

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2017

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. 2016AP550

Cir. Ct. No. 2014FA255

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DAVE WILLIAM REYNOLDS,

PETITIONER-APPELLANT,

V.

KARI ANN REYNOLDS,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dave Reynolds appeals a divorce judgment and an order clarifying the judgment. We affirm.

¶2 We first address the circuit court’s imputation of income to Dave for purposes of determining child support and maintenance. The court found that in the years immediately before the divorce Dave acted unreasonably and in bad faith with intent to close the couple’s business as a means of depriving Kari Reynolds of financial stability after divorce. The court stated that “the only reason it went out of business was Dave’s desire to ‘bury’ Kari financially.” Based on this finding, the court imputed future monthly income to Dave of \$9,700, which the court described as “the amount that he was making at the time just prior to the commencement of this action.”

¶3 On appeal, Dave does not dispute the court’s findings about his actions, and does not argue that it was improper for the court to impute future income. Instead, he argues that the court erred in setting the figure at \$9,700. Dave argues that the court acted improperly because it obtained that figure from the stipulation for a temporary order that was entered early in this case. He further argues that the actual evidence from the trial shows his income capacity to be less than that.

¶4 We conclude that Dave has failed to demonstrate that the finding is erroneous. Even if we were to assume that Dave is correct that the circuit court improperly used the stipulation, the question would still remain as to whether the court’s dollar figure was clearly erroneous in light of the available evidence.

¶5 On that point, Dave’s argument for an alternative figure is weak and undeveloped. He does not develop a detailed argument for a specific figure. And, in this summarizing sentence from his reply brief, it appears that he is entirely missing the point of the court’s imputation of income: “If income is to be imputed

to Dave, it should be the income Kari's expert testified to: \$60,000 a year," or \$5,000 per month.

¶6 The problem here is that the expert testimony was about only the salary that should be paid to a technician who is also a manager of the business, but that figure did not include profits from the business as a whole that would accrue to the owner. That \$60,000 figure would not fulfill the court's purpose in imputing income to Dave, which was to use a figure that would represent the income he would still be making if he still owned a healthy business. In short, Dave has not shown on appeal that a correct view of the evidence would lead to a monthly figure lower than \$9,700. Accordingly, we conclude that he has not established circuit court error on this point.

¶7 Dave next argues that the circuit court engaged in improper double counting by first including the value of the business in making the property division, and then using imputed income from the business as a basis for Dave's maintenance payments. Dave acknowledges case law holding that it is not double counting to include a business in the property division, and then also use income from the business for maintenance purposes. See *McReath v. McReath*, 2011 WI 66, ¶¶59-61, 335 Wis. 2d 643, 800 N.W.2d 399. But he argues that his case is different because here the court ordered that the business be sold.

¶8 In response, Kari points out that the court did *not* order the business to be sold, but instead awarded it to Dave. In reply, Dave appears to shift grounds and argue instead that the circuit court decision "denies Dave the right to decide if he should sell." We disregard this argument because it was made for the first time in the reply brief, which deprives Kari of a chance to respond. See *Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

¶9 Dave next argues that the circuit court erroneously exercised its discretion in awarding maintenance. He first argues that the court used maintenance to punish him. He relies on a passage from the court’s decision where it recited some of what it perceived as his misconduct during the divorce, and stated that such conduct could not be tolerated by the court.

¶10 We disagree that this passage shows that the court intended to punish Dave. This passage was explanation for the court’s decision to impute future income to Dave for maintenance and child support purposes, based on his conduct regarding the business. Dave does not dispute that imputation of income is a proper response to that conduct. He does not argue that imputation of income is somehow improper punishment.

¶11 Dave also argues that the circuit court erred by not sufficiently explaining how the statutory factors it cited led to its specific maintenance order. Without attempting to repeat that discussion here, we conclude that the circuit court’s discussion was adequate.

¶12 Finally, Dave argues that the circuit court’s child placement decision failed to “maximize” the time that the parties’ child would spend with Dave, as that term is used in WIS. STAT. § 767.41(4)(a)2. Kari correctly notes that the supreme court has held that this provision does not supersede the court’s duty to consider the best interests of the child and other statutory factors. *See Landwehr v. Landwehr*, 2006 WI 64, ¶¶18-23, 291 Wis. 2d 49, 715 N.W.2d 180. Dave does not argue that the court erred in its application of those factors or in its determination of the child’s best interests. Therefore, Dave has not shown that any error occurred.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).

