

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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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.

No. 99-1716

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

LYNN M. SURA,

PETITIONER-RESPONDENT,

v.

FRANKLIN J. SURA,

RESPONDENT-APPELLANT.

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

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Franklin J. Sura appeals from a judgment divorcing him from Lynn M. Sura. On appeal, Franklin challenges the circuit court's valuation of one of the parties' vehicles, its intention to reopen maintenance if Franklin does not make the equalization payment on the property division, its

adoption of the arguments in Lynn's brief in reaching its discretionary decisions and its approach to marital debt. We are unpersuaded by Franklin's arguments and affirm.

¶2 Franklin and Lynn were married in September 1994. Lynn sought a divorce in April 1997. The parties were unable to agree on a value for the Hyundai automobile which was initially driven primarily by Lynn. Lynn turned the vehicle over to Franklin, who sold it prior to trial. Franklin, who worked as a mechanic for an automobile dealership, sold the vehicle for \$2057 on April 10, 1998. Franklin testified at the April 23, 1998 divorce trial that he received a commercially reasonable price for the vehicle. Franklin also placed in evidence an appraisal of \$2050. At trial, Franklin agreed that his appraiser had valued the Hyundai prior to sale at \$5175, a valuation upon which Lynn relied for purposes of her proposed property division.

¶3 The court repeatedly asked for Franklin's opinion of the value of the vehicle because Lynn had submitted an appraised value of \$5175. Franklin testified that the vehicle was not sold for its appraised value because he and Lynn had agreed to sell the vehicle to pay off a roughly equal amount of debt. Also, the vehicle was under threat of repossession because the loan payments were outstanding.

¶4 In its decision on the property division, the circuit court accepted Franklin's appraiser's valuation of \$5175, not the sale price of the vehicle. Franklin objects. The division of the marital estate is within the discretion of the circuit court. See *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We will sustain the court's decision if it 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. *See id.* The valuation of a particular marital asset is a finding of fact which we will not upset unless clearly erroneous. *See id.*; *see also* WIS. STAT. § 805.17(2) (1997-98).¹

¶5 Franklin argues that the court erred in accepting his appraiser's \$5175 value for the Hyundai because the appraiser did not testify. We note that the appraiser was hired by Franklin and evidence of the appraisal was received without objection. Franklin and Lynn testified that the vehicle was sold to pay off a certain amount of debt. Therefore, the vehicle was not necessarily sold for its fair market value, which is the goal when valuing an asset at the date of divorce. "Property to be divided at divorce is to be valued at its fair market value. Fair market value assumes sale by one who desires but is not obligated to sell and purchase by one willing but not obligated to buy." *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 853, 454 N.W.2d 55 (Ct. App. 1990) (citation omitted). The circuit court had discretion to apply another valuation methodology, i.e., Franklin's appraiser's reliance on a blue book value.² *See Sharon v. Sharon*, 178 Wis. 2d 481, 489, 504 N.W.2d 415 (Ct. App. 1993) (court has discretion to select the appropriate valuation methodology).

¶6 Franklin argues that the circuit court failed to deduct the lien on the vehicle from its value. He characterizes this as an error in calculation. Regardless of

¹ All references to the Wisconsin Statutes are to the 1997-98 version.

² Franklin argues that the circuit court could not ignore a change in the condition of the vehicle which affected its value. For this proposition, Franklin relies upon *Preuss v. Preuss*, 195 Wis. 2d 95, 536 N.W.2d 101 (Ct. App. 1995). In *Preuss*, the wife testified that the value of the livestock herd had diminished since the date of an appraisal because some of the animals had left the herd and the husband had received proceeds from the disposition of some of the animals. *See id.* at 107. The circuit court erred in accepting the appraiser's valuation in light of these changes. *See id.* *Preuss* is distinguishable because the vehicle at issue here was appraised in January 1998 for \$5175 yet sold in April 1998 for \$2057 in order to pay off a loan, not necessarily to achieve fair market value.

the merits of this argument, this type of error should have been raised in the circuit court, not for the first time on appeal. *See Schinner v. Schinner*, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988). Therefore, we do not address it.

¶7 Franklin argues that the court erred when it decided postjudgment to hold open maintenance after both parties had waived maintenance. Franklin's argument is flawed in its premise. The record reveals that the court made this ruling before entering the judgment of divorce. Lynn's counsel was directed to prepare a proposed judgment of divorce. Before submitting that proposed judgment, Lynn's counsel wrote to the court to ask for a deadline by which Franklin had to make the property division equalization payment and for an award of maintenance in the absence of that payment. The court granted this request at a hearing before the judgment was entered.³

¶8 Franklin next argues that the circuit court merely adopted Lynn's positions in its written decision contrary to *Treichmann v. Treichmann*, 178 Wis. 2d 538, 541-42, 504 N.W.2d 433 (Ct. App. 1993). In *Treichmann*, the circuit court, without setting out its reasoning process or the factors upon which it relied, merely adopted one party's proposed findings of fact and conclusions of law. *See id.* This was reversible error.

¶9 We disagree with Franklin's characterization of the circuit court's decision. Our review of the court's decision confirms that the court made findings of fact and conclusions of law and stated the factors upon which it relied in making its discretionary decisions on property division and maintenance. *See id.* at 541. The

³ Franklin does not make any other challenge to the maintenance provision.

court used its own reasoning and analysis and did not impermissibly rely on Lynn's arguments.

¶10 Franklin complains that the court did not give its reasons for rejecting his claims that he brought substantial assets to the marriage (i.e., his work tools), paid Lynn's student loans and supported her until she became employed. Franklin further complains that the court did not explain its reasons for rejecting his argument that the parties should leave the marriage pursuant to Franklin's proposed property division.

¶11 In its decision, the court acknowledged Franklin's proposed property division and proposed credits for debt payments. The court rejected this approach because the parties had chosen to litigate valuation and property division. The court expressed an adequate reason for rejecting Franklin's proposed property division which was based on a theory to which the parties did not subscribe at trial.

¶12 The court obviously rejected Franklin's claim that his contribution to the marriage exceeded Lynn's. The court contrasted Franklin's argument regarding his contribution with Lynn's argument that Franklin would share in the pension funds Lynn generated during the marriage. It is apparent that the court found Lynn's argument more persuasive.

¶13 With regard to the parties' debt, the court found specific instances of erroneous debt calculation dates. The court determined the debt in a manner which reflected what the parties should have been paying under the temporary order. The court found that Lynn had paid some debts, including Franklin's share of that debt. The court found that while Franklin's school loans were paid off during the marriage, Lynn's student loans were not satisfied. Therefore, the court included

Lynn's student loans as marital debt. The court properly exercised its discretion in addressing the parties' debt.

By the Court.—Judgment affirmed.

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

