

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1114-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

CORA SUE BRUCEK,

Petitioner-Appellant,

v.

CARL EDWARD BRUCEK,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Barron County:
FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Cora Sue Brucek appeals those parts of a divorce judgment dividing the marital property, awarding maintenance and denying her request for attorney fees.¹ She argues that the trial court failed to adequately

¹ This is an expedited appeal under RULE 809.17, STATS.

state its rationale for its decision on any of the disputed issues in the divorce action. Carl Brucek agrees that the property division and maintenance issues must be remanded for the trial court to explain its decision, but argues that the attorney fee issue was not properly raised in the trial court. Cora argues that the decisions on property division and maintenance are not supported by the record. Therefore, she asks that this court require the trial court to modify its award rather than merely explaining its decision. We conclude that the attorney fee issue was properly before the trial court and that the judgment should be reversed and the cause remanded on each of these issues to allow the trial court, in its discretion, either to elaborate the rationale for its decision or to change the decision. The court is also free to hear additional testimony on any issues that it deems appropriate.

Following trial to the court, the court asked the parties to submit briefs along with a proposed judgment. The court decided the contested issues by signing the findings of fact, conclusions of law and judgment drafted by Carl. The only change the trial court made was that it retyped page seven of the proffered document where the issue of maintenance is addressed, briefly discussing Cora's earning capacity, the uncertainty of Carl's bonuses and the amount of child support he pays.

The parties contested the valuation of assets and how the marital debts should be divided, the exclusion of certain items claimed as gifts and whether potential taxes should be subtracted from the value of some assets. Except for the party's homes, the court did not set a value on each of the assets. Without any explanation, the court required a cash payment of \$11,527 from Cora to Carl. The court rejected Cora's claim that some property was exempt from division because it was gifted property, but it provided no information regarding its analysis of that argument. Likewise, it accepted Carl's argument that pre-retirement accounts should be discounted for future income taxes at a rate of fifteen percent, although no testimony was presented on this issue. The court also apparently accepted Carl's argument that some stock should be discounted in value by the amount he will have to pay in taxes when he sells the stock, although no evidence was presented on that issue and the court provided no explanation or description of its thought process.

The court granted Carl a credit for his reduction of the principal balance owed on a loan taken against his 401K plan while this action was

pending but, denied Cora a similar credit for her reduction on the home mortgage loan during the divorce. The parties also disagreed on how to handle debts incurred by each during the pendency of the divorce. Also, without explanation, the trial court adopted Carl's argument that he should receive credit for his Best Buy account incurred after commencement of the divorce action, but there should be no other credit to either party.

Because the trial court's decision does not reveal the mental process by which the decision was made, the decision does not constitute a proper exercise of discretion and must be reversed and remanded. See *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). The court may not make its findings by merely adopting one party's position without explanation. *Trieschmann v. Trieschmann*, 178 Wis.2d 538, 541, 504 N.W.2d 433, 434 (Ct. App. 1993).

The issues relating to maintenance and attorney fees were decided in the same manner. While the court retyped page seven of Carl's proposed judgment, rewording the observations regarding Cora's earning capacity, Carl's child support and insurance coverage, the court gave no indication of how those findings factored into its final decision on the amount of maintenance.

The trial court denied Cora's request for attorney fees without explanation. Attorney fees were requested in the petition for divorce, and some evidence was presented on that issue at trial. Cora also requested attorney fees in her post-trial brief. We conclude that the issue was properly before the trial court and that its failure to explain its rationale for denying attorney fees constitutes an improper exercise of discretion.

By the Court.— Judgment reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.