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

**May 8, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2011AP2161** **Cir. Ct. No. 2008FA427**

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

---

**IN RE THE MARRIAGE OF:**

**JEFFREY D. WEST,**

**PETITIONER-RESPONDENT,**

**V.**

**DIANA R. WEST,**

**RESPONDENT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Diana West appeals a judgment of divorce. She asserts the circuit court erroneously exercised its discretion when awarding

maintenance and refusing to permit her to withdraw admissions pertaining to bank withdrawals made during the divorce proceedings. We affirm.

## BACKGROUND

¶2 Diana and Jeffrey West were married in 1992. Jeffrey petitioned for divorce on August 12, 2008. At the time of the final hearing, Jeffrey was fifty-four and Diana was forty-seven. Neither has a bachelor's degree, though Jeffrey has an associate's degree in industrial electronics. The marriage produced three children, all of whom were minors at the time of the divorce. Diana was last employed in 1996 as a part-time certified nursing assistant. After that, she cared for the children while Jeffrey worked.

¶3 In 1996, Jeffrey founded Silicon Logic Engineering, which designed advanced computer chips. Jeffrey earned approximately $2.5 million when he sold the company to Tundra Semiconductor in 2006. Eighty percent of that amount was paid up front, while the rest was paid in stock over the following two years. As a condition of the sale, Jeffrey continued to manage his former company during the two-year "earn out" period. Jeffrey drew an annual salary of $120,000 while at Tundra, but left at the conclusion of the "earn out" period. He then started a business coaching organization for executives. Jeffrey earned just over $16,000 in gross income in 2008, but gradually increased his income to $47,000 in 2010.

¶4 On March 12, 2010, Jeffrey sent Diana a request for admissions regarding certain bank withdrawals that allegedly exceeded amounts authorized by a temporary court order. Jeffrey identified just over $382,000 in unauthorized withdrawals, the most significant of which was $309,000 by Diana for a home purchase. Diana's counsel failed to respond to the request. When Diana's counsel

questioned Diana about her withdrawals, Jeffrey objected, arguing that the matter had been deemed admitted and was no longer at issue.[1] Diana nonetheless argued that some of the amounts identified were inaccurate or predated the temporary order. In total, Diana challenged $25,239.49 in withdrawals. After a short off-the-record discussion during Diana's questioning, the court stated that Diana's attorney could not produce promised documentation and the withdrawals would remain admitted. The entire $382,000—including the disputed $25,239.49—was counted against Diana in the property division, under which each party would receive "well over a million dollars in relatively liquid assets," according to the court.

¶5 Diana requested $3,000 per month in open-ended maintenance, while Jeffrey proposed limited-term maintenance of five years. When considering Diana's maintenance request, the court considered the length of the marriage and the age, health, and educational level of the parties. With respect to earning capacity, the court noted Jeffrey's success as a "financial entrepreneur" and determined he could draw a $76,000 annual salary.[2] The court found Diana did not possess Jeffrey's "flexibility, ingenuity, and history of financial success," but she had been productive before and would need to return to work. Ultimately, the court awarded limited-term maintenance of $2,000 per month for five years.

---

[1] Under WIS. STAT. § 804.11(1)(b), a matter is deemed admitted if no response is served within thirty days of the request.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] According to the court, this was Jeffrey's "largest salary," which he earned in 2000. Presumably, the court meant that this was Jeffrey's largest annual salary not associated with the sale of his business.

¶6 Diana filed a motion for reconsideration. The motion requested that the court recalculate maintenance based on an imputed annual income of $120,000 for Jeffrey. It also requested that Diana be permitted to withdraw her admission regarding the bank withdrawals and that the court recalculate the property division. The court denied Diana's motion. She now appeals.

## DISCUSSION

¶7 Diana first challenges the circuit court's maintenance award. "The determination of the amount and duration of maintenance is entrusted to the sound discretion of the circuit court," and this court will not disturb the circuit court's determination unless it has erroneously exercised its discretion. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987). "A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and … considered together for the purpose of achieving a … reasonable determination." ***Id.*** (citation omitted).

¶8 Review of a maintenance award must begin with WIS. STAT. § 767.56. ***LaRocque***, 139 Wis. 2d at 31. That statute identifies ten factors a court must consider when awarding maintenance, including the property division, the earning capacity of the party seeking maintenance, and the feasibility that the party seeking maintenance can become self-supporting. WIS. STAT. § 767.56(3), (5)-(6).

¶9 Diana contends the circuit court erred in determining Jeffrey's earning capacity. The circuit court appears to have found that Jeffrey could earn

$76,000 per year,[3] the amount Jeffrey earned in 2000 and his largest salary not associated with an extraordinary event. This was a reasonable finding in light of the varying amounts Jeffrey earned before and during the divorce. In the two years before the divorce, Jeffrey earned an annual salary of $120,000 during the "earn out" period with Tundra. After Jeffrey left Tundra, he formed a business coaching organization. Between 2008 and 2010, Jeffrey's gross income rose from $16,453 to $47,000. Implicitly, the court determined that neither Jeffrey's income at Tundra nor his income at his new job represented his typical earnings.

¶10 In addition to Jeffrey's historical earnings, the court's finding regarding Jeffrey's earning capacity is also supported by the testimony of Jeffrey's vocational expert, Jeanne Krizan. She testified that Jeffrey's "technology skills and contacts and associations with the high-tech industry [are] outdated," and he has "limited marketability" in that sector. In addition, Jeffrey's lack of a bachelor's degree means "he is not a highly desirable employee …." Krizan estimated Jeffrey could earn approximately $50,000 annually as a direct employee in the labor market.[4] In light of this testimony, the circuit court did not err in finding Jeffrey's earning capacity was significantly less than $120,000.

[3] Jeffrey contends that the circuit court's oral decision may be interpreted as awarding maintenance based on the parties' actual earnings rather than earning capacity. Under this theory, Jeffrey asserts the "award of $2,000 in monthly maintenance provides Diana with slightly more than half of the total family income," with the award disproportionately favoring Diana because of Jeffrey's higher earnings immediately before the divorce. Although this may be a reasonable construction of the award as a whole, the court specifically found Jeffrey's earning capacity to be $76,000. We therefore address Diana's contention regarding the reasonableness of that amount.

[4] Krizan testified that no statistical wage analysis was available for Jeffrey's job as a business coach.

¶11 Diana also asserts Jeffrey could have remained with Tundra, but this is sheer speculation. Her argument is based on Jeffrey's response during trial that he "probably" could have remained at Tundra after the "earn out" period. And as Diana concedes in her reply brief, the real question is whether Jeffrey's salary at Tundra is representative of his earning capacity. As we have explained, the circuit court did not erroneously exercise its discretion when concluding it was not.

¶12 Next, Diana contends the circuit court erred by relying heavily on the property division in its maintenance determination. Diana concedes that the property division is one of several relevant statutory factors that the court must consider when awarding maintenance. *See* WIS. STAT. § 767.56(3). "[T]he weight to be given to the relevant factors under the maintenance statute is committed to the trial court's discretion." ***Metz v. Keener***, 215 Wis. 2d 626, 640, 573 N.W.2d 865 (Ct. App. 1997).

¶13 Further, the circuit court's decision reflects an understanding of the dual purposes of maintenance. The WIS. STAT. § 767.56 factors promote two distinct but related objectives: support of the recipient spouse and a fair and equitable financial arrangement. ***Hacker v. Hacker***, 2005 WI App 211, ¶9, 287 Wis. 2d 180, 704 N.W.2d 371. "A trial court should examine all the relevant circumstances of a particular case and may employ maintenance, property division or a combination of the two in order to fairly compensate a spouse." ***Lundberg v. Lundberg***, 107 Wis. 2d 1, 15, 318 N.W.2d 918 (1982). The circuit court noted that under the property division, each party would receive "well over a million dollars in relatively liquid assets." It found the parties lived "fairly frugally" and that this case presented a rare occurrence in which "both parties [can] walk out of here basically financially secure." The court determined that limited-term

maintenance was necessary, however, to allow Diana time to obtain further education and find work.

¶14 Diana claims that five years is too short a term. She contends the circuit court "failed to provide any particular justification for a five-year limitation on maintenance," and asserts the number was "entirely arbitrary." Diana's contention is belied by the court's decision. At trial, Diana expressed some hesitation about obtaining future employment. The court stated that maintenance was appropriate, but would be "limited because Ms. West, I think, is certainly capable of being productive." Limited-term maintenance is appropriate to provide the recipient spouse with funds for employment training and to create an incentive for the spouse to seek employment. ***Bentz v. Bentz***, 148 Wis. 2d 400, 406, 435 N.W.2d 293 (Ct. App. 1988). The circuit court's determination that limited-term maintenance was appropriate to permit Diana time to become self-supporting was not erroneous.[5]

¶15 Diana also argues the circuit court erred in refusing to allow her to withdraw the admissions regarding funds taken from the parties' joint bank accounts. A matter admitted, either affirmatively or by the passage of time, is deemed conclusively established unless the court permits withdrawal. ***Mucek v. Nationwide Commc'ns, Inc.***, 2002 WI App 60, ¶26, 252 Wis. 2d 426, 643 N.W.2d 98. The court may permit withdrawal "when the presentation of the merits of the action will be subserved thereby and the party who obtained the

[5] The spouse's ability to become self-supporting must be measured by the standard of living the parties enjoyed before the divorce. ***Bentz v. Bentz***, 148 Wis. 2d 400, 406, 435 N.W.2d 293 (Ct. App. 1988). Here, the circuit court found the parties lived "fairly frugally" and the property division would provide financial security for Diana.

admission fails to satisfy the court that withdrawal … will prejudice the party in maintaining the action or defense on the merits." WIS. STAT. § 804.11(2). "The decision to allow relief from the effect of an admission is within the trial court's discretion." ***Mucek***, 252 Wis. 2d 426, ¶25.

¶16 Jeffrey concedes the circuit court failed to consider the criteria identified in WIS. STAT. § 804.11(2) when denying Diana's request for withdrawal. However, we do not automatically reverse a decision that does not articulate or apply the § 804.11(2) criteria. ***Luckett v. Bodner***, 2009 WI 68, ¶35, 318 Wis. 2d 423, 769 N.W.2d 504 (citing ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983)). A reviewing court must uphold a discretionary decision of the trial court if there are facts of record which would support the trial judge's decision had discretion been exercised on the basis of those facts. ***Schmid***, 111 Wis. 2d at 237.[6]

¶17 Here, the circuit court would have been justified in concluding that the withdrawal would not promote presentation of the merits of the case. There is no question that property division is a central issue in any divorce proceeding, but Diana's admission concerned only a small fraction of the court's property division award. By Diana's own account, her request to withdraw pertained to only $25,239.49, a relatively small amount when considered in the context of the entire marital estate. In fact, this sum represents just over one percent of the total marital

[6] Diana contends that in ***Luckett v. Bodner***, 2009 WI 68, ¶¶35-36, 318 Wis. 2d 423, 769 N.W.2d 504, our supreme court qualified the rule that a reviewing court will uphold a discretionary determination if it is supported by the record. She asserts that application of the rule is limited to circumstances in which the appellant does not ask the court to remand the matter to the circuit court to exercise its discretion after applying a proper standard of law. We do not read ***Luckett*** to alter our approach to review based on the appellant's strategy.

property. Accordingly, withdrawal would not have significantly altered the property division award.

*By the Court.*—Judgment affirmed.

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