

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 2006

Cornelia G. Clark
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. 2005AP485

Cir. Ct. No. 2001FA285

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

SARA M. SANDBERG P/K/A SARA M. DONAHUE,

PETITIONER-RESPONDENT,

V.

JOHN P. DONAHUE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. This divorce proceeding between Sara Sandberg and John Donahue comes before us for a second time. After the first appeal, we remanded to the circuit court for further proceedings. *Sandberg v. Donahue*, No. 2003AP615, unpublished slip op. (Wis. Ct. App. Mar. 18, 2004). Donahue appeals the circuit court’s judgment on remand. He argues that the circuit court: (1) should have granted his substitution motion; (2) should have awarded him the premarital component of his FERS account; (3) failed to give appropriate consideration to Donahue’s premarital estate; (4) should have considered the parties’ debt as of the date of trial, not the date the proceedings were commenced; (5) improperly included a farm account containing \$4000 as Donahue’s asset; (6) erred in including Sandberg’s \$2371 debt for her car on the property division sheet; and (7) erred when it assigned tax exemptions. We affirm in part, reverse in part, and remand with directions.

¶2 Donahue first argues that the circuit court should have granted his substitution motion. He bases his argument on *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee County*, 2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679. In *Findorff*, the supreme court held that there is a right to judicial substitution on remand unless the circuit court need perform only a “purely ministerial duty.” *Id.*, ¶¶20-25.

¶3 Donahue’s argument fails because *Findorff* is not a divorce case and does not apply in the divorce context. In the divorce context, the statutory right of judicial substitution does not apply on remand. See *State ex rel. Hubert v. Circuit Court for Winnebago County*, 163 Wis. 2d 517, 520, 522-23, 471 N.W.2d 615 (Ct. App. 1991); *State ex rel. Parrish v. Circuit Court for Kenosha County*, 148 Wis. 2d 700, 702-05, 436 N.W.2d 608 (1989); *Bahr v. Galonski*, 80 Wis. 2d 72, 86-87, 257 N.W.2d 869 (1977). In *Hubert*, we stated: “We conclude that *Parrish*

should be broadly construed to apply whenever a divorce judgment is reversed and remanded for further consideration *of any aspect of the judgment on the strength of the record developed at trial.*” **Hubert**, 163 Wis. 2d at 523 (emphasis added). Our prior decision reversed and remanded for further proceedings based on the trial record. **Sandberg**, No. 2003AP615. The circuit court’s decision on remand was, in fact, based on the record at trial. Therefore, Donahue did not have a right to judicial substitution.

¶4 Donahue next challenges the circuit court’s decision with regard to his federal FERS pension account. In our prior decision, we said:

Our review of the circuit court’s decision shows that it both failed to address Donahue’s argument that he should be given credit for his premarital contribution to this retirement account and failed to explain why it was appropriate to grant a credit for the premarital portion of the TSP, but not the FERS, both of which are retirement accounts. The circuit court’s failure to address this issue requires a remand. See **Corliss v. Corliss**, 107 Wis. 2d 338, 347, 320 N.W.2d 219 (Ct. App. 1982) (where the circuit court’s exercise of discretion relies on an incomplete analysis, we must remand for further consideration).

Id., ¶5. Donahue contends that the circuit court incorrectly concluded on remand that he had not presented sufficient information for the court to determine the premarital portion of the account. He also contends that the circuit court erroneously exercised its discretion in deciding that the value of the FERS, including the premarital portion, should be divided equally between the parties.¹

¹ The circuit court awarded the entire FERS account to Donahue, but awarded Sandberg an equal amount of property to offset its value.

¶5 In our prior decision, we directed the circuit court to address Donahue's argument that he should be given credit for his premarital contribution to the FERS account and to explain why it was appropriate to grant credit for the premarital portion of the TSP, but not the FERS. *Id.*, ¶5. The circuit court has done that. The court addressed Donahue's argument and explained that it was awarding the FERS account without regard to his premarital portion because it had already given Donahue credit for his premarital portion of the TSP account, which the court implicitly decided was an adequate deviation from its equal division of the estate to compensate Donahue for the money he brought to the marriage and the gifts his family provided during the marriage. Stated differently, the circuit court concluded that there was a reason to deviate to a certain extent from the equal property division and to achieve that with an unequal division of one account, but not the other. Therefore, we reject Donahue's argument.²

¶6 Donahue next argues that the circuit court erred in failing to give appropriate consideration to his premarital estate. In our prior decision, we stated:

Donahue next argues that the circuit court should have considered his request to deviate from an equal property division. Donahue argued that the deviation was appropriate because he brought substantial assets to the marriage and received gifts from his family during the marriage. It appears the circuit court did not address this argument. Instead, it stated that the preexisting and gifted funds had lost their distinct character and had become commingled with the marital estate. The circuit court apparently misunderstood Donahue's argument. He did not argue that the funds remained his separate property. He

² We need not address Donahue's argument that the circuit court erred in concluding that it could not determine the premarital value of the account. Regardless of whether the circuit court could determine the premarital value based on the evidence presented, the court concluded that the premarital portion should not be excluded, so a determination of the precise amount was not necessary.

argued that the circuit court should deviate from a presumptive equal property division because he brought greater assets to the marriage and received gifts from his family during the marriage. We remand for the circuit court to consider this argument. See *Corliss*, 107 Wis. 2d at 347.

Id., ¶6 (footnote omitted).

¶7 While the circuit court’s decision on remand on this point could have been explained in more detail, the court’s explanation is sufficient. The court made supplemental findings of fact that the parties had agreed that Sandberg would remain in the home to care for their children so that Donahue “could continue in his career, permitting [Donahue] increased job flexibility and the ability to travel freely, thus enhancing his career opportunities.” The court also found that Sandberg “made valuable contributions to the marital estate, as well as to [Donahue’s] career opportunities, by assuming primary responsibility for homemaking and child care during the marriage.” These findings support the circuit court’s decision to award the marital assets equally, with the exception of the TSP account. We reject Donahue’s argument that the circuit court failed to consider the relevant factors.

¶8 Donahue next argues that the circuit court should have considered the parties’ debt as of the date of trial, not the date the proceedings were commenced. The circuit court decided to use the date proceedings were commenced because there was no testimony presented concerning the responsibility for the outstanding debts as of the date of trial. “Valuation of the marital estate lies within the sound discretion of the trial court.” *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Donahue points to a deposition transcript discussing credit card debt to argue how the debt should be assigned, but he does not point to *trial testimony* on this topic.

Although the deposition was received as an exhibit, it was among thousands of pages of exhibits received at trial. The circuit court was not required to wade through the exhibits to determine the credit card debt as of the date Donahue prefers. The circuit court did not misuse its discretion in valuing the credit card debt as of the date proceedings were commenced because the debt as of that date was established, while responsibility for the additional debt accumulated prior to the date of trial was not well established. There was no misuse of discretion.

¶9 Donahue next argues that the circuit court improperly included in the marital estate a farm account of \$4000 that contained his brothers' money. Donahue provides only one record cite to support his allegations, and that record cite does not relate to this account. We will not sift through the record for facts to support counsel's contention, *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463, and do not consider this argument further.

¶10 Donahue next argues that the circuit court made an error on the property division sheet. We agree. On the property division sheet, the court included Sandberg's \$2371 debt for her car in its calculations. However, the court had stated earlier in its decision that some of the parties' debts, including Sandberg's debt of \$2371, offset each other and, by implication, that they would not be included in the final division of property. Because the circuit court incorrectly included the \$2371 debt in the final division of property, we remand to the circuit court for the limited purpose of correcting this error.

¶11 Donahue next argues that the circuit court erroneously exercised its discretion when it assigned tax exemptions. The circuit court explained that "[g]iven the overall tax consequences of the Court's other awards, including that of family support, the Court awards the Petitioner the use of both children as

exemptions for income tax purposes.” This ruling is a proper exercise of discretion because the support payments awarded to Sandberg are taxable to her, but provide a deduction for Donahue. By awarding the tax exemptions to Sandberg, the court attempted to offset the tax consequences Sandberg faced due to the support she received. We reject this claim.

¶12 Sandberg, albeit in an offhanded manner, requests that we remand to the circuit court and direct the circuit court to award her attorney’s fees under WIS. STAT. § 767.262 (2003-04).³ We will not consider this argument because it is not well developed. *See Roehl v. American Family Mut. Ins. Co.*, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998) (we will not consider issues that are inadequately briefed). In his reply brief, Donahue joins Sandberg’s request for a remand to determine attorney’s fees. Sandberg and Donahue may present their requests directly to the circuit court, if they so desire.

¶13 We have not addressed every argument, or sub-argument, that Donahue has raised, nor will we. Appellate courts need not address poorly developed, confusing, or patently meritless arguments. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

¶14 We also note that Donahue’s counsel has used inappropriate language in his briefs when describing the circuit court’s actions and his perception of the fairness of the court’s decision. In particular, referring to the circuit court’s actions, errors, and alleged errors, counsel for Donahue says “this just stinks!” As stated in the preamble to the Rules of Professional Conduct for

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Attorneys, “[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges” *See* Preamble: A Lawyer’s Responsibilities, SCR Chapter 20. Regardless how counsel perceives the actions of the circuit court, or any court, he is badly mistaken if he thinks such language is either persuasive or necessary to convey discontent with the actions of a court. We caution counsel to refrain from using such language and remind him that we sometimes impose sanctions for this type of conduct.

¶15 In sum, we remand to the circuit court for the limited purpose of correcting the judgment to reflect the fact that Sandberg’s \$2371 debt for her car should not have been included in the final division of property.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

