

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2013AP1524

Cir. Ct. No. 2010FA492

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JENNIFER LOUISE OPPERMAN,

JOINT-PETITIONER-RESPONDENT,

v.

WADE WILLIAM OPPERMAN,

JOINT-PETITIONER-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK J. TAGGART, Judge. *Affirmed.*

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

¶1 PER CURIAM. Wade Opperman appeals a judgment of divorce from Jennifer Opperman, challenging the circuit court's decisions regarding

division of property, calculation of child support, and determination of maintenance.¹ We affirm the judgment for the following reasons.

BACKGROUND

¶2 This has been a heavily litigated divorce case that was tried over an extended period in 2012. In May 2013, the circuit court issued a comprehensive, 50-page amended findings of fact, conclusions of law, and judgment of divorce (hereafter the judgment of divorce).

¶3 Jennifer and Wade were married in 2000 and had a child in 2003. They filed a joint petition for divorce on December 13, 2010. At the time of the divorce, Wade was 41 and Jennifer 36, and both were physically healthy.

¶4 Both parties entered the marriage with college bachelor's degrees. During the marriage, Jennifer obtained a master's degree. At the time of the divorce, she was director of a college and in the process of completing a doctorate. Wade was in sales during the marriage and had completed continuing education in sales.

¶5 The court based its maintenance and child support decisions in part on findings that Jennifer's earnings at the time of the divorce were \$47,250 per year and that Wade's rate of pay at the time the divorce petition was filed, the equivalent of \$94,992 per year, represented his earning capacity at the time of the divorce.

¹ Because the parties share a surname, we refer to them by first names.

¶6 On September 27, 2012, after the trial in this case was completed, Jennifer filed for bankruptcy protection in federal court under Chapter 7 of the Bankruptcy Code. On November 30, 2012, Wade filed pleadings in this case asking the circuit court to take into account in its determination of Jennifer's earnings or earning capacity financial information that Jennifer submitted in the bankruptcy proceedings. After clarifying that Wade was not arguing that Jennifer had misrepresented any financial detail in discovery or at the divorce trial, the circuit court rejected Wade's request, on the ground that the court should base its decisions on the evidence adduced at trial following extended discovery, not on subsequent events.

¶7 In the judgment of divorce the court ordered the following, as pertinent to issues raised on appeal: (1) Wade shall pay Jennifer non-modifiable maintenance of \$2,000 per month for 15 years; (2) Wade shall pay Jennifer child support of \$1,583 per month (20 percent of Wade's earning capacity of \$94,992 per year); and (3) marital property shall be divided equally, requiring an equalization payment of \$128,839.20 from Wade to Jennifer.

¶8 During the course of this appeal, the parties corresponded with this court about the possibility of errors in the judgment of divorce. As a result, on May 15, 2014, this court ordered that the appellate briefing schedule be stayed for 60 days to allow Wade to seek relief from the judgment in circuit court.

¶9 On the same day, May 15, 2014, the circuit court signed an order, drafted by Wade's counsel (hereafter the May 15 order). The May 15 order stated that the parties had stipulated that Wade is to make the payments that are denominated in the judgment of divorce as maintenance payments only in the event that Wade does not make the property division equalization payment of

\$128,839.20 set forth in the judgment of divorce. In that event, the May 15 order further provides, these payments would be “a substitute for the equalization payment.”

¶10 On July 15, 2014, Wade filed a reply brief that makes no reference to the May 15 order.

¶11 In an order dated July 18, 2014, this court noted that Jennifer had taken the position, in correspondence that covered transmission of the May 15 order to this court, that pursuant to the May 15 order she “has no longer been awarded maintenance.”

¶12 In light of these developments, we ordered Jennifer to file either a replacement respondent’s brief or a letter indicating that she did not wish to file a replacement brief, and ordered Wade, in the event that Jennifer filed a replacement brief, to file a replacement reply brief or a letter indicating that he did not wish to file a replacement reply brief.

¶13 Jennifer filed a replacement brief on August 18, 2014. Wade filed neither a replacement reply brief nor the letter that this court requested in the event that he decided not to file a replacement reply brief.

DISCUSSION

Wade’s Earning Capacity

¶14 Wade argues that the circuit court erroneously exercised its discretion in ordering him to pay \$2,000 per month in maintenance and \$1,583 per month in child support, based on the court’s determination that his earning capacity is \$94,922 per year, because the only evidence presented to the court

supported lower estimates for his earning capacity. However, we conclude that the court's finding that Wade's annual earning capacity is \$94,922 is a reasonable decision supported by relevant facts under a proper standard of law.² Wade effectively seeks to relitigate the earnings capacity issue in this court, asking us to assign different weights to relevant factors than the circuit court did, and also underplays the significance of circuit court findings that Wade does not show are clearly erroneous.

¶15 We review a circuit court's decision on child support and maintenance for an erroneous exercise of discretion. *Ladwig v. Ladwig*, 2010 WI App 78, ¶15, 325 Wis. 2d 497, 785 N.W.2d 664. "We will uphold the circuit court's discretionary decision if the 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.'" *Id.* (quoted source omitted).

¶16 Wade does not dispute that a circuit court may estimate earning capacity, as opposed to relying exclusively on actual earnings, as part of its determinations of both maintenance and child support, if the court finds that a spouse made voluntary and unreasonable choices under the circumstances to lower his or her actual earnings. See *Sellers v. Sellers*, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996). The question of whether a job choice is unreasonable presents a question of law, although "we will give appropriate

² We ignore for purposes of this discussion any potential negative consequences to Wade's argument that might result from application of the May 15 order, which as noted in the text Wade entirely ignores. We express no opinion on any such consequences, but instead dispose of Wade's argument, as it is presented, on other grounds.

deference to the trial court's legal conclusion because it is so intertwined with factual findings supporting that conclusion." *Id.*

¶17 Wade also acknowledges that the court's determination on this issue was heavily influenced by facts that he does not contest: He had been earning \$7,910 per month (for an annual rate of \$94,920) in late 2010, when the petition for divorce was filed, before he was terminated from a sales job due to his own misconduct. In addition, Wade acknowledges that the court did not base its decisions on misunderstandings of what Wade had actually earned, at lower rates of pay, in recent years.

¶18 Wade argues that the circuit court erroneously exercised its discretion because the court ignored evidence supporting a conclusion that Wade's earning capacity is no more than "the mid \$60,000 range," based on: prevailing wages for sales jobs of the type that Wade is qualified to hold; Wade's history of earning significantly less than approximately \$8,000 per month; and "mental health issues" or a "serious emotional disorder" that Wade alleges make it difficult for him to hold jobs that last long or that produce higher incomes.

¶19 However, these arguments rest on the premise that "[t]here is no work history evidence in the record that would show Wade is capable of earning \$94,922 annually," and this premise is incorrect. The court found that, while holding a job at that wage rate, Wade

purposely and willfully made attempts to defraud his employer so that he would be fired and he could blame the fact he was fired on having too many hearings [in connection with this divorce case]. The Court finds his behavior to be wasteful and done with the intent of hurting the marital estate and Jennifer.

That is, the circuit court found that Wade made a voluntary and unreasonable decision to effectively walk away from a position that pays \$94,920 a year, and that he did not lose this high paying sales job for any other reason.

¶20 In addition, the court had available the written vocational evaluation of certified rehabilitation counselor Leslie Goldsmith. Goldsmith concluded that a “reasonable projection” of Wade’s earning capacity “in the next one to two years is \$50,000 to \$60,000,” but thereafter his capacity would be “well above that amount, assuming continued success.” Goldsmith also noted that Wade had earned, at an annualized rate, as much as \$116,000 per year in 2007 and stated that Wade “is capable of holding down a job and doing quite well, at times earning between \$80,000 to over \$100,000 per year on an annualized basis.” Wade had an opportunity to try to persuade Goldsmith that Wade’s mental health does not permit him to hold higher paying jobs for extended periods, as Wade now emphasizes. Moreover, Goldsmith’s report did not appear to take into account as a factor that, as the court found, Wade intentionally walked away from a job with a rate of pay equivalent to \$94,920 per year.

¶21 We conclude that the court had grounds to estimate Wade’s earning capacity as the pay rate of a job he intentionally left, and that Wade fails to explain why we should conclude that this decision was not a reasonable one, based on relevant facts under the proper standard of law.

Date of Judgment of Divorce

¶22 For purposes of assessing evidence relevant to property division, maintenance, and child support, the circuit court determined that the date of the granting of the judgment of divorce was August 16, 2012. Wade argues that there is “no support whatsoever in the record” for using this as the cut-off date for

evidence to be considered by the court and that this unfairly prevented the court from considering relevant evidence that would have resulted in decisions more favorable to him. This includes an argument that the circuit court failed to “divide the marital estate equally,” because the court did not take into account Jennifer’s ability to discharge debt in bankruptcy. We reject these arguments for the following reasons.

¶23 In itself, Wade’s argument that there is “no support whatsoever in the record” for using August 16, 2012, as the date of the granting of the judgment of divorce is frivolous. This was the final day of a trial that stretched over eight days between March 9 and August 16, 2012. As the circuit court explained to the parties, “this court has to decide the case based upon ... the facts as they are at the time of the trial,” and without an ability to draw a clear line, a circuit court would be unable to bring a contested divorce proceeding to a close.

¶24 Turning to Wade’s attempt at a broader argument, he contends that the circuit court erroneously exercised its discretion in failing to rely on information about Jennifer’s assets and income that she disclosed during the course of the bankruptcy proceeding, which she filed after the trial but before the court rendered its decision to resolve this divorce proceeding. However, in making this argument to the circuit court, Wade conceded that he was not alleging that the postdivorce trial bankruptcy proceedings had revealed that Jennifer had fraudulently misrepresented any fact during the course of discovery and trial in the divorce case. Instead, Wade’s allegation was that Jennifer had failed to update her financial information following the divorce trial. One problem with this argument is that, as we now explain, Wade prevailed before the circuit court in taking what amounts to a contrary position, strongly opposing Jennifer’s motion to reopen

discovery to allow the court to consider updated financial information from the parties.

¶25 On June 11, 2014, with the divorce trial already well underway, the circuit court considered a motion from Jennifer to enlarge the time for discovery. Jennifer's position was that, given the highly contentious history of the case, a long period of time was going to have elapsed from the time the petition for divorce was filed, through the course of discovery and trial, up until the date on which the court rendered its final decision. Therefore, she argued, various pertinent valuations had become "stale," and "we need to know" new values. For these reasons, Jennifer sought the opportunity for the parties to take a new round of discovery.

¶26 Counsel for Wade did not merely oppose the motion. He condemned it as "harassment." He described in some detail voluminous discovery that had been taken before the discovery period closed in February 2012, and argued, "[M]y point is, Judge, enough already. We want to get this thing done."

¶27 The court denied Jennifer's motion to reopen discovery. While "there could be a lot of different values out there" with the passage of time, the court stated, "I see no reason to relitigate the matter for another 19 days of trial, which is certainly what could happen if I allow discovery to be reopened with no apparent good reason."

¶28 Because the only potentially non-frivolous argument that we understand from Wade's briefing regarding the date of the judgment of divorce and Jennifer's bankruptcy proceeding runs directly contrary to the position he took before the circuit court on the potential for late-in-the-case discovery, Wade cannot be heard on appeal to allege error by the court on these topics. In sum, he

does not allege that he raised and the court declined to consider a claim of possible misrepresentation by Jennifer, and he successfully urged the court to firmly close the door on all new financial information production.

Maintenance

¶29 In his principal brief, filed in January 2014, Wade argues that the circuit court made an error of law in requiring him to pay non-modifiable maintenance, because the parties did not stipulate to a period of non-modifiable maintenance, and in addition erroneously exercised its discretion in awarding Jennifer 15 years of maintenance at \$2,000 per month following a marriage of only 12 years. We reject both arguments based on the history that we recite above regarding the May 15 order.

¶30 In her replacement brief on appeal, Jennifer argues, in part, that Wade's arguments regarding maintenance are moot in light of the May 15 order.

¶31 In his reply brief, filed two months after the May 15 order, Wade ignores the May 15 order. In addition, he filed neither a replacement reply brief, which would have been an opportunity to reply to the mootness argument that Jennifer made in her replacement brief, nor the letter that this court requested in the alternative.

¶32 Based on this record, we conclude that Wade concedes that the May 15 order renders moot his arguments regarding maintenance. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578.

The Value of Jennifer's Education

¶33 Wade briefly argues that the circuit court erroneously exercised its discretion “when it ordered Wade to pay for one-half of Jennifer’s student loans but provided him with no compensation for Jennifer’s advance[d] degree.” We reject Wade’s argument as undeveloped, because it ignores our standard of review by failing to address, much less undermine, the following unambiguous findings of the circuit court: (1) student loans that Jennifer took out were used in part to support the family while she was in school and Wade was not working full-time, and (2) Wade was “more of a hindrance” than a help to Jennifer in her efforts to obtain advanced degrees. Wade does not take on the task of showing why these findings were clearly erroneous or how the court misapplied the law to these facts.

¶34 For these reasons, we affirm the judgment of divorce, as amended by the circuit court in the May 15 order.³

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

³ Wade makes an additional purported argument based on judicial estoppel, apparently involving Jennifer’s bankruptcy proceeding, which does not appear to add anything to the argument we reject above regarding the date of the judgment of divorce, and is in any case undeveloped. We reject the argument on that basis.

Separately, we deny Jennifer’s motion for fees and costs pursuant to WIS. STAT. § 809.25(3)(c) (2013-14). We cannot conclude that under all of the circumstances the appeal is “so indefensible that the party or his attorney should have known it to be frivolous.” See *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶¶28, 30, 277 Wis. 2d 21, 690 N.W.2d 1 (quoted source omitted).

