COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP91 **Cir. Ct. No. 2010FA160**

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

IN RE THE MARRIAGE OF:

MICHAEL S. EISENGA,

PETITIONER-APPELLANT,

V.

CLARE A. EISENGA N/K/A CLARE A. HAWTHORNE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

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

¶1 KLOPPENBURG, J. Michael Eisenga and Clare Hawthorne (formerly Eisenga) were married in September 2004 and filed for divorce in May

2010. Pursuant to a court order, Michael and Clare[1] participated in binding arbitration to resolve the financial issues in the divorce, including the amount of child support Michael would be required to pay. The arbitrator issued an award ordering Michael to pay $18,000 per month to Clare in child support, and establishing a $15,000 per month child support "floor" below which Michael's child support obligation could not fall. The circuit court subsequently issued a judgment of divorce and incorporated the arbitrator's award, including the $15,000 per month child support floor, into the judgment.

¶2 Less than a year after the judgment of divorce was issued, Michael moved to modify his child support obligation because of a decline in his income. Michael also moved to strike the child support floor provision of the arbitrator's award as against public policy. Additionally, Michael moved to compel discovery from Clare regarding her financial resources, which he claimed he needed to develop support for his motion to reduce his child support obligation.

¶3 The circuit court denied all of Michael's motions. The circuit court held that Michael waived his right to challenge the child support floor provision, and also found that the child support floor provision did not violate public policy. The circuit court refused to modify Michael's child support obligation because it found that Michael could pay the amount out of his substantial separate estate. The circuit court also found that Clare had adequately responded to a number of Michael's discovery requests, and that the other requests sought irrelevant material. Michael now appeals.

[1] The parties refer to themselves as Michael and Clare. We will do the same.

¶4 On appeal, Michael challenges the circuit court's decisions denying his motion to strike the child support floor as against public policy, refusing to modify his child support obligation, and denying his motion to compel discovery from Clare. For the reasons set forth below, we affirm the circuit court.

BACKGROUND

¶5 Michael and Clare were married in September 2004. Three children were born of the marriage. During the marriage, Michael ran the businesses that he owned and Clare was a stay-at-home mother.

¶6 Michael filed a divorce petition in May 2010. The circuit court ordered Michael and Clare to participate in alternative dispute resolution pursuant to WIS. STAT. § 802.12(2)(a) (2011-12),[2] which permits a judge to "order the parties to select a settlement alternative as a means to attempt settlement." It appears from the record and the parties' briefs that Michael and Clare elected to participate in binding arbitration, with retired Judge Angela Bartell serving as the arbitrator.

¶7 After a four-day arbitration hearing, the arbitrator issued an award that resolved all of the contested issues in the divorce. The arbitrator upheld the marital property agreement that Michael and Clare signed shortly before their marriage; as a result, Michael was awarded his separate property, which was valued at approximately $30 million, and Clare was denied maintenance.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶8 Additionally, the arbitrator ordered Michael to pay $18,000 per month in child support. This amount was based on Michael's 2010 income, the percentage of income guidelines set forth in WIS. STAT. § 767.501, and the high-income payer calculations set forth in WIS. ADMIN. CODE §§ DCF 150.03(1) and DCF 150.04(5). The arbitrator ordered an annual "true-up" each April, at which time Michael's child support obligation would be reevaluated based on fluctuations in his income. The arbitrator also set a child support floor of $15,000 per month below which Michael's child support obligation could not fall, regardless of his income. The arbitrator set the child support floor at this level "because Michael has the ability to pay such base child support out of his [substantial] separate estate in the event that his income does not support such an award."

¶9 After the arbitrator's award was issued, the circuit court held a divorce hearing. At this hearing, Michael and Clare submitted the arbitrator's award to the circuit court and asked the court to incorporate the arbitrator's award into the judgment of divorce. The circuit court granted Michael and Clare a judgment of divorce and incorporated the contents of the arbitrator's award into the judgment of divorce.

¶10 Approximately ten months after the circuit court issued the judgment of divorce, Michael filed a motion to reduce his child support obligation, claiming that his income had fallen substantially. Michael submitted an affidavit prepared by his accountant, who averred that while Michael's 2010 gross income was $1,188,012, his 2011 gross income was $231,519, and that Michael's child support obligation should be set at $4,109.07 per month based on his 2011 income. Michael subsequently moved to strike the child support floor provision in the judgment of divorce as against public policy.

¶11 Michael also served Clare with a number of requests for production of documents, claiming that he needed documentation of Clare's financial resources to support his motion for a reduction in child support. Clare moved for a protective order, claiming that the document requests were irrelevant and intended to harass her.

¶12 In an order dated August 14, 2012, the circuit court determined that Michael had waived his right to challenge the child support floor provision as against public policy because he did not challenge the provision before the arbitrator, and because he did not challenge the arbitrator's award in accordance with WIS. STAT. ch. 788, which governs arbitration proceedings. The circuit court nevertheless found that the child support floor provision did not violate public policy. The circuit court also determined that it retained the authority to modify Michael's child support obligation under limited circumstances, but declined to do so under the circumstances presented.

¶13 In a subsequent order, the circuit court ordered Clare to turn over her 2011 income tax returns and W-2 and 1099 statements. As to the other information Michael requested, the circuit court determined either that Clare had adequately responded, or that the requested information was not relevant and did not necessitate a response. On October 8, 2012, the circuit court issued a final order on the child support issue.[3]

[3] The circuit court set Michael's child support obligation at $15,000 per month, based on the parties' stipulation. This stipulation is not at issue in this appeal.

DISCUSSION

¶14 On appeal, Michael argues that: (1) the circuit court erred when it denied Michael's motion to strike the child support floor provision, because the child support floor violates public policy; (2) the circuit court erred when it denied Michael's motion to reduce his child support obligation, because his reduction in income constituted a substantial change in circumstances and because requiring him to pay $15,000 per month in child support is inconsistent with the requirement that parents pay a fair amount for their children's support and results in hidden maintenance to Clare; and (3) the circuit court erroneously exercised its discretion when it denied Michael's motion to compel discovery from Clare regarding her financial resources.

¶15 In response, Clare argues that: (1) this court lacks jurisdiction because Michael's appeal is untimely; (2) Michael waived his right to challenge the child support floor provision on public policy grounds; (3) the circuit court properly denied Michael's motions to strike the child support floor provision from the judgment of divorce as against public policy and to modify his child support obligation; and (4) the circuit court did not erroneously exercise its discretion when it denied Michael's motion to compel discovery of Clare's financial records. We address each of the issues raised by the parties as follows.

Whether this Court has Jurisdiction over Michael's Appeal

¶16 Clare claims that this court lacks jurisdiction because Michael did not appeal from the judgment of divorce and because Michael's appeal from the circuit court's August 14, 2012 order is untimely. Michael was not required to appeal from the judgment of divorce to later move for postjudgment relief from the judgment of divorce. In family law matters, to determine whether an order

disposes of the entire matter in litigation we look at the relationship among the matters put in litigation by postjudgment motions. *See* ***Campbell v. Campbell***, 2003 WI App 8, ¶¶4 & 10, 259 Wis. 2d 676, 659 N.W.2d 106 (WI App 2002) (determining that an order that set child support but left the amount of arrearages unresolved was not final and appealable because child support and arrearages both comprised the matter in litigation); ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 757 n.3, 548 N.W.2d 535 (Ct. App. 1996) (explaining the need for finality on all issues in post-divorce proceedings).

¶17 Michael filed postjudgment motions that put an adjustment of child support in issue. Although the August 14, 2012 order resolved the motion to strike the child support floor as against public policy, it did not terminate the litigation between the parties as to the adjustment of child support. The August 14, 2012 order therefore was not final because it merely resolved one of the issues in litigation, but did not resolve the entire matter in litigation. *See* ***Heaton v. Independent Mortuary Corp.***, 97 Wis. 2d 379, 396, 294 N.W.2d 15 (1980) (explaining that the test of finality "speaks of 'final' not in terms of a final resolution of an issue but in terms of a final resolution of the entire matter in litigation").

¶18 Additionally, the August 14, 2012 order only decided one substantive issue, and did not use language disposing of the entire matter in litigation or indicating finality for purposes of appeal. *See* ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶35, n.13, 299 Wis. 2d 723, 728 N.W.2d 670 ("'[D]eciding' in the sense of memorializing legal reasoning is not the functional equivalent of 'disposing' of the case, which requires an explicit statement dismissing or adjudging an entire matter in litigation as to one or more parties."). The October 8, 2012 order concluded the litigation over the adjustment of child

support. Michael's timely appeal from the October 8, 2012 order brings before this court the prior non-final ruling on Michael's motion to strike the child support floor as against public policy. *See* WIS. STAT. RULE § 809.10(4).

Whether the Circuit Court Erred by Refusing to Strike the Child Support Floor as Against Public Policy

¶19 Michael argues that the circuit court erred by refusing to strike the child support floor provision of the arbitrator's award.[4] The circuit court found, and Clare argues, that Michael waived his right to challenge the child support floor provision on public policy grounds because he did not challenge it before the arbitrator, and because he did not follow the procedures for challenging an arbitrator's award set forth in WIS. STAT. ch. 788. We agree that Michael cannot now challenge the child support floor provision as against public policy for the reasons that follow.

¶20 First, it appears that Michael may have conceded this issue. In his reply brief on appeal he states: "Michael appeals from the court's refusal to modify support, not the underlying order." If by "the underlying order" Michael means the judgment of divorce, then we understand him to be saying that he is not challenging the terms in that judgment, which include the child support floor provision. Accordingly, by his own admission, Michael is not challenging the circuit court's "refusal" to invalidate the child support floor in the judgment of divorce.

[4] In his briefing, Michael conflates his motion to strike, or more accurately to invalidate, the child support floor as against public policy and his motion to modify his child support obligation. These are two distinct motions, subject to distinct legal analyses. In this section, we address his motion to strike, and in the next section we address his motion to modify.

¶21 Alternatively, Clare argues that Michael fails in his appellate brief-in-chief to challenge the circuit court's determination that he had "waived" his objection to the child support floor because he had not previously objected to it. Michael does not respond to Clare's argument regarding his failure to challenge the child support floor in his reply brief. Michael's apparent failure to reply to Clare's argument constitutes a concession that the ruling is correct. *See* ***Shadley v. Lloyds of London,*** 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838 ("Arguments not rebutted on appeal are deemed conceded.").

¶22 Second, we conclude that Michael *forfeited* his right to challenge the arbitrator's award as against public policy. Case law is "rife with confusion about the words 'waiver' and 'forfeiture,'" but "the two words embody very different legal concepts." ***State v. Ndina***, 2009 WI 21, ¶¶28-29, 315 Wis. 2d 653, 761 N.W.2d 612. "'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" ***Id.***, ¶29 (quoted source omitted). A party may forfeit the right to later assert a claim on appeal by failing to raise an objection in a timely manner (***id.***, ¶30), or by failing to raise an argument before the circuit court. *See* ***Shadley***, 322 Wis. 2d 189, ¶25. Michael forfeited his right to challenge the child support floor provision on public policy grounds because he neither timely objected to it before the arbitrator nor argued against it before the circuit court.

¶23 WISCONSIN STAT. ch. 788 governs arbitration proceedings and sets forth the procedures that a party must follow to challenge an arbitrator's award. A party who believes that an arbitrator's award was in error may move to modify or correct the award under WIS. STAT. § 788.11, or to vacate the award under WIS. STAT. § 788.10. Notice of a motion to modify, change, or vacate the award must be served on the opposing party within three months after the arbitrator's award is

filed or delivered. WIS. STAT. § 788.13. A party may also challenge an arbitration award by taking an appeal from a judgment entered upon the award. WIS. STAT. § 788.15.

¶24 Michael now claims that the child support floor provision of the arbitrator's award violates public policy, but he allowed nearly a year to pass before he moved to strike the child support floor provision on public policy grounds. If Michael believed that the child support floor provision violated public policy, his recourse was to move to vacate the arbitrator's award under WIS. STAT. § 788.10.[5] To challenge the arbitrator's award, Michael was required to serve Clare with notice of his motion within three months from the date on which the arbitrator's award was issued. *See* WIS. STAT. § 788.13. Michael did not challenge the arbitrator's award until over ten months after it was issued. In addition, Michael did not appeal from the circuit court judgment incorporating the arbitration award under WIS. STAT. § 788.15. By failing to challenge the arbitrator's award within the three-month time limit established by § 788.13, or by timely appealing from the judgment incorporating the award, Michael forfeited his right to challenge the validity or enforceability of the provision. *See* ***Ndina***, 315 Wis. 2d 653, ¶¶28-29 ("'forfeiture is the failure to make the timely assertion of a right'" (quoted source omitted)).

¶25 Because we conclude that Michael forfeited his right to challenge the child support floor provision on public policy grounds, we do not decide whether, as Michael argues, the child support floor provision violates public

[5] Under Wis. Stat. § 788.10, a court will overturn an arbitrator's award "'if the award … violates strong public policy.'" ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988) (quoted source omitted).

policy, is inconsistent with the requirement that parents pay a fair amount to support their children's needs, or results in hidden maintenance to Clare. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

Whether the Circuit Court Applied the Correct Legal Standard

¶26 Michael argues that the circuit court did not apply the correct legal standard to his motion to modify his child support obligation. According to Michael, the circuit court correctly noted that it retained the authority to modify his child support obligation based upon a substantial change in circumstances, but erred in concluding that it retained this power only under "limited circumstances." Michael contends that the circuit court erroneously concluded that it had limited authority to review the arbitrator's award as to child support based on its mistaken reliance on ***Franke v. Franke***, 2004 WI 8, ¶24, 268 Wis. 2d 360, 674 N.W.2d 832, which states that "judicial review of an arbitral award is narrow." Michael claims that, by relying on ***Franke***, the circuit court "ignore[d] the statutory provisions that clearly provide that courts always retain the equitable power to modify a previously-entered child support order based upon a substantial change in circumstances." We disagree, and conclude that the circuit court applied the proper legal standard to Michael's motion to modify his child support obligation.

¶27 The circuit court correctly acknowledged the limited scope of judicial review of an arbitrator's award. *See* ***Joint Sch. Dist. No. 10, City of Jefferson v. Jefferson Educ. Ass'n***, 78 Wis. 2d 94, 117, 253 N.W.2d 536 (1977) ("This court has, on numerous occasions, said that '[j]udicial review of arbitration awards is very limited.'" (Quoted source omitted.)). The record does not reflect

any statement of the circuit court suggesting that the limitation on the review of an arbitrator's award played any role in its decision on the ultimate question here. Rather, the circuit court explained that it retained the authority to modify Michael's child support obligation if Michael showed a substantial change in circumstances:

> Franke makes clear that if there has been a substantial change in circumstance a modification of the award is permissible.... Consequently, this court must conclude that it retains the power to modify this award under limited circumstances even though no appeal was taken at the time the judgment was entered.

The circuit court's statement of its authority is consistent with the governing statute.

¶28 WISCONSIN STAT. § 767.59(1f) states: "[A] revision under this section of a judgment or order as to the amount of child or family support may be made only upon a finding of a substantial change in circumstances." Michael agrees that under this statute, a court is authorized to modify an existing child support obligation only if one of the parties shows a substantial change in circumstances. Therefore, the circuit court applied the correct legal standard in concluding that it could only modify Michael's child support obligation upon Michael's showing of "a substantial change in circumstances."

Whether Michael Demonstrated a Substantial Change in Circumstances

¶29 Michael claims that the alleged reduction in his income from $1,188,012 in 2010 to $231,519 in 2011 constitutes a substantial change in circumstances. "The determination of whether there has been a substantial change of circumstances sufficient to warrant a modification of … child support presents a mixed question of fact and law." ***Benn v. Benn***, 230 Wis. 2d 301, 307, 602

N.W.2d 65 (Ct. App. 1999). We will not overturn a circuit court's findings of fact regarding what changes in circumstances have occurred unless the findings are clearly erroneous. ***Id.*** The determination as to "whether those changes are substantial is a question of law which we review *de novo*." ***Id.***

¶30 The circuit court indicated that it would not set Michael's child support obligation below the $15,000 floor because Michael "was awarded an extremely high amount of separate property under the prenuptial agreement valued at approximately $30,000,000," and Michael was not requesting a change in his child support obligation based on any depletion of his separate estate.

¶31 Michael argues that the circuit court erroneously required "near total depletion" of his separate estate, and "near total financial ruin," as a condition for modifying his child support obligation. Michael's argument has several flaws, but the most salient is that Michael does not argue that any decline in the value of his separate estate had occurred here.

¶32 Due to Michael's failure to proffer evidence that the value of his separate estate declined to such a degree that his child support obligation should be modified, we agree with the circuit court that Michael did not show a substantial change in circumstances warranting modification of his child support obligation.

Whether the Circuit Court Erred by Denying Michael's Motion to Compel Discovery

¶33 Michael argues that the circuit court erroneously exercised its discretion by denying his motion to compel discovery regarding Clare's financial resources. As explained above, Michael sought this information as part of his

motion to modify his child support obligation. We do not reach this issue because the discovery that Michael sought relates to topics rendered moot by our foregoing conclusions. *See* ***Turner***, 268 Wis. 2d 628, ¶1 n.1 (when a decision on one issue is dispositive, we need not reach other issues raised).

CONCLUSION

¶34 For the reasons set forth above, we conclude that the circuit court properly determined that Michael forfeited his right to challenge the child support floor provision of the arbitrator's award on public policy grounds and that Michael did not demonstrate a substantial change in circumstances sufficient to warrant modification of his child support obligation, and we conclude that Michael's challenge to the circuit court's denial of his motion to compel discovery is moot.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.