COURT OF APPEALS DECISION DATED AND FILED

August 27, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2025AP2208 **Cir. Ct. No. 2023FA1091**

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

IN RE THE MARRIAGE OF:

MARYBETH ANN WITKOWSKI-SCHLEGEL,

PETITIONER-APPELLANT,

V.

DUKE JON SCHLEGEL,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed in part, reversed in part and cause remanded for further proceedings*.

Before Graham, P.J., Kloppenburg, and Nashold, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. As part of this divorce proceeding between Marybeth Witkowski-Schlegel and Duke Schlegel, the circuit court ordered that Marybeth would receive a percentage of two of Duke's retirement accounts.[1] After the court entered the judgment of divorce, the parties disputed whether the court intended that Marybeth's award would include "gains and losses" between the date of the divorce judgment and the date that the funds were transferred into a segregated account for Marybeth. They also disputed whether Marybeth's percentage of one of the accounts should be calculated based on the account's gross or net value as of the valuation date. In oral rulings after the judgment of divorce, the court determined that Marybeth's award was to be based on the balance of Duke's retirement accounts as of the date of the divorce judgment, and was not to include post-judgment gains and losses. The court also determined that Marybeth's percentage should be calculated based on the net value of the disputed account, and it rejected Marybeth's argument that gross value needed to be used to account for tax consequences. The court memorialized these rulings in a written order.

¶2 We conclude that the circuit court did not erroneously exercise its discretion when it declined to award Marybeth gains and losses after the date of the divorce judgment. However, we also conclude that there's nothing in the record that supports the court's stated rationale with respect to the tax consequences, and therefore, the court's decision on this issue does not amount to a proper exercise of discretion. Accordingly, we affirm in part, reverse in part, and remand for additional proceedings on this issue.

[1] We refer to the parties by first name for clarity because their surnames are similar.

BACKGROUND

¶3 Marybeth and Duke were married in 2012. This was a second marriage for both spouses.

¶4 At the time of their divorce, Marybeth and Duke each owned Roth and traditional (non-Roth) individual retirement accounts (IRAs). Duke's accounts were worth substantially more than Marybeth's and, at their divorce trial, one of the issues was how the accounts held by both parties would be divided. The parties agreed that the total value of the retirement accounts should be divided more or less equally between the two spouses. The sole disagreement on this topic was whether a portion in net retirement assets that Duke accumulated before the marriage should be carved out from this otherwise equal division of retirement assets.

¶5 In the end, the parties agreed that Marybeth would retain the full value of her accounts and that two of Duke's accounts would be divided, but they disagreed on the percentage of Duke's accounts that Marybeth should receive to accomplish a more-or-less equal division of retirement assets. The parties presented competing property division worksheets, both of which were prepared by an accounting firm the parties jointly hired. As pertinent here, both worksheets identified the gross (pre-tax) and net (post-tax) values of each account as of the day on which the account was valued. The difference between the worksheets was that Duke's worksheet, referred to as Exhibit 16, excluded certain retirement assets from an otherwise equal division to account for Duke's pre-marriage contributions.

¶6 With respect to the two accounts that would be divided, Exhibit 16 proposed that Marybeth would receive 27.86 percent of those accounts. It identified $89,984 as the net value of Marybeth's share of those accounts as of December 31, 2023 (the date those accounts were valued). Excluding the pre-marriage contributions that Duke would retain, this division would result in both parties receiving approximately $245,000 in net retirement benefits.

¶7 In an oral ruling at the conclusion of the divorce trial, the circuit court adopted Duke's proposal as "set forth in Exhibit 16." Although Exhibit 16 reflected Marybeth's share of the divided accounts as both a percentage and a fixed-dollar amount, the court's remarks suggest that it intended the award to be percentage-based. Specifically, the court stated that it was adopting Exhibit 16 "for the division of the accounts and whatever QDRO needs to be submitted that would accomplish that with a percentage in it."[2] The court clarified that it did not know what the precise dollar amount of Marybeth's award would be and that "there might be a $10,000 swing or something … one way or another," but that the dollar amount was "not going to be a lot different" from what was stated in Exhibit 16.

¶8 The circuit court entered the judgment of divorce shortly thereafter. In contrast with the court's oral ruling, the written judgment, which had been drafted by Marybeth's counsel and not objected to by Duke's counsel, did not express Marybeth's award as a percentage. Instead, the judgment provided that Marybeth would be awarded "$89,984.00" "as established in Exhibit 16."

[2] A Qualified Domestic Relations Order, or "QDRO," is used to facilitate the division of funds held in a qualified private retirement plan, and to require the plan's administrator to designate account funds for someone other than the original account holder. Such a recipient is referred to as an "alternate payee" and, as in this case, may include the original account holder's former spouse. *See* 26 U.S.C. § 414(p)(1)(A); *see also* ***Lindsey v. Lindsey***, 140 Wis. 2d 684, 689, 412 N.W.2d 132 (Ct. App. 1987).

¶9 The discrepancy between the oral ruling and written judgment came to a head after Marybeth retained substitute counsel and the parties attempted to agree on the terms of the draft QDRO that would be submitted for the circuit court's signature. The parties could not agree on two related issues: whether the transfer was to be based on the fixed-dollar amount ($89,984) or the percentage (27.86) that was stated in Exhibit 16; and, provided that the award was to be percentage-based, the valuation date that should be used to determine Marybeth's 27.86-percent share. At bottom, the dispute can be summarized as whether Marybeth's share was fixed at $89,984, or whether her share would include any gains and losses on the accounts after they were valued for purposes of creating Exhibit 16.

¶10 Ultimately, Marybeth submitted an amended draft QDRO to the circuit court, and the court signed it after Duke failed to timely object. As pertinent here, that QDRO provided that Marybeth's interest in Duke's retirement accounts was "27.86%," and that her share was to include gains and losses from the date the account was valued until the date that Marybeth's award was segregated from Duke's accounts.

¶11 After the QDRO was submitted to the plan administrator, a total of $134,062.91 was transferred to Marybeth in early 2025. As we understand it, this amount was calculated by taking 27.86 percent of the gross value of the accounts as of December 31, 2023, and adding the gains and losses on that amount through the day that Marybeth's share was transferred into a segregated account. Although we do not have the benefit of the accountant's testimony on this issue, we understand that Marybeth's percentage was calculated using the gross value of Duke's non-Roth IRA rather than its net value because Marybeth would ultimately be responsible for paying the tax liability on the non-Roth funds when she withdrew them from her segregated account.

¶12 Shortly after this transfer occurred, Duke filed a motion for contempt. *See* WIS. STAT. § 785.01(1)(b) (2023-24)[3] (providing that "[c]ontempt of court" means, among other things, "intentional … disobedience … of [an] … order of a court"). He argued that the amount transferred to Marybeth did not comport with the written judgment of divorce, which "unequivocally provided for a total award of $89,984."

¶13 Marybeth responded by filing a motion for sanctions. She argued that a transfer of $89,984 would not comport with the circuit court's oral ruling, which provided for an award based on a "percentage." Marybeth acknowledged that the court's ruling was unclear about the date on which her percentage of account should be valued. However, she took the position that Wisconsin case law requires that "percentage transfers must account for post-divorce gains and losses" through the date that a retirement account is actually divided. She also took the position that whatever the net value of the award to Marybeth, the non-Roth funds had to be "grossed up" before they were transferred to Marybeth to account for the fact that she would ultimately be responsible for the tax liability on her portion of the non-Roth account.

¶14 The circuit court held a hearing on the motions in July 2025. At the outset of the hearing, the court denied Marybeth's request to present the accountant's testimony because, in the court's view, the disputed issues were

[3] All references to the Wisconsin Statutes are to the 2023-24 version.

purely legal. In an oral ruling, the court denied the competing motions for contempt and sanctions but clarified the discrepancy between its oral decision at the conclusion of the divorce trial and the written judgment of divorce.

¶15 As part of its oral decision clarifying the award, the circuit court judge indicated that he "remember[ed] this case" and "that [approximately] $89,000" that was set forth on Exhibit 16, and that "that $89,000, some odd dollars figure [was] what was driving my thinking here." Even so, the court agreed with Marybeth that the award was to be based on the percentage (that is, 27.86 percent) that was listed in Exhibit 16, rather than the fixed-dollar amount of $89,984. The court appeared to reason that Marybeth's share should not be fixed as of December 31, 2023, the date listed on Exhibit 16, because that was months before the divorce was finalized.

¶16 However, the circuit court rejected Marybeth's argument that she was entitled to the gains on her share of Duke's accounts through the date of division as a matter of law. According to the court, "the fairest thing to do" was to apply Marybeth's percentage as of the date of the divorce judgment. The court confirmed that it was ordering "the percentage of the full account value as of September 3rd, 2024, the date of the divorce." It ordered Marybeth to return any difference between the $134,062.91 that had been transferred to her pursuant to the QDRO and the amount she was entitled to pursuant to the court's order, as clarified during the hearing.

¶17 Following the circuit court's oral ruling, an additional dispute arose with respect to the amount that Marybeth was required to return. This dispute pertained to the tax consequences of the award, and specifically, whether Marybeth's percentage should have been calculated based on the net or gross value of the accounts as of the date of the divorce judgment. Duke took the position that Marybeth should have received 27.86 percent of the *net* value of his non-Roth account, and Marybeth took the position that she should have received 27.86 percent of the *gross* value of that account. As we understand it, Marybeth would have to return $29,110 if Duke's proposed method prevailed, but she would have to return just $4,670.61 if her proposed method prevailed.

¶18 The circuit court held a status conference in which it adopted Duke's proposed method of calculating Marybeth's share. That is, the court determined that Marybeth's 27.86 percent would be calculated based on the net value, rather than the gross value, of Duke's non-Roth account as of the date of divorce. The court stated that if it accepted Marybeth's proposal, Duke would end up paying "all of the taxes, and that's not right." Marybeth sought reconsideration of this determination and again asked to be able to present the accountant's testimony, but the court denied the motion. Marybeth appeals.[4]

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[4] The appellate briefs submitted by both parties fail to comply with the rules of appellate procedure in significant respects that create unnecessary burdens on this high-volume court.

Marybeth's appellate briefing consistently refers to the parties by their party designation of "Petitioner" and "Respondent," and Duke's appellate briefing alternates between referring to the parties by their name and party designation. WISCONSIN STAT. RULE 809.19(1)(i) requires parties to be referred to by name rather than party designation in appellate briefing.

Duke does not consistently cite to the record in his appellate briefing. Instead, he often cites to the appendix without including parallel citations to the appellate record, and he sometimes uses "id." for a citation, when it is not clear to what that short citation refers. "[T]he appendix is not the record," ***Balsimo v. Venture One Stop, Inc.***, 2024 WI App 58, ¶4 n.2, 414 Wis. 2d 27, 13 N.W.3d 228, and WIS. STAT. § 809.19(1)(d)-(e) provides that briefs must contain "appropriate references to the record" and "citations to the … parts of the record relied on."

We remind counsel of the obligation to follow the rules of appellate briefing.

DISCUSSION

¶19 On appeal, Marybeth argues that the circuit court erred in dividing Duke's retirement accounts based on the value in the accounts as of the date of the divorce judgment without including post-judgment gains and losses; and when it determined that the amount distributed to Marybeth should have been calculated based on the net value rather than the gross value of the accounts. We address the issues in that order.

I. Post-Divorce Gains and Losses

¶20 A circuit court has significant discretion when resolving disputed issues regarding the division of marital property, including the valuation and division of retirement accounts. *See* ***Peterson v. Peterson***, 126 Wis. 2d 264, 265, 376 N.W.2d 88 (Ct. App. 1985). We will uphold the circuit court's discretionary decision on appeal so long as the court "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." ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). A court has erroneously exercised its discretion "if it makes an error of law or neglects to base its decision upon facts in the record." ***King v. King***, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

¶21 Wisconsin law provides that unless there are "exceptional intervening circumstances," courts should generally determine "the value of assets" as of the date of divorce. *See, e.g.*, ***Hollbrook v. Hollbrook***, 103 Wis. 2d 327, 334-35, 309 N.W.2d 343 (Ct. App. 1981). Here, in its post-judgment ruling, the circuit court determined that Marybeth should receive 27.86 percent of Duke's retirement accounts as of the date of the divorce judgment, without accounting for any post-judgment gains and losses.

¶22 It is clear that in coming to this conclusion, the circuit court sought to promote a result that balanced the parties' competing positions. As noted, Duke's position was that Marybeth's award should have been fixed based on valuations that were made months before the date of the divorce judgment, while Marybeth's was that her award should include gains that Duke's accounts experienced months after the judgment was entered. The court rejected both approaches, concluding that "the fairest thing to do" was to stop the clock as of the date of the judgment. Based on this record, we conclude that the court "examined relevant facts, applied a proper standard of law," and "reached a conclusion that a reasonable judge could reach" with respect to the division of the accounts. ***Long***, 196 Wis. 2d at 695.

¶23 In arguing to the contrary, Marybeth asserts that the circuit court's original division of retirement assets, as expressed in the oral ruling and written judgment of divorce, "unambiguously" allowed for post-judgment gains and losses. She argues that the original ruling controls and that we cannot rely on the court's post-judgment ruling, which she contends was "an erroneous modification and deviation from that clear award."

¶24 This argument is not supported by the record. Neither the original oral ruling nor the written judgment of divorce said anything one way or the other about post-judgment gains and losses. Accordingly, contrary to Marybeth's assertion, the court was permitted to clarify this ambiguous aspect of its original decision in a post-judgment order. *See* ***Washington v. Washington***, 2000 WI 47, ¶¶16-17, 234 Wis. 2d 689, 611 N.W.2d 261 (providing that "silence in the final division of property [can] create[] an ambiguity" and "if a divorce judgment is ambiguous, construction is allowed").

¶25 Marybeth also argues that she is entitled to post-divorce judgment gains and losses as a matter of law. She cites our decision in ***Taylor v. Taylor***, 2002 WI App 253, 258 Wis. 2d 290, 653 N.W.2d 524, in support; according to Marybeth, ***Taylor*** stands for the proposition that whenever a court awards a percentage share of retirement assets, it must award post-judgment gains and losses on the accounts up through the day the accounts are divided. We do not agree with this interpretation of ***Taylor***.

¶26 In ***Taylor***, the parties entered into a marital settlement agreement that awarded the wife a 35-percent interest in her former husband's retirement plan. ***Id.***, ¶2. After the circuit court adopted the marital settlement agreement, the parties disputed whether the wife was entitled to a percentage of the account as of the date of the divorce judgment or whether "her share (like his) was subject to fluctuations in the market until redeemed." ***Id.***, ¶5. The court was tasked with interpreting the agreement and reasoned that, "by opting to take a percentage of the [plan]" rather than a fixed amount, the wife agreed to "enjoy the benefits" and "assume the risk of a decrease in value." ***Id.***, ¶6. Therefore, she was entitled to receive the percentage as of the date that her award was segregated from her husband's account. ***Id.***

¶27 On appeal, we affirmed the circuit court's interpretation. Among other things, we reasoned that had the wife "wanted to lock in a certain dollar figure," the parties would have agreed to a dollar amount rather than a percentage in their marital settlement agreement. ***Id.***, ¶11. We further explained that by "agreeing to a percentage share of a variable asset, [the wife] agreed to assume a proportionate share of any subsequent gains or losses until such time as she liquidates the asset." ***Id.***, ¶12.

¶28 To be sure, the ***Taylor*** decision lends support to the argument that the circuit court *could have* awarded post-divorce judgment gains and losses up through the date the accounts were segregated. However, we do not read ***Taylor*** as creating an iron-clad rule that every time an award is percentage-based, a court *must* award gains and losses until assets are distributed. In ***Taylor***, the court's decision rested on its legal interpretation of a particular marital settlement agreement. ***Taylor*** did not comment on what a circuit court may or may not do when it exercises its discretionary power to determine what is fair and equitable under the circumstances of a particular case, as is the situation here.

¶29 As noted, here, the circuit court determined that under the circumstances of this case, the fairest result would be to award Marybeth gains and losses through the date of the judgment, but not after the judgment. We will not upset the court's exercise of discretion on this point.

II. Tax Consequences

¶30 As noted, Marybeth also challenges the circuit court's determination that the amount distributed to Marybeth should have been calculated based on the net value of Duke's traditional (non-Roth) account. More specifically, she argues that the court's determination that her contrary proposal would result in Duke "paying all the taxes" was an "incorrect and unreasonable application of law to facts." Before addressing her argument, we provide some additional background.

¶31 As noted, both parties had savings held in retirement accounts that they had accumulated before the divorce. During the trial, the shared aim of the parties and the circuit court appears to have been to accomplish a more-or-less equal division of these assets. The parties retained an accounting firm to determine the value of the various accounts and to propose a division. And, because Duke's accounts were worth more than Marybeth's, everyone agreed that Marybeth should keep the funds in her own accounts and be given a percentage of the funds from two of Duke's accounts.

¶32 The retirement accounts fall into two categories: Roth and non-Roth accounts. We do not have the benefit of accountant testimony on the accounting issues, in part because the court denied Marybeth's request to present that testimony. However, as we understand it based on representations in the parties' briefing, the income taxes on contributions to Roth accounts have already been paid, meaning that funds held in Roth accounts will not be subject to income taxes upon withdrawal. By contrast, traditional (non-Roth) accounts are pre-tax assets, and when funds are withdrawn from those accounts, the recipient of the funds will incur income tax liability on the amount withdrawn.

¶33 Marybeth represents that for purposes of determining the value of non-Roth accounts, it is customary to apply a tax discount (here, the accountants applied 20%) to account for the fact that whoever withdraws those funds will have to pay taxes on the amounts withdrawn. Applying a tax discount to funds held in traditional non-Roth accounts results in a net (post-tax) value for all accounts, and allows the dollar values in Roth and non-Roth accounts to be compared on a roughly equal basis so that the funds in the accounts can be more or less equally distributed.

¶34 At the divorce trial, the topic of tax consequences was not specifically addressed in the testimony, nor was it addressed in the circuit court's oral ruling or the written judgment of divorce. However, these consequences were alluded to, albeit obliquely, in the competing property division worksheets that both parties filed. As noted, both worksheets accounted for tax implications by reducing the balance of all of the parties' non-Roth accounts by 20 percent; that way, the dollars held in the parties' non-Roth accounts could be compared with the dollars held in their Roth accounts, and the court could ensure that both parties would receive a roughly equal amount of retirement assets after tax liabilities were addressed. As noted, it appears that the court was attempting to accomplish that roughly equal division by awarding Marybeth a specific percentage of two of Duke's accounts, with the result that both parties would receive approximately $245,000 in net retirement benefits.

¶35 However, when it came time to actually distributing the funds in the accounts, the parties could not agree on whether the accountants should apply the 20-percent tax discount to the gross value of Duke's non-Roth account before calculating Marybeth's 27.86-percent share. Duke took the position that the entire balance of his non-Roth account must first be reduced by 20 percent because that was the way Marybeth's share was calculated in Exhibit 16. Marybeth took the position that she should receive 27.86 percent of the gross value of the non-Roth account to account for the fact that she, not Duke, would be responsible for the tax liability on her share of the non-Roth account.

¶36 In a brief oral ruling, the circuit court determined that the parties were to calculate Marybeth's share of the non-Roth account consistent with how it was calculated in Exhibit 16. That is, the accountants should determine the gross value of the non-Roth account as of the divorce date, reduce the gross value to net value by applying the 20-percent tax discount, and then calculate Marybeth's 27.86 percent of the net value of the account. In explaining this determination, the court appeared to reason that, if the 20-percent tax discount was not applied to the non-Roth account before Marybeth's 27.86-percent share was calculated, "it would be forcing Duke … to pay all of the taxes, and that's not right."

¶37 On appeal, Marybeth argues that this determination amounted to an erroneous exercise of discretion. Generally speaking, when a circuit court "sets forth the underlying rationale for its consideration of tax consequences on a retirement or pension plan," an appellate court will uphold the circuit court's findings and rationale "unless clearly erroneous or the result is unconscionable under the circumstances of the case." ***Laribee v. Laribee***, 138 Wis. 2d 46, 53, 405 N.W.2d 679 (Ct. App. 1987); *see also* ***King***, 224 Wis. 2d at 248 (a court erroneously exercises its discretion "if it makes an error of law or neglects to base its decision upon facts in the record").

¶38 The crux of Marybeth's argument is that the factual premise of the circuit court's ruling—that her proposed method would force Duke to pay all of the taxes—is incorrect. Marybeth's argument is as follows, as we best understand it. The reason that Exhibit 16 reduces the gross value of Duke's non-Roth account by 20 percent is to account for the tax liabilities that will be incurred by both parties, on each party's respective portion of that account. However, the net value of the non-Roth account should only have been used for the purpose of comparing it to the other accounts, to effectuate a more-or-less equal division of assets. Duke will never have to pay taxes on Marybeth's share of his non-Roth account; it is Marybeth who will be responsible for paying that tax liability, and she should receive the portion of the tax discount that corresponds with her share of the account. If she were to receive no more than the net value of her share of the non-Roth account, Duke would be allowed to keep the net value of his own share plus the 20-percent tax discount attributable to both parties' shares, even though he will only have to pay taxes on his share of the account. By contrast, if Marybeth received 27.86 percent of the gross value of the account, then both parties will end up receiving the portion of the tax discount that corresponds with the tax liabilities for their respective shares of the account.

¶39 Marybeth makes a compelling argument. As noted, she was not allowed to introduce accounting testimony in support of her argument, but if the accounting underlying her argument proves to be accurate, it appears that the method of calculation ordered by the circuit court will result in Duke receiving substantially more, and Marybeth receiving substantially less, than an equal distribution of the net value of the retirement accounts. This would appear to be contrary to the court's apparent intent in adopting the division of retirement assets set forth in Exhibit 16.

¶40 For his part, Duke does not mention, much less attempt to defend, the circuit court's assertion that Duke would be forced to pay "all of the taxes" if Marybeth's share of the non-Roth account is calculated as Marybeth suggests. Rather, Duke merely argues that the court "specifically considered" the tax implications when it issued its oral ruling on this topic. Duke does not respond to Marybeth's argument that the court's consideration of the issue was based on an incorrect underlying factual premise.[5]

¶41 On this record, we are unable to determine that the circuit court's underlying factual premise is correct. At a minimum, there is no record support for the court's determination that Marybeth's method of calculating her award

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[5] Duke also argues that "any tax consequences Marybeth suffered in connection with the division of the retirement assets were largely of her own making" because she "cashed out" the amount "that was transferred to her," which "trigger[ed a] 10[-percent] early withdrawal penalty." This argument does not appear to be on point. We do not understand Marybeth to be arguing that Duke should pay any withdrawal penalty that she incurred. We understand her argument to be based on the income tax liability that is associated with all non-Roth funds.

would lead to Duke being forced to pay all of the taxes. Accordingly, on this record, it is not clear that the court "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." ***Long***, 196 Wis. 2d at 695. That is, we cannot say that the court appropriately exercised its discretion on this point, and we remand for further proceedings to address the issue.[6]

By the Court.—Order affirmed in part, reversed in part and cause remanded for further proceedings.

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

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[6] In his respondent's brief, Duke argues that the entirety of Marybeth's appeal is frivolous, and he filed a separate motion seeking costs and fees pursuant to WIS. STAT. § 809.25(3)(c)2. Sanctions are not appropriate unless an entire appeal is frivolous, ***Thompson v. Ouellette***, 2023 WI App 7, ¶44, 406 Wis. 2d 99, 986 N.W.2d 338, and here, neither of the issues Marybeth raises are frivolous. Indeed, we have determined (among other things) that Marybeth's argument about tax consequences is sufficiently meritorious to warrant a remand to the circuit court for additional proceedings. We therefore deny Duke's motion.