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DISTRICT II

October 30, 2013

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2013AP859-FT

In re the marriage of: Susan J. Westerman v. Donald S. Knoke
(L.C. # 2011FA93)

Before Brown, C.J., Reilly and Gundrum, JJ.

Donald S. Knoke appeals a judgment of divorce from Susan J. Westerman. He challenges the circuit court's maintenance award to Westerman. Pursuant to a presubmission conference and this court's order of April 30, 2013, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).¹ Upon review of those memoranda and the record, we affirm the judgment of the circuit court.

Knoke and Westerman were married in 1994, and this divorce action was commenced in November 2011. The parties have one child, who has reached the age of majority.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

At the time of the divorce trial, Knoke was employed as an over the road truck driver with an average annual income of \$64,747.04 for the years 2008 through 2011. Westerman, meanwhile, had recently attained employment as a customer service representative with an earning capacity of approximately \$25,000 per year. Prior to that, she had held a number of different jobs including cashier, secretary, administrative assistant, and real estate agent. Westerman did not advance any particular career during the marriage, as she was the primary caretaker for the parties' child. Westerman indicated that she wished to pursue an associate's degree in digital marketing. According to her vocational expert, this program will take four or five years to complete going part-time. After another three to five years of experience in the field, Westerman could expect to earn approximately \$42,760 per year.

After the divorce trial, the circuit court entered a decision on maintenance followed by the findings of fact, conclusions of law, and judgment of divorce. The terms of the judgment required Knoke to pay Westerman maintenance over a nine-year period as follows: \$1100 per month for the first three years, \$900 per month for the following three years, and \$700 per month for the final three years.²

Knoke subsequently moved for reconsideration of the maintenance award due to a change in employment and reduction in income. Knoke anticipated that his new annual income would be approximately \$50,000. The circuit court granted the motion in part, modifying the amount of

² The circuit court ordered the maintenance award to take effect on January 1, 2013. Knoke now argues for retroactive application of the award to the date of the divorce trial on September 27, 2012. As noted by Westerman, the circuit court made clear that its temporary order regarding maintenance was effective until it rendered a final decision on the matter. Knoke made no objection to the court doing this. Consequently, we do not consider his argument now.

payments owed to Westerman to \$847 per month for the first three years, \$693 per month for the following three years, and \$300 per month for the final three years. The duration of the maintenance award was not altered. Knoke now appeals.

On appeal, Knoke challenges the circuit court's maintenance award to Westerman. He asserts that Westerman's former career as a real estate agent contributed to her earning capacity more than the circuit court acknowledged when establishing the amount of the award. He further asserts that the duration of the award was excessive to Westerman's need to become self-supporting.

The determination of the amount and duration of maintenance is committed to the circuit court's sound discretion, and we will uphold the award absent an erroneous exercise of discretion. See *Bisone v. Bisone*, 165 Wis.2d 114, 118, 477 N.W.2d 59 (Ct. App. 1991). Discretion is properly exercised when the court arrives at a reasoned and reasonable decision through a rational mental process by which the facts of record and the law relied upon are stated and considered together. *LaRocque v. LaRocque*, 139 Wis. 2d 23, 27, 406 N.W.2d 736 (1987).

Reviewing the circuit court's decision, we are satisfied that it properly exercised its discretion in establishing the amount of the maintenance award. Here, the court took into account Westerman's present earning capacity and projected her future earning capacity with a degree in her desired field of work. Although Knoke alleged that Westerman could earn significantly more money as a real estate agent,³ there were reasons to dismiss this argument. As

³ Citing statewide averages, Knoke submitted that Westerman could expect earnings as a real estate agent in the range of \$50,000 to \$64,000 annually.

noted by the circuit court, Westerman was not currently licensed as an agent and did not want to go back to selling real estate. Moreover, she never made more than \$23,000 per year when selling real estate, and the average annual salary of agents in her area was between \$25,000 to \$35,000.⁴ To expect Westerman, who had been out of the real estate business for a decade, to obtain a license and start making significantly more money than she currently earns was pure fantasy on the part of Knoke.

We are also satisfied that the circuit court properly exercised its discretion in setting forth the duration of the maintenance award. In requiring Knoke to pay maintenance over a period of nine years, the court recognized that Westerman had the ability to become self-supporting over time. This determination is supported by the testimony of Westerman's vocational expert, who believed that it would take Westerman four to five years to obtain her degree and another three to five years before she could expect to earn approximately \$42,760 per year. Although Knoke is correct in noting that Westerman may be able to become self-supporting before the nine-year period is complete, this does not mean that the circuit court's decision was erroneous. Rather, it simply means that Knoke is free to return to the circuit court with a petition to change the maintenance award should the circumstances warrant it.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ As a real estate agent, Westerman would have to pay for her own health and dental insurance costs, thereby reducing the income she would earn.