

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2002

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. 01-1475
STATE OF WISCONSIN**

Cir. Ct. No. 99-FA-154

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

JULIE MARIE BIRSCHBACH,

PETITIONER-APPELLANT,

V.

GERALD EUGENE BIRSCHBACH,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Reversed and cause remanded.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Julie Marie Birschbach has appealed from a judgment of divorce from the respondent, Gerald Eugene Birschbach. She contends that the trial court erroneously exercised its discretion by ordering her to

pay Gerald \$200 per month in child support, and awarding Gerald tax exemptions for the parties' two minor children. She also contends that the trial court erroneously exercised its discretion when it divided the marital estate. In conjunction with these arguments, she contends that the trial court erroneously exercised its discretion when it denied her motion for relief from the judgment under WIS. STAT. § 806.07 (1999-2000).¹ Because we conclude that the trial court failed to properly exercise its discretion in awarding child support and the tax exemptions, and in dividing the marital estate, we reverse the judgment and remand the matter for further consideration by the trial court.

¶2 Trial was held on May 26, 2000. The evidence indicated that Julie was earning \$11.17 per hour at the time of trial, with an increase to \$11.39 per hour expected on July 1, 2000. Gerald was earning \$16.79 per hour at the time of trial, with an increase to approximately \$18 per hour expected later in the year. Both parties were employed by the State of Wisconsin and had interests in state retirement accounts. Both parties presented evidence as to the value of those accounts, with Julie requesting that the value of both accounts be divided by a qualified domestic relations order (QDRO), and Gerald valuing both accounts according to their separation benefit values, which did not include any contribution by the State as an employer. In addition, each party testified as to the value of the vehicle in his or her possession, with Gerald retaining a 1999 Dodge Ram truck and Julie retaining a 1998 Dodge Avenger. Gerald also filed a document captioned "Marital Estate Analysis," which was entered in the trial court record as Exhibit 9 and set forth Gerald's proposed division of the marital estate.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

¶3 In its memorandum decision and judgment, the trial court adopted a proposed placement plan under which custody and physical placement of the parties' minor children was shared. The trial court then ordered Julie to pay \$200 per month in child support to Gerald, and awarded Gerald the tax exemptions for both children. In dividing the parties' property, it adopted Exhibit 9, thus adopting Gerald's proposed division of the parties' estate.

¶4 The determination of child support is committed to the sound discretion of the trial court. *Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). The awarding of tax exemptions for minor children is an aspect of child support. *Peters v. Peters*, 145 Wis. 2d 490, 493, 427 N.W.2d 149 (Ct. App. 1988). Like the decision as to whether to award child support, the decision as to the award of dependency exemptions involves the exercise of discretion. *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 850, 454 N.W.2d 55 (Ct. App. 1990).

¶5 A trial court's discretionary decision will be sustained by this court when it has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). Because the trial court provided no clear rationale for requiring Julie to pay \$200 per month in child support and awarding the tax exemptions for both children to Gerald, we reverse the child support and exemption awards and remand the matter to the trial court.

¶6 Initially, we note that the trial court made inconsistent or conflicting statements concerning the need for child support. In making the award, it stated that the parties would have joint legal custody, and would be spending

“approximately equal time” with the children. However, when awarding the tax exemptions to Gerald, the trial court stated that “it appears that [he] is paying over 50% of the support for the two children.” The trial court also stated that Gerald’s residence was designated as the “primary residence of the minor children for educational purposes,” although it failed to explain how this would affect Gerald’s need for support.

¶7 The trial court’s statement that the parties would be spending approximately equal time with the children, combined with the evidence of Gerald’s larger income, seems to support Julie’s argument that she should be awarded child support, not required to pay it. Moreover, the trial court set forth no basis for its statement that Gerald appeared to be paying more than fifty percent of the children’s support, which appears to conflict with its statement that the parties would be spending equal time with the children.²

¶8 Even if the trial court had provided reasons for ordering Julie to pay child support, it also failed to provide any explanation for selecting \$200 as the amount of the monthly award. It did not discuss the financial needs of Julie, Gerald, or the children, or explain why, based upon the parties’ respective financial abilities and needs, Julie should be required to pay \$200 per month in

² Gerald contends that the trial court found, based upon evidence submitted by him, that he had physical placement of the children sixty-one percent of the time. However, nothing in the record indicates that the trial court made such a finding. Instead, as set forth above, the trial court found that the parties had “approximately equal” time with their children. Moreover, Gerald’s contention that he has the children sixty-one percent of the time is based upon overnight stays, including Sundays during the school year when he does not get the children until 7:00 p.m. Because Julie has the children the remaining nineteen hours on those Sundays, including mealtimes, Gerald’s argument concerning placement percentages does nothing to reconcile the inconsistency between the trial court’s statement that the parties have approximately equal placement, and its statement that Gerald appears to be paying more than fifty percent of the children’s support.

support. Similarly, it provided no rationale for why Gerald should be awarded the tax exemptions for the children, while Julie was ordered to pay support.

¶9 On remand, the trial court must consider all of the evidence relevant to child support and the award of the exemptions, and must consider the statutory factors and requirements set forth in WIS. STAT. § 767.25. It must make whatever findings of fact are necessary to support its decision, and must state the factors upon which it relies in making its decision.

¶10 We also reverse the trial court's property division. The division of the marital estate lies within the sound discretion of the trial court. *Trieschmann v. Trieschmann*, 178 Wis.2d 538, 541, 504 N.W.2d 433 (Ct. App. 1993). However, as with the child support award, the trial court's decision 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 reasoned and reasonable determination. *Id.* at 541-42. The trial court must not only state its findings of fact and conclusions of law, but must also state the factors upon which it relies in making its decision. *Id.* at 542.

¶11 In making its property division award, the trial court simply adopted Exhibit 9, which was Gerald's proposed division of the marital estate. While a trial court may accept the rationale or arguments made in a party's brief, it may not do so without indicating the factors on which it is relying in making its decision, and must state those factors on the record. *Id.* at 544. In this case, the trial court failed to explain why Gerald's proposed property division was a fair and reasonable distribution of the estate based upon the factors set forth in WIS. STAT. § 767.255(3), and failed to articulate the facts and factors upon which it based the property division award.

¶12 Moreover, in adopting Gerald's proposed property division, the trial court adopted his valuations of the parties' assets, including the parties' motor vehicles and state retirement accounts. In valuing the parties' vehicles, Gerald relied upon the blue book trade-in value for the Dodge Ram truck retained by him, and upon the blue book retail value of the Dodge Avenger retained by Julie. While the valuation of the marital estate lies within the sound discretion of the trial court, the valuation may not be arbitrary. *Sommerfield*, 154 Wis. 2d at 852. We can discern no rational basis for valuing the vehicles inconsistently, nor does the trial court's decision articulate any reason for doing so.³ Similarly, the trial court gave no explanation for rejecting Julie's request that the parties' retirement accounts be divided by a QDRO, and for adopting Gerald's valuation of the retirement accounts, even though Gerald's valuation excluded any employer contribution. On remand, the trial court must reconsider these matters and provide a rational basis for the values it assigns to the disputed assets.

¶13 Because the trial court's property division award is not supported by sufficient reasons on the record, the matter must be remanded for further proceedings. *Trieschmann*, 178 Wis. 2d at 544. On remand, the trial court must address the property division, child support, and the award of tax exemptions. It must consider all of the facts and relevant law related to each issue, must make the necessary findings of fact, and must explain the factors and reasons upon which its decision is based. *Id.* at 544-45. We leave it to the trial court's discretion to determine whether additional evidence or testimony is required.

³ We acknowledge that in his proposed property division, Gerald listed the value of Julie's Dodge Avenger as \$17,095, rather than the \$17,895 blue book retail value. However, nothing in the record provides a basis to conclude that subtracting \$800 from the blue book retail value rendered the value comparable to the Avenger's trade-in value.

By the Court.—Judgment reversed and cause remanded.

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

