

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2008

David R. Schanker
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. 2006AP2377

Cir. Ct. No. 2004FA424

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

TIFFANY MICHELE McVEY,

PETITIONER-RESPONDENT,

v.

ROSS JAMES McVEY, JR.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Ross James McVey, Jr. appeals from those portions of the judgment of divorce that addressed custody and placement and property division. He argues that the trial court erred in its determination of

custody and placement of his minor children, and when it divided the marital estate. Because we conclude that Ross has not established that the circuit court erroneously exercised its discretion, we affirm the judgment.

¶2 Ross McVey and Tiffany McVey were divorced in 2006. They had two minor children from the marriage. At the time of the final divorce hearing, Ross was incarcerated in federal prison. He appeared at the hearing, however, by telephone. The trial court awarded sole custody and primary physical placement of the children to Tiffany. The court also assigned to Ross a \$50,000 debt due to his parents, and assigned to Tiffany a \$71,000 student loan debt. The trial court also devalued Tiffany's retirement accounts by twenty-five percent of their current value for tax purposes.

¶3 Ross challenges the court's ruling in three general respects: custody, placement, and property division. He also argues that he was deprived of due process and was not given the opportunity to rebut the evidence Tiffany presented at the divorce hearing. The record does not support Ross's allegations about the conduct of the hearing. At the start of the hearing, the court noted that the matter had been pending for two years, and that Ross had not taken any of the actions he needed to take to be present at the hearing. Further, although Ross was in prison, he fully participated in the hearing by telephone. We reject his challenges to the conduct of the hearing.

¶4 Child custody and placement determinations are committed to the sound discretion of the trial court. *Gould v. Gould*, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). Similarly, we review the trial court's findings with respect to property division to determine whether the court properly exercised its discretion.

Settipalli v. Settipalli, 2005 WI App 8, ¶¶10-12, 278 Wis. 2d 339, 692 N.W.2d 279.

A trial court engages in an erroneous exercise of discretion when it “fails to consider relevant factors, bases its award on factual errors, makes an error of law, or grants an excessive or inadequate award.” *Olski v. Olski*, 197 Wis. 2d 237, 243 n.2, 540 N.W.2d 412 (1995). Moreover, “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.” *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

Id., ¶11.

¶5 The trial court awarded sole custody to Tiffany because Ross was incarcerated at the time of the divorce hearing. The court found that because Ross was in prison, communication between Ross and Tiffany would have to occur primarily by mail. The court found that this created a cumbersome decision-making process that was simply “unrealistic.” The court concluded that Ross’s incarceration created a condition that would substantially interfere with the exercise of joint legal custody under WIS. STAT. § 767.41(2)(b)2.b. (2005-06), and that it was in the children’s best interests for Tiffany to have sole custody. We conclude that this was a proper exercise of discretion.

¶6 Again, because Ross was incarcerated at the time of the divorce hearing, the court awarded primary physical placement to Tiffany. The court told Ross that once he was released from prison, which he has since been, he could petition the trial court to change the placement order. We also conclude that the circuit court properly exercised its discretion when it made this determination.

¶7 Ross raises various challenges to the court’s property division. First, he argues that the court erred in assigning a \$50,000 debt owed to his parents only to him. Tiffany testified at the hearing that the debt arose when Ross’s parents paid off credit cards that Ross had taken out in their name. Ross also stated at one point at the hearing that he would pay his parents. Ross argues to this court that he was not allowed to prove to the court that the loan was incurred to pay off marital debt. The record does not support this assertion.

¶8 Ross next argues that the court improperly considered Tiffany’s student loan as a marital debt. He argues that there was no evidence to support this finding, other than Tiffany’s testimony. We conclude that there was a sufficient basis for the court to determine that this was marital debt. Moreover, the record shows that based on the court’s final division of the marital estate, Tiffany was owed an equalizing payment. Tiffany, however, waived the equalizing payment, to her detriment.

¶9 Ross also argues that the court erred when it accepted Tiffany’s statement about the value of her retirement accounts and “inexplicably” devalued them by twenty-five percent. Again, the record supports the trial court’s determination of the value of her accounts. Further, the process of devaluing a retirement account for tax purposes is a standard one and within the trial court’s discretion. *See Rumpff v. Rumpff*, 2004 WI App 197, ¶25, 276 Wis. 2d 606, 688 N.W.2d 699. We again conclude that the trial court properly exercised its discretion.

¶10 For the reasons stated, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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

