**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 21, 2018**

**Sheila T. Reiff**
**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. 2017AP1620** **Cir. Ct. No. 2016FA316**

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

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**IN RE THE MARRIAGE OF:**

**JODI MARIE ROBERTS,**

**PETITIONER-RESPONDENT,**

**V.**

**AARI KEVIN ROBERTS,**

**RESPONDENT-APPELLANT.**

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

Before Sherman, Blanchard and Kloppenburg, JJ.

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. Aari Kevin Roberts appeals pro se from a judgment of divorce, challenging the maintenance award, the child support amount, and the property division. For the reasons discussed below, we affirm.

## BACKGROUND

¶2 Jodi and Aari married in 1996 and divorced in 2017. The parties share two children, the eldest of whom turned eighteen while the divorce was pending and graduated from high school two weeks after the divorce trial. The younger child was seventeen at the time of the final divorce. The parties entered into a partial marital settlement agreement (MSA) which resolved issues of custody, placement, and property division. The issues of maintenance and child support were tried to the court.

¶3 After trial, the circuit court issued a written decision finding Aari's gross monthly income to be $4,167 from employment plus $292 from rental property awarded him in the property division. The court found Jodi's gross monthly income to be $2,862 from employment[1] plus $955 from interest on a land contract awarded her in the property division. The circuit court ordered that Aari pay maintenance to Jodi in the amount of $240 per month for an indefinite term. The court set maintenance "based upon its best estimate of actual incomes," and in order to equalize the parties' incomes. Aari was ordered to pay $260 per month in child support.

[1] This monthly amount represents $2,812 from Jodi's main employer and another $50 in supplemental earnings from her work as a free lance interpreter.

## DISCUSSION

I. Maintenance Award

¶4 Maintenance determinations are entrusted to the discretion of the circuit court and will be upheld if the court examined the relevant factors, applied a proper standard of law, and using a rational process, reached a conclusion that a reasonable judge could reach. ***Ladwig v. Ladwig***, 2010 WI App 78, ¶15, 325 Wis. 2d 497, 785 N.W.2d 664. Circuit courts consider statutorily listed factors in determining whether maintenance is appropriate, and, if so, how much and for how long. *See* WIS. STAT. § 767.56(1c) (2015-16).[2] These factors:

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. The factors enumerated in WIS. STAT. § 767.56(1c) are:

> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.
>
> (c) The division of property made under s. 767.61.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.

(continued)

> are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective).

***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987).

¶5 The circuit court properly exercised its discretion in setting maintenance to Jodi at $240 per month for an indefinite term. The circuit court acknowledged the statutory factors as the "touchstone" of a maintenance analysis and expressly addressed each factor, noting which it deemed relevant and which it considered a "non-factor." The court determined that this was "a relatively long-term marriage justifying, at least as a starting point, a 50/50 division of net incomes." *See* WIS. STAT. § 767.56(1c)(a); s*ee also* ***Bahr v. Bahr***, 107 Wis. 2d 72, 84-85, 318 N.W.2d 391 (1982) (recognizing reasonableness of using income equalization to set maintenance in a long-term marriage). Noting that Jodi, at fifty-four years old, is seven years older than Aari, the court found that Aari could expect more income producing years, and concluded that "[t]his factor favors an equal division of net incomes." *See* § 767.56(1c)(b). The court stated that the

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> (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (i) The contribution by one party to the education, training or increased earning power of the other.
>
> (j) Such other factors as the court may in each individual case determine to be relevant.

parties' equal property division was a "non-factor," but considered the award to Aari of significant non-divisible property to favor income equalization. *See* § 767.56(1c)(c).

¶6 The court found that Jodi had a greater earning capacity than reflected in her actual earnings but determined "that the fairness factor of maintenance dictates that she not be required" to find new employment:

> The parties, throughout the entirety of their 20 year marriage agreed to an economic arrangement whereby Jodi was gainfully employed no more than 30 hours per week and Aari was the significant wage earner.

*See, e.g.*, ***Finley v. Finley***, 2002 WI App 144, ¶13, 256 Wis. 2d 508, 648 N.W.2d 536 (the circuit court's decision to set maintenance based on the recipient wife's actual earnings rather than what she could earn if she worked full time "was supported by the record and was reasonable"). The court considered that Jodi had worked in the same position since just after the parties were married, increasing her hours "over time and in the latest years of the marriage" to thirty hours per week, for which she received "full-time benefits." The court concluded that its maintenance award would enable both parties to approximate their pre-divorce lifestyle while still enjoying the flexibility associated with their career choices.

¶7 Aari's contention that the circuit court did not consider his actual or projected income in setting maintenance is contradicted by the record. Acknowledging that Aari was self-employed and could no longer count on significant income from the Department of Transportation, the circuit court's stated goal was to answer the question of what Aari's income is for purposes of setting maintenance and child support. Using Aari's own numbers, the court arrived at the amount of $50,000 by taking the average of Aari's income for the

years 2013, 2015 and 2016, while excluding his 2014 income, a higher income year, in order to be fair to Aari. The court observed that in 2016, when only ten percent of Aari's income came from contract work for the DOT, he was able to earn $49,665. The court's factual finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶8 Aari argues that the circuit court's maintenance award "unfair[ly] requir[es] [him] to work 50-60 hours a week, while Jodi [] only works 30 hours a week." This assertion mischaracterizes the record as well as the circuit court's findings and conclusions. The circuit court never made a finding that Aari worked "50-60 hours a week" during the marriage or that he would have to do so post-divorce.[3] To the contrary, the court found that Aari enjoyed flexibility associated with his career choice:

> Like Jodi, Aari enjoys and has enjoyed throughout the entirety of the marriage the flexibility associated with his career choice. His enjoyment stems from his ability to control what jobs he takes, what type of work[] he engages in, and his hours. This court does not intend to impose upon Aari a different set of standards tha[n] those imposed upon Jodi. Jodi may choose to continue to work 30 hours per week, and Aari may choose to continue to be self-employed. Aari has demonstrated an ability to earn $50,000 per year without sacrificing the flexibility he has historically enjoyed. This court expects that he will continue to do so.

¶9 Next, Aari argues that the circuit court erred by failing to consider his post-divorce health insurance cost in setting maintenance. Aari concedes that

[3] Aari's assertion that he is required "to work 50-60 hours a week" appears to flow from his citation to ***Forester v. Forester***, 174 Wis. 2d 78, 90, 496 N.W.2d 771 (Ct. App. 1993), where the court held unfair a maintenance order which required the payor "to continue working fifty to sixty hours per week, but allowed [the recipient] to forgo employment."

he failed to present this cost or evidence thereof to the circuit court, but now contends that the monthly cost is $925.14. We do not consider assertions of fact that are outside the record. ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).[4]

¶10 As part of the property division, Jodi was awarded the vendor's interest in a land contract the parties owned at the time of the divorce. In effectuating an equal division, the principal remaining on the land contract was considered as an asset to Jodi. To avoid double counting, and with all parties in agreement, the circuit court added to Jodi's income the portion of the monthly payment attributable to interest, or, $955. Aari now argues that the circuit court should have calculated Jodi's income using the entire monthly payment. We are baffled by Aari's inconsistent and illogical position. Based on the property division and the amortization schedule, the circuit court correctly concluded that only $955 of the total $2000 monthly payment received by Jodi should be counted as income.[5]

¶11 To the extent Aari argues that his trial attorney provided ineffective assistance of counsel by conceding that only the land contract interest should count toward Jodi's monthly income, it is well established that Aari has no constitutional right to the effective assistance of counsel in this civil divorce case.[6]

[4] For this same reason, we decline to address Aari's claim that the circuit court should have considered information outside the record concerning his post-divorce mortgage refinancing closing costs. Further, the projected closing costs are a one time expense that would not impact Aari's continuing ability to pay maintenance.

[5] We further observe that the interest income to Jodi will reduce each year and end in 2020, when Jodi will receive a balloon payment for the remaining principal. The circuit court implicitly rejected Jodi's argument that this decrease justified a larger maintenance award.

[6] Similarly, nothing in our statutes provides a right of counsel in divorce cases.

*See* ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 405, 308 N.W.2d 887 (Ct. App. 1981). The right to effective assistance of counsel is not available to Aari and cannot serve as grounds for relief.

¶12 Finally, Aari's assorted complaints about the circuit court's application of the statutory maintenance factors and the fairness of its maintenance award overlook our deferential standard of review. Aari's refusal to acknowledge the wide discretion afforded the circuit court is evident from his exposition of various cases which, he argues, demonstrate that the circuit court should not have ordered maintenance to Jodi. These cases have a common denominator; each recognizes and approves the circuit court's wide discretion to apply the maintenance factors to a case's unique facts and to reach a reasonable tailored result. The circuit court's considered and well-explained process in the instant case represents precisely such a rational decision. We will not disturb a demonstrably reasonable exercise of discretion based on what we think a different court *might* have ordered in another case based on different facts.

II. Child Support

¶13 In setting a monthly child support amount, the circuit court ordered Aari to pay $82 based on the percentage formula in WIS. ADMIN. CODE § DCF 150.04(2) (through June 2018) and to contribute $175 "toward the cost of health/dental/vision insurance" available through Jodi's employer. *See* WIS. STAT. § 767.513 (in addition to ordering child support, the circuit court must "assign responsibility for and direct the manner of payment of the child's health care expenses"); WIS. ADMIN. CODE § DCF 150.05(1) (June 2018). The circuit court acknowledged that $21 of the health insurance contribution would permit Jodi to maintain family coverage "as opposed to employee + one, so that [the eldest child]

is insured as well through Jodi's insurance." According to Aari, the additional $21 constitutes an impermissible order requiring him to pay financial support for an adult child. We disagree.

¶14 In support of his argument, Aari relies on a partial sentence in WIS. STAT. § 49.90(1)(a)1., stating "but no parent shall be required to support a child 18 years of age or older." Chapter 49 addresses children, other dependents, and families receiving public assistance, and is specifically excluded from both WIS. STAT. § 767.513(1), and WIS. ADMIN. CODE § DCF 150.05(1)(a). Section 49.90(1) is inapt and does not support Aari's claim.[7]

¶15 We agree with Jodi that the circuit court acted reasonably and within its authority in ordering the slight upward deviation. WISCONSIN ADMIN. CODE § DCF 150.05(1)(b)4. specifically provides: "The court may incorporate responsibility for a contribution to the cost of private health insurance as an upward or downward adjustment to a payer's child support obligation." Similarly, the slight upward deviation is permissible as an "other factor[]" under WIS. STAT. § 767.511(1m)(i). Finally, we observe that the circuit court could have reasonably added the $21 to Jodi's maintenance award, requiring Aari to pay the sum indefinitely rather than for the duration of his child support order which, we suspect, will soon terminate.

[7] Aari also suggests that the child support order ran afoul of WIS. STAT. § 49.90 because Jodi's budget includes expenses related to their eighteen-year-old child. Not only does this argument overstate Jodi's trial testimony, it makes little sense in that child support is calculated based the parties' respective incomes, not their budgets.

III. Property Division

¶16 Aari claims that his trial attorney provided ineffective assistance of counsel by failing to advise him that he was due a greater share in the property division due to the greater effect his special skills and individual work had in the marital property accumulated during the marriage. As stated previously, the right to effective assistance of counsel is not available to Aari in this civil divorce proceeding.

¶17 Aari also argues that this court should "void" the stipulated property division because it is "against public policy, it was not signed freely and knowingly, and it is not fair and equitable." We are not persuaded. The cases on which Aari relies are not remotely analogous. And, not only did Aari receive the entirety of his inherited property held in trust,[8] he received a full one-half share of the remaining marital estate. The circuit court properly determined that the stipulation was fair and equitable.

¶18 Further, Aari's claim that he did not knowingly and voluntarily enter into the stipulated property division is belied by the record. The MSA signed by Aari, Jodi, and their respective attorneys provided that the stipulated property division "is a full, final, complete and equitable property division." The signed MSA states that it was executed "free of any duress, coercion, collusion or undue influence" and that "both parties believe the terms and conditions to be fair and reasonable." Each party acknowledged the pre-agreement advice rendered by their attorney including "the range of what the Court may order if called upon to

[8] Based on Aari's testimony, the court found that one parcel of property in the larger trust was worth at least $275,000.

decide the case as a contested matter." At trial, Aari testified that he reviewed, understood and signed the MSA and agreed to be bound by its terms. He testified, and the circuit court found, that the MSA was fair and reasonable under the circumstances.

*By the Court.*—Judgment affirmed.

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