

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2005

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. 04-1246
STATE OF WISCONSIN**

Cir. Ct. No. 01FA002058

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

AMY B. MCCORMICK,

PETITIONER-RESPONDENT,

V.

DANIEL J. MCCORMICK,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Daniel McCormick appeals from the judgment divorcing him from Amy McCormick. He raises numerous issues concerning the trial court's property and family support awards. We affirm.

¶2 The parties were married in 1987 and divorced in May 2003. Daniel was thirty-eight, and earned \$7,130 per month at the time of the divorce as a City of Madison employee. Amy was thirty-seven and earned no income, although the trial court attributed to her an earning capacity of \$1,646 per month. There were two children of the marriage, and the parties stipulated to joint legal custody and equal placement.

¶3 For several years Amy and Daniel lived in a home owned by her parents. Amy eventually received a gift of equity in the home worth approximately \$86,000 to her when the home was sold. After the sale Amy used the \$86,000 as a down payment on the home Amy and Daniel purchased together in 2000 and still owned at the time of the divorce. The court valued that home at \$206,600, the assessed value for taxes, and credited Amy with the \$86,000 down payment. The court's nearly equal division of the parties' debts and the remaining equity gave Daniel \$4,000 more than Amy in recognition of his work to improve the home. The division of assets required Amy to pay Daniel an equalization amount of \$22,314.

¶4 Daniel did not oppose temporary maintenance for Amy, and acknowledged his child support obligation. Rather than separately award maintenance and child support, the court ordered family support, in order to give Daniel a tax benefit. The court ordered seven years of support at \$2,000 per month. In doing so, the court acknowledged that the award hampered Daniel's ability to meet his monthly debt payments, but concluded that he could use his \$22,314 equalization payment to retire some of his debts and reduce those payments. To justify the significant amount of family support ordered, the court considered the length of the marriage and the substantial increase in Daniel's education and earnings while it lasted, and Amy's contribution to family and child

rearing responsibilities. The court limited the award to seven years because Amy was young, educable, and could, in time, potentially support herself. The award essentially equalized the income of the parties, factoring in Amy's earning capacity.

¶5 The division of divisible property lies within the trial court's discretion. *Ashraf v. Ashraf*, 134 Wis. 2d 336, 340, 397 N.W.2d 128 (Ct. App. 1986). We will affirm a discretionary decision if the trial court makes a reasoned and reasonable decision based on facts of record and the appropriate law. *Johnson v. Johnson*, 157 Wis. 2d 490, 497, 460 N.W.2d 166 (Ct. App. 1990). Determining the appropriate amount of family support is also discretionary. *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 481, 377 N.W.2d 190 (Ct. App. 1985). It is a substitute for separate maintenance and child support awards. *See* WIS. STAT. § 767.261 (2003-04).¹ In awarding family support the trial court must assess the family's needs and the paying spouse's ability to pay. *Corliss v. Corliss*, 107 Wis. 2d 338, 348, 320 N.W.2d 219 (Ct. App. 1982).

¶6 Daniel first contends that the trial court erred by not giving him a share of Amy's \$86,000 gift proceeds. He contends that because she invested her gift in marital property, it became a divisible marital asset. We agree that once Amy used her gift to buy joint property, she converted it into divisible, marital property. *See Friebe v. Friebe*, 181 Wis. 2d 285, 298, 510 N.W.2d 767 (Ct. App. 1993) (explaining that gifted property is presumptively converted to divisible property when the owning spouse uses it to purchase jointly owned property.)

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

However, even when gifted property becomes divisible, as it did here, the trial court retains discretion to unequally divide it based on its former status as gifted property. See *Schwartz v. Linders*, 145 Wis. 2d 258, 263, 426 N.W.2d 97 (Ct. App. 1988). Here, the trial court reasonably awarded Amy the value of her gifted property due to the short duration of the joint tenancy. Amy invested in the jointly owned property in 2000, and separated from Daniel in 2001. The court could reasonably deem the division of this property a windfall to Daniel under that circumstance.

¶7 Daniel next contends that the trial court erred in valuing the homestead at its \$206,600 assessment. The trial court used the assessment because it was an objective measure, and fell between the appraisals the parties submitted. As Daniel notes, Amy subsequently stipulated to his appraised valuation of \$210,000. Notwithstanding the parties' agreement on the value, the trial court properly exercised its discretion by choosing an objective measure of value, instead. And, given the trial court's disposition of the home's equity, the difference between the assessed and appraised value is not significant.

¶8 Daniel also challenges what he contends is excessive maintenance, by which he means the portion of family support intended for Amy's maintenance. In determining that portion, the court considered the length of the marriage, Amy's contribution to it, her contribution to Daniel's enhanced education and earnings, her comparatively low earning capacity, the tax consequences to the parties, and Amy's potential to improve her earning capacity over time. These were proper factors to consider in determining Amy's share of the parties' combined income. See WIS. STAT. § 767.26. They justify as reasonable an award of family support that roughly equalizes the income and potential income between the parties for

seven years. The trial court also reasonably considered Daniel's ability to reduce some of his short-term budget problems with his equalization payment.

¶9 Daniel next contends that the court erred by making him solely responsible for the children's medical insurance coverage. He is employed and can insure the children through his employer's health plan. Amy is unemployed. The court reasonably assigned coverage responsibility under these circumstances.

¶10 Daniel presents numerous other assertions of trial court error. In some cases they are unsupported by citation to facts of record or the applicable law, and we therefore decline to address them. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In other cases, Daniel fails to refute Amy's assertion that he did not present these arguments in the trial court. We therefore decline to address those arguments as well. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superceded on other grounds by statute as stated in Wilson v. Waukesha County*, 157 Wis. 2d 790, 460 N.W.2d 830 (Ct. App. 1990).

¶11 Amy moves for an award of costs and attorney's fees under WIS. STAT. RULE 809.25(3), governing frivolous appeals. Amy's motion was not timely under WIS. STAT. RULE 809.25(3)(a), and we deny it on that basis.

By the Court.—Judgment affirmed.

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

