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

**December 11, 2008**

**David R. Schanker**
**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. 2007AP2719** **Cir. Ct. No. 2001FA285**

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

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**IN RE THE MARRIAGE OF:**

**SARA M. SANDBERG,**

**PETITIONER-RESPONDENT,**

**V.**

**JOHN P. DONAHUE,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed in part, reversed in part and cause remanded.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. This divorce proceeding between Sara Sandberg and John Donahue is before us for a fourth time. After the first appeal we remanded to the circuit court for further proceedings. ***Sandberg v. Donahue***, No. 03-0615, unpublished slip op. (WI App March 18, 2004). After the second appeal we again remanded to the circuit court for additional proceedings. ***Sandberg v. Donahue***, No. 05-485, unpublished slip op. (WI App June 22, 2006). On April 17, 2007, we summarily affirmed a third appeal by Donahue, explaining that the circuit court had followed our instructions on remand, so there were no issues for appeal because Donahue was not allowed to raise other issues pertaining to the original judgment of divorce and first appeal. ***Sandberg v. Donahue***, No. 07-310, unpublished slip. op. (WI App April 17, 2007). Donahue now appeals the circuit court's decision made after he filed additional post-judgment motions in the circuit court.

¶2 Donahue argues that the circuit court erroneously denied his motion to enforce the property division judgment. He contends that Sandberg received overpayments from two retirement accounts pursuant to the initial judgment of divorce, which was later revised on appeal in Donahue's favor, and that she must return the funds to him in accord with the property division as amended by the first appeal. The circuit court's written decision entered on August 21, 2007, which is the subject of this appeal, does not explicitly state that the court decided this issue, which was addressed by the family court commissioner in an order dated May 2, 2007. The circuit court's decision refers only to the orders of the court commissioner dated January 30 and February 14, 2007. However, the transcript of the hearing shows that the court did in fact consider the May 2 family court commissioner's order, and, at the end of the circuit court's written decision, the court states that "[i]n all regards not specifically mentioned, the

Commissioner's decisions, and the rationale therefore, are affirmed." Therefore, this issue is properly before us in the context of this appeal.

¶3 Donahue's first argument is that Sandberg received too large a share of his TSP account. He contends in his opening brief that she received $56,438, but that she should have received only $43,930. In the reply brief Donahue concedes that Sandberg is correct in pointing out that she was entitled to an increased award to account for tax consequences. However, he still contends that she received an overpayment because she received $439 more than she should have received: the initial judgment awarded her $44,369, but the revised judgment awarded her only $43,930.

¶4 The problem with this argument is that Donahue did not challenge the discrepancy between the initial judgment entered January 24, 2003, and the revised judgment entered January 13, 2005, in the appeal he took from the January 13, 2005 revised judgment. Because Donahue did not raise the issue in the context of that appeal, he is foreclosed from raising the issue now. Moreover, Donahue improperly failed to raise this argument until his reply brief. *See* ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188 (if an appellant fails to discuss an alleged error in its main brief, an appellant may not do so in the reply brief). Therefore, we reject this argument.

¶5 Donahue next argues that Sandberg received an overpayment of $3,750 from his WROS account. He contends that Sandberg received $7,778 pursuant to the original judgment, but that she should have received only $4,028

as provided by the judgment as revised on appeal.[1] The commissioner's decision, adopted by the circuit court, concluded that Donahue was not entitled to relief because he did not file a motion for relief from the judgment under WIS. STAT. § 806.07 (2005-06).[2] We reject this reasoning. Donahue's motion for relief was properly before the circuit court because Sandberg received more from this account under the original judgment than she was entitled to based on the judgment as revised on appeal. Donahue is entitled to redress because we revised downward the amount of Sandberg's award from the WROS account, but Fidelity had already paid Sandberg the higher amount pursuant to the original judgment. We therefore remand for the circuit court to consider Donahue's motion to enforce the judgment by requiring Sandberg to transfer to Donahue the funds from the WROS account that she has already received, but to which she was not entitled.[3]

¶6 Donahue next argues that the family court commissioner did not have authority to find Donahue in contempt of court for failure to pay the daycare expenses that he was ordered to pay. He contends that a commissioner's authority to enforce child court orders in WIS. STAT. § 757.69(1)(p)3. makes no mention of daycare expenses. We reject this argument. We conclude that the court

[1] In her respondent's brief, Sandberg does not dispute that she received $3,750 more than she should have received from this account.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] Donahue's failure to previously raise this issue does not preclude him from now raising it, unlike the situation with the TSP account. With the TSP account there was a minor discrepancy between the initial judgment and the judgment as amended after the first appeal. Donahue should have been aware of this discrepancy at the time the amended judgment was entered and should have sought redress when he took an appeal from that judgment. With regard to the WROS account, however, the amended judgment was correct, so there was no error in that judgment to appeal. Instead, the issue is whether Sandberg received more than she should have received pursuant to the amended judgment.

commissioner had authority to make rulings on contempt under this statute because daycare expenses are inextricably linked with child care. Donahue also contends that a contempt order is not valid unless signed by a judge. Again, we disagree. In addition to the commissioner's authority under WIS. STAT. § 757.69(1)(p)3., WIS. STAT. chs. 767 and 785, read together, provide authority for the court commissioner to issue a contempt order. This is because under WIS. STAT. § 767.001(1b) "court" includes court commissioners, so court commissioners have the same authority as the circuit court for the purposes of ch. 767. In WIS. STAT. § 767.77(3), courts (and therefore court commissioners) are authorized to use any appropriate remedy to enforce a judgment or order, including contempt of court under ch. 785. Therefore, court commissioners are authorized to enforce judgments and orders with contempt sanctions.[4]

¶7 Donahue next makes several arguments pertaining to child support. He contends that the circuit court erred in calculating child support because it based its support calculations on a four-week earning period, instead of a monthly earning period which is slightly longer. Sandberg concedes that there was an error in calculation and that the equation used by Donahue is correct. We therefore remand for the circuit court to address and correct this error in calculation.

¶8 Donahue argues that the evidence does not support the circuit court's finding that Sandberg averaged thirty-four hours per week at work. Sandberg testified that although she has sometimes worked forty hours per week, there are weeks where she has worked less because the dentist was out of the office for

[4] Donahue also argues that due process considerations prohibit court commissioners from deciding contempt motions unless the hearings are held on the record. Donahue has not adequately developed this argument, so we do not consider it further.

continuing education. Donahue contends that Sandberg's testimony about her hours was inconsistent with her actual hours worked as evidenced by the paycheck stubs she provided, which, he contends, showed that she worked an average of 37.54 hours per week in the prior nineteen weeks. We decline to address this issue. Because we have concluded that we must remand for the circuit court to address the error in the child support calculation, we believe the better course is to remand this question to the circuit court. The circuit court is better suited to address the factual question of how many hours Sandberg has been working per week in light of the parties' arguments on the issue.

¶9 Donahue raises two other issues pertaining to child support. He contends that the circuit court should have explained why it set support prospectively instead of from the date he first filed a motion to modify support. He also argues that the circuit court should have directly addressed how many tax exemptions he has been awarded. He points out that the commissioner's order awarded him one of the tax exemptions related to the children, but that the circuit court's order was silent on the issue. Again, we conclude that the circuit court should address these issues on remand when it takes up the matter of child support.

¶10 Finally, Sandberg moves for attorney's fees on the grounds that this appeal is frivolous. *See* WIS. STAT. RULE 809.25(3). However, she did not file a motion in support of her request and we will thus not consider it further. ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621 ("In order for parties before the court of appeals to have the proper notice and opportunity to be heard, parties wishing to raise frivolousness must do so by making a separate motion to the court…."); *see also* ***City of Prescott v. Holmgren***, 2006 WI App 172, ¶13, 295 Wis. 2d 627, 721 N.W.2d 153; ***Holt v. Hegwood***, 2005 WI App 257,

¶¶23-24, 287 Wis. 2d 853, 708 N.W.2d 21. Moreover, we note that this appeal is clearly not frivolous as we have decided some of the issues in Donahue's favor. *See* ***Howell***, 282 Wis. 2d 130, ¶9 (before awarding attorney fees and costs as a sanction, an appellate court must conclude the entire appeal is frivolous).

*By the Court.*—Order affirmed in part, reversed in part and cause remanded.

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