The court also concluded the only credible evidence of Shawn's business interest indicated a net value of \$7,909.30. On June 26, 2012, the court issued an order amending judgment and amended judgment, which included a valuation of the pension at \$35,525, and the business interest at \$7,909.30.

¶9 In the present appeal, Dawn argues that, despite previously accepting the agreement that the value of the pension was \$33,000, the circuit court improperly utilized a valuation of \$35,525 in its decision on remand and its order for judgment. We conclude the circuit court pension valuation of \$35,525 stated in the decision on remand is an obvious scrivener's error.

¶10 As related above, the court explicitly accepted the parties' agreement of \$33,000 as the pension's value at the hearing after remand. The court reiterated its acceptance of the \$33,000 valuation in its decision on remand, which was then memorialized in the court's subsequent January 30 order. Despite these determinations that the value of Dawn's retirement account was \$33,000, the court then inadvertently entered the amount of \$35,525 in its written decision on remand and subsequent order amending judgment.¹

¹ Shawn's counsel inaccurately states on appeal that the "only value presented into evidence" regarding the value of the pension was \$35,525. No testimony was taken at the
(continued)

¶11 We therefore modify the order amending judgment and amended judgment accordingly to reflect a pension value of \$33,000. On remittitur, the Findings of Fact, Conclusions of Law and Judgment of Divorce dated April 22, 2009, shall be amended consistent with this opinion.

¶12 Separately, we conclude that the circuit court properly exercised its discretion concerning the valuation of Shawn's business interest. We reject Dawn's contention that our decision in the prior appeal required additional testimony upon remand. Although our remand invited additional testimony, we did not mandate it, and our decision did not require the circuit court to lift its prior sanctions and allow Dawn to offer evidence after remand that she had been properly precluded from offering previously. Regarding the issue of business valuation, our remand focused on requiring the circuit court to base its valuation on facts of record. It was within the court's discretion to maintain its sanctions, which we previously approved, and determine a valuation of the business interest from the evidence already in the record.² Upon remand, the court reviewed the existing evidence and properly, so far as the record reflects, valued Shawn's business interest at \$7,909.30. Accordingly, we affirm the court's valuation in that regard.

January 18, 2012 hearing, and no evidence was otherwise admitted into evidence at the hearing concerning a pension valuation of \$35,525.

² We note that Dawn failed to submit a reply brief in this court. We thus deem admitted Shawn's argument that the record contained evidence of a value of each item of equipment based on the properly admitted evidence presented at the April 22, 2009 divorce trial. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

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

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2011-12).

