

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2003

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. 01-3068
STATE OF WISCONSIN

Cir. Ct. No. 99-FA-797

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

CELESTE T. MALOVRH, N/K/A CELESTE T. SCHWEINER,

PETITIONER-RESPONDENT,

V.

JOSEPH J. MALOVRH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Joseph Malovrh appeals a divorce judgment. Joseph argues the record fails to support the trial court's finding with respect to his

income used to calculate child support. He further contends the trial court erred by determining the net marital estate subject to division because it failed to divide credit card debt. In addition, Joseph argues the court erroneously exercised its discretion when it ordered a \$114,741 balancing payment to be paid to his former wife, Celeste Schweiner, within three years with no provision for capital gains taxes.

¶2 We conclude that the record supports the court's determinations with respect to income available for child support calculation and the net marital estate subject to division. However, we are not satisfied that the record reflects a reasonable exercise of discretion with respect to the three-year time frame for a balancing payment with no consideration of capital gains tax consequences. Therefore, we affirm the judgment in part and remand with directions to the trial court to reconsider the time frame of the property division payment and capital gains tax consequences.

BACKGROUND

¶3 The parties were married in 1981. Joseph grew up on a farm and, in 1978 when he was twenty years old, he borrowed funds to purchase 240 acres of the parties' Taylor County farm. At the time of the divorce, Joseph, age forty-three, worked as a dairy farmer milking approximately fifty cows. He had done so during the entire marriage.

¶4 The parties have three children and, at the time of the 2000 divorce hearing, they were ages seventeen, fourteen, and twelve. During the first sixteen years of the marriage, Celeste was not employed other than on the farm. During the fall of 1997, she began working at Kraft Pizza. After the parties separated in 1999, she moved with the children to Brown County and secured employment at

\$10.25 per hour for approximately forty hours per week. Celeste was age forty-two at the time of the divorce.

¶5 Joseph testified and Celeste does not dispute that he usually did most of the farm work. She would occasionally help him, although her duties never exceeded twenty-five percent of the chores, and they occasionally hired a few seasonal workers.

¶6 One of the contested issues at trial involved Joseph's purchase of sixty-eight acres of cropland between May 1999 and July 2000 for \$40,000 and the distribution of debt associated with it. It was purchased during the parties' separation, and Celeste denied that she knew Joseph was going to complete the transaction.¹ Joseph testified that with low milk prices, he diversified into crop production because "we needed to go back more into crops because the Government is making payments. [I]n order for the farm to make it we needed cash flow. We were partially into crops. We have the equipment. We went deeper into it. ... We had started that before Celeste left."

¶7 The sixty-eight acres was contiguous to the Malovrh farm. Joseph testified that he rented and planted crops on the land in 1999 with the intention of purchasing it. He paid the sellers \$2,725. This sum included a down payment on the sixty-eight acres and rent for two other parcels. He also planted crops on the sixty-eight acres during 2000. The sellers required that Joseph pay the balance on or before July 15, 2000.

¹ Celeste testified that although Joseph had talked about the purchase, she did not know he was going to go through with it.

¶8 Joseph testified that he talked to two bankers in an attempt to obtain conventional financing, but was turned down. As a result, he borrowed \$10,000 from his mother and used credit cards to obtain another \$10,000 to \$15,000. In addition, he obtained a \$25,000 operating loan from Farm Credit Services and applied \$15,000 from that loan to pay the purchase price in full.

¶9 Douglas Berends, the vice-president and branch manager of the Farm Credit Services branch in Medford, testified that he has worked with Joseph since before his marriage to Celeste in 1981. He testified that Joseph currently had three loans with his office, a real estate loan, an operating loan and a chattel loan. Berends testified that he was surprised to learn that a portion of an operating loan was used to purchase the sixty-eight acres. He thought the loan “would have been used for corn.” Berends further testified that Joseph’s thirty to thirty-five percent owner equity was low and, based on Joseph’s cash flow, “the chances of getting additional money would be pretty—pretty slim.”

¶10 Berends also testified that Joseph’s debt per cow ratio was at the maximum of \$3,500 to \$4,000. A fifty-cow herd would support debt of \$175,000 to \$200,000. Joseph’s farm debts exceeded that. Nonetheless, Berends testified that Joseph was always current with his loan payments.

¶11 The parties’ 1998 and 1999 tax returns showed net losses to the farm itself. Joseph stated that in recent years the herd experienced severe health problems. He explained that he was able to remain current with his financial obligations only by incurring large credit card debt. Joseph testified that while he did not want to sell the farm, he may be forced to do so to accomplish Celeste’s proposed property division.

¶12 The trial court excluded the sixty-eight acres from the property division and awarded it to Joseph. The court also excluded Joseph's \$58,000 credit card debt and ordered him to be solely responsible for it. The court equally divided the balance of the property. The court found the farm/homestead was valued at \$454,225² and that there was \$230,648 marital debt. The court awarded the farm/homestead and marital debt to Joseph. The net result was that the court found Joseph would owe Celeste \$114,741 to create an equal distribution of the marital estate.

¶13 The court ordered this amount to be paid in three annual \$38,000 installments at six percent interest, and it awarded Celeste a mortgage against the farm as security for payments. In so doing, the court observed, "Although I cannot conclude that it is probable that financing of this amount is possible from the farm operation, neither can I conclude that it is impossible."

¶14 The court disallowed most of the depreciation listed on Schedule F of the parties' tax return and determined that Joseph's annual income was approximately \$31,000. The court ordered Joseph to pay \$750 per month in child support from March 1 to June 1, 2001, and \$650 per month thereafter until the youngest child reaches eighteen or is no longer in school.

DISCUSSION

1. Standard of review

¶15 The division of the marital estate and the amount of child support are committed to trial court discretion. *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549

² This figure included real estate, livestock, equipment and crops.

N.W.2d 481 (Ct. App. 1996). “An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Brad Michael L. v. Lee D.*, 210 Wis. 2d 437, 455, 564 N.W.2d 354 (Ct. App. 1997).

¶16 Underlying a discretionary determination may involve questions of fact and credibility of testimony. See *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 148, 153, 502 N.W.2d 918 (Ct. App. 1993). Here, the trial court’s findings with respect to income required fact determinations. A mistake of fact amounts to an erroneous exercise of discretion. We apply the clearly erroneous standard to factual findings and defer to the trial court’s weight and credibility assessments. WIS. STAT. § 805.17(2);³ see *Michael A.P.*, 178 Wis. 2d at 153.

2. Income available for child support

¶17 Joseph argues that the trial court erroneously determined his annual income, resulting in an excessive child support obligation. Taking into consideration the depreciation allowed by the court, and his farm income and loss, Joseph arrives at an average annual income of \$17,094.⁴ This results in a monthly

³ All statutory references are to the 1999-2000 version unless otherwise noted.

⁴ Joseph relies on the following figures:

	<u>1998</u>	<u>1999</u>
Capital Gains	2,791.00	9,769.00
Other Gains	712.00	2,349.00
Farm Loss	(5,800.00)	(8,993.00)
Depreciation (Net as explained above)	6,283.00	1,979.00
20% Cooperative Div.[]	1,145.00	1,409.00
Agricultural Program Payment	7,501.00	13,862.00
Gas tax refund	<u>545.00</u>	<u>636.00</u>
Totals	\$13,177.00	\$21,011.00

child support obligation of \$413 for three children and \$356.12 for two children.⁵

We are unpersuaded.

¶18 The trial court made the following findings with respect to Joseph's income:

One thing is clear from the extensive hearings in this case. It is almost impossible to determine true farm income. [Celeste] argues that the Court should look at the depreciation in the farm tax return and use that as a base for determining appropriate income. ... While depreciation schedules are, or can be, very artificial, they also recognize the fact that in any business machinery breaks down and wears out. If the business is going to continue to function, some reasonable reserve for replacement and repair must be taken into consideration.

¶19 The court observed that based on the appraisals showing \$68,000 in equipment, "it seems eminently reasonable" that a ten percent per annum reserve would be appropriate. The court noted that Joseph adequately feeds his livestock and can grow and sell crops. Based on the depreciation taken on farm tax documents of approximately \$36,000 per year as well as \$1,000 proceeds from crop sales, and that "all these figures defy exactitude," the court based child support on approximately \$31,000 per year income.⁶

¶20 In Wisconsin, a circuit court is required to order either or both parents to pay an amount reasonable or necessary to fulfill the duty of child support. *Cook v. Cook*, 208 Wis. 2d 166, 176, 560 N.W.2d 246 (1997). Unless

⁵ WISCONSIN ADMIN. CODE § DWD 40.03 states the child support obligation will be twenty-nine percent of the gross income for three children and twenty-five percent for two children. *Id.* at § DWD 40.03(1)(b) and (1)(c).

⁶ Although the court stated that it imputed \$37,000 in income to Joseph, it appears this figure represents Joseph's income before the court allowed \$6,800 depreciation expense.

unfair to the child or a party, a circuit court shall determine child support payments using the percentage standards established by the Department of Work Force Development. *See* WIS. STAT. §§ 767.25(1j) and 46.25(9)(a) (1993-94); WIS. ADMIN. CODE § DWD 40.03; *see also* **Cook**, 208 Wis. 2d at 176.⁷

¶21 A child support award established under the percentage standards is based on the payer's gross income. Gross income includes income realized in any form and derived from any source. **Brad Michael L.**, 210 Wis. 2d at 455. WISCONSIN ADMIN. CODE § DWD 40.03(2) provides:

GROSS INCOME AVAILABLE FOR CHILD SUPPORT. In determining the payer's base under sub. (1), the court may adjust the gross income by adding wages paid to dependent household members and by reducing gross income by the business expenses which the court determines are reasonably necessary for the production of that income or operation of the business and which may differ from the determination of allowable business expenses for tax purposes.

A trial court has discretion to determine whether excessive depreciation may be an unnecessary business expense. **Brad Michael L.**, 210 Wis. 2d at 458.

¶22 Here, the trial court based its determination on Joseph's 1998 and 1999 income tax returns. In 1998, Joseph reported a net loss from farming in the sum of \$5,800. Schedule F showed depreciation of \$36,083 and wages paid to Celeste of approximately \$6,000.⁸ Adding back his depreciation (minus the

⁷ Joseph does not request to be relieved of the percentage standards on the basis of hardship.

⁸ Celeste was no longer paid farm wages after 1998.

\$6,800 the court allowed), plus crop income of \$1,000 and Celeste's wages would net \$30,483.⁹

¶23 In 1999, Joseph reported a farming loss of \$8,993. He showed depreciation in the sum of \$36,899. Joseph also reported income of \$9,769 for the sale of dairy cows. Allowing for \$6,800 depreciation and \$1,000 crop income results in a net of \$31,875.¹⁰ We conclude that the court's approximation of Joseph's income is not clearly erroneous.

¶24 Joseph argues that disallowing his claimed depreciation is unreasonable, especially when, in 1998, he needed to purchase sixteen dairy cows at a cost of \$22,100 and \$7,700 in farm equipment. In 1999, Joseph purchased twelve dairy cows for \$18,250 and machinery and equipment at a cost of \$16,670, for a total expenditure of \$34,920.

¶25 At trial, Joseph testified that due to herd illness, he needed to replace numerous dairy cows in 1998 and 1999. It is apparent, however, that the trial court rejected Joseph's contention that replacing a large percentage of his herd due to illness is an annual event. Joseph's argument neglects his own testimony that he regularly replenished his herd from young stock. The court no doubt inferred that because Joseph had been a dairy farmer for over twenty years, 1998 and 1999 could not have been typical years with respect to illness and herd replacement. Consequently, the court rejected Joseph's calculations as an accurate indicator of his depreciation expense. Because the court's determination rested on its weight

⁹ $\$36,083 - (\$5,800 + \$6,800) + (\$6,000 + \$1,000) = \$30,483.$

¹⁰ $\$36,899 - (\$8,993 + \$6,800) + (\$9,769 + \$1,000) = \$31,875.$

and credibility findings, we do not overturn it on appeal. *See* WIS. STAT. § 805.17(2).

¶26 We note that under WIS. STAT. § 767.32, the court retains jurisdiction over child support issues and, in the event Joseph's income in future years departs substantially from the court's findings, the court is empowered to make the necessary adjustments. Also, the court cannot sanction Joseph unless he has the ability to make the payments and does not do so. *Poncek v. Poncek*, 121 Wis. 2d 191, 193, 358 N.W.2d 539 (Ct. App. 1984).

3. Credit card debt

¶27 Joseph contends the court erred by determining the net marital estate available for division because it failed to divide approximately \$58,000 credit card debt allegedly incurred from the time of the separation¹¹ through the date of divorce. He concedes that because the court did not include the sixty-eight acres valued at \$40,000 in the property division, "it would have been appropriate ... to exclude \$30,000.00 of the credit card debt (as \$10,000 was from Joseph's mother)." He contends that the remaining \$28,872 credit card debt should have been included as farm debt subject to division.

¶28 Joseph initially argued the debt represents credit used for feed, seed and other items relating to the farm's operation. In his reply brief, however, Joseph contends: "It is immaterial whether the debt was incurred for purposes of the farming operations." He claims that because it was incurred before the date of the divorce decree, it was subject to division.

¹¹ For present purposes, the date of separation may be considered September 15, 1999, which is the date of the temporary order.

¶29 Joseph cites to his exhibit 20 in support of his argument.¹² Exhibit 20 is a single typewritten page entitled “MARITAL ESTATE WORKSHEET” that lists the assets and debts of the parties. The sole reference to credit card debt states: “Credit card for feed, seed, fertilizer, spraying, equipment, and repairs 58,872.00.”

¶30 In absence of some exceptional intervening circumstances, the date of granting of the divorce is the proper time to determine the value of the estate for property division purposes. *Brackob v. Brackob*, 265 Wis. 513, 518, 61 N.W.2d 849 (1953). This proposition does not, however, relieve a party of demonstrating the nature and legitimacy of the debts. See *Dean v. Dean*, 87 Wis. 2d 854, 868-69, 275 N.W.2d 902 (1979) (uncorroborated debts and squandered assets).

¶31 Here, the court noted that many of the debts listed in exhibit 20 were reasonable and necessary to the farming operation and included them in determining the net marital estate. However, with respect to the \$58,000 credit card debt, the court stated that it was “not substantiated by the record.”

¶32 The court concluded that “there is little to substantiate” the amounts that went to the farming operation or the dates when they were incurred. As a result, the trial court refused to accept Joseph’s unsubstantiated testimony. We will not disturb the trial court’s assessment of the relative weight to be given to

¹² A judgment of divorce was granted on August 8, 2000, retroactive to July 28, 2000. Upon Joseph’s request and over Celeste’s objection, division of the assets and determination of child support was held open until October 25, 2000. Exhibit 20 was presented at the October 25 hearing. Although the court acknowledged a general discouragement of such bifurcation, the court felt comfortable with the arrangement because the parties had agreed Joseph would receive the farm/homestead. The court incorporated this agreement into the divorce decree and believed that any remaining issues would be solely of valuation or accounting.

various items of evidence. See *Turner v. State*, 76 Wis. 2d 1, 18, 250 N.W.2d 706 (1977) (the trial court's credibility determinations are generally not subject to review). Because the court's determination rested on a weight and credibility assessment, we conclude its determination of the net marital estate was rationally based and not subject to reversal.

4. Balancing payment

¶33 Joseph argues that the court erroneously exercised its discretion when it ordered the \$114,000 balancing payment to be paid in three annual installments of \$38,000. Joseph contends the time frame is unreasonable because he has neither the cash flow nor the borrowing capacity to pay Celeste the balancing payments without selling the farm. Because the record fails to reveal a rational basis to support a three-year payment schedule with no provision for capital gains consequences, we reverse this portion of the judgment.

¶34 Joseph cites *Ashraf v. Ashraf*, 134 Wis. 2d 336, 343, 397 N.W.2d 128 (Ct. App. 1986), which requires a trial court to consider tax consequences in its property division. He argues that it would be unfair to force him to sell the farm and be solely responsible for the enormous capital gains tax liability. He suggests that it is reasonable to permit him to continue farming and allow him to pay interest only on the balancing payment until his child support obligation is fulfilled in June of 2006. At that time, due to his child support being eliminated, his cash flow would be improved to permit him to accomplish the property division without necessarily being forced to sell.

¶35 We agree with Joseph that if he is required to sell the farm to accomplish the balancing payment, fairness dictates that Celeste share responsibility for the resulting capital gains tax liability. In her response brief,

Celeste does not dispute Joseph's assertion that in the event he must sell the farm to accomplish the property division, the sale of farm assets will result in a large capital gain and correspondingly large income tax consequences. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted). Indeed, the court's findings are consistent with this view.¹³ The trial court intended to enter an equal property division and, if the farm must be sold to pay the property division, an equitable distribution of the capital gains tax liability is required to accomplish that objective.

¶36 “In dividing the marital property upon divorce, the trial court should consider the tax consequences to each party.” *Schorer v. Schorer*, 177 Wis. 2d 387, 408, 501 N.W.2d 916 (Ct. App. 1993). “This court acknowledges the reasonableness of [the] argument that the costs of achieving property division should be shared.” *Ashraf*, 134 Wis.2d at 342. “The rule is not that tax considerations are controlling, but that the trial court should be aware of the tax consequences of its rulings and take such consequences of any proposed division into consideration in making its ruling. How the arrangement works out in reality after taxes is a test of fairness.” *Id.* at 343-44 (citation omitted).

¶37 The exercise of discretion is not the equivalent of unfettered decision-making. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). To be sustained, a discretionary determination must demonstrably be

¹³ The trial court found that “[t]he substantial bulk of the assets of these parties is tied-up in the farmstead which includes the real estate, the farm buildings, the land upon which this business is operated, the equipment and the livestock. ... That equalizing payment on a business that is different than the typical business can result in an economic pressure upon the farming operation that is difficult to reconcile.”

made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. *Id.* “Additionally, and most importantly, 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 are considered together for the purpose of achieving a reasoned and reasonable determination.” Failure to articulate a rationale basis for a discretionary decision results in an erroneous exercise of discretion. *Id.* at 69. Here, the court observed that Joseph was faced with a cash crisis,¹⁴ but failed to explain why three years was a reasonable time frame for the balancing payment and failed to discuss capital gains tax consequences. Consequently, the court’s order of a three-year payment schedule with no consideration of capital gains tax consequences resulted in an erroneous exercise of discretion.

¶38 Therefore, we affirm the judgment in part, reverse in part and remand with directions to the trial court to provide a rational basis for a payment schedule and demonstrate consideration of capital gains tax consequences.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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

¹⁴ The trial court noted the dilemma, stating: “It is troublesome that this award can only reasonably be expected to be paid by affecting the farm operation.”

