COURT OF APPEALS
DECISION
DATED AND RELEASED

February 19, 1997

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. 96-0270

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

In re the Marriage of:

PETER L. WALLS,

Petitioner-Appellant,

v.

PAMELA A. WALLS,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Peter L. Walls appeals from a judgment of divorce from Pamela A. Walls. He argues that the trial should have been adjourned, that the property division failed to enforce a pretrial stipulation and was based on misevaluation of his business and property, and that the award of retroactive child support was improper. We conclude that the trial court erroneously exercised its discretion in failing to grant Peter's pro se request for an

adjournment because he had only received the business appraisal the day before trial. We conclude that the trial court's failure to grant the adjournment and follow the parties' pretrial stipulation affected the valuation of Pamela's business and property owned by Peter. Therefore, we reverse those portions of the judgment. We affirm the evaluation of Peter's business and the child support determination. We remand the case to the trial court for further proceedings.

The Walls were married in 1969. The divorce action was filed on July 10, 1992. The Wallses' only child turned eighteen during the pendency of the divorce.

At a hearing on May 19, 1994, the parties entered into a stipulation to settle various disputed issues. Trial was scheduled for July 26, 1995. At a hearing on June 12, 1995, Peter's attorney was allowed to withdraw from representation. Two days before trial, Attorney Jennifer Wall informed the trial court that she would represent Peter if there was an adjournment of the July 26 trial date. On the day of trial, Peter appeared pro se and indicated that he was not ready to proceed. The trial proceeded with Peter acting pro se.

Rulings on motions for continuance are discretionary decisions for the trial court. *See* ***Schwab v. Baribeau Implement Co.***, 163 Wis.2d 208, 216, 471 N.W.2d 244, 247 (Ct. App. 1991). Prejudice must be shown in order to set aside the trial court's ruling. *See* ***id.***

The court appointed an appraiser to value businesses owned by Peter and Pam. The report on Pam's business, Fairview Group Home, Inc., was provided to the parties the day before trial. At the start of the trial, Peter indicated that he had not had time to go through the appraisal yet. The trial court did not consider whether an adjournment should be granted because of the last-minute submission of the appraisal.[1] A decision which requires an

[1] The trial court focused on Peter's request for an adjournment in order to obtain the assistance of counsel. Although we do not find it necessary to address this ground, we are troubled that the court quickly jumped to a conclusion that the age of the litigation foreclosed an adjournment. The withdrawal of counsel had occurred within only weeks of the trial. It was clear that Peter wanted to be represented by an attorney. Moreover, the late submission of the business appraisal made the absence of counsel even more significant.

exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an erroneous exercise of discretion. *See* ***Schmid v. Olsen***, 111 Wis.2d 228, 237, 330 N.W.2d 547, 552 (1983). A reviewing court is obliged to uphold a discretionary determination if it can independently conclude that the facts of record applied to the proper legal standard support the trial court's decision. *See* ***id.***

Although Pam argues that Peter had months before trial to obtain a separate appraisal, it would not be apparent that such evidence was necessary until the report of the court-appointed appraiser was complete. A local court rule allows a party to file an objection within forty-five days of receipt of an appraisal from a court-appointed appraiser. *See* RULES OF THE WAUKESHA COUNTY CIRCUIT COURT FAMILY COURT DIVISION, Rule 10.2 (April 6, 1993). The last-minute submission of the appraisal deprived Peter of an adequate opportunity to consider and challenge the appraisal.[2] We cannot find facts in the record which would sustain the denial of an adjournment on this ground. On remand, the valuation of Pam's business must be revisited to provide Peter the missed opportunity to challenge the court-appointed appraisal.

We turn to the pretrial stipulation between the parties. The stipulation was entered in the record at a hearing held on May 19, 1994.[3] At no time during trial did Pam ask to have the stipulation set aside under § 806.07, STATS. She contends, and apparently does so for the first time on appeal, that the stipulation was not unequivocally intended to be incorporated into the final property division. We disagree. The recitation of the stipulation includes statements such as "this settles the issue about the note," "that will be a charge to her in the property division," "she will pay him … $1,000, which will be an advance payment from him to her on the property division," and "she'll have a credit coming against whatever she owes him in the property division." The stipulation outlined the outcome depending on which party was ultimately awarded a particular asset. There is no basis to conclude that the stipulation

[2] We reject Pam's contention that Peter waived any error with respect to the late submission of the appraisal because he did not ask any questions of the court-appointed appraiser and did not object to admission of the report. Without an adequate opportunity to review the report, Peter, as a pro se litigant, was in the dark.

[3] The May 19, 1994 hearing was in front of Judge Willis Zick. By the time of trial, Judge Zick had retired from the bench. The trial was heard by Judge Donald J. Hassin, Jr.

was for guidance only. Having been placed on the record in accordance with § 807.05, STATS., the stipulation was fully enforceable. *See* ***Steven G. v. Herget***, 178 Wis.2d 674, 684, 505 N.W.2d 422, 426 (Ct. App. 1993).

The parties stipulated on May 19, 1994, that a promissory note made to Pam in connection with her sale of a one-half interest in her business would be valued at the principal balance due on the note on the date the divorce action was filed. The principal balance was $126,721 at that time. The trial court valued the note at $63,371 based on amortization of the principal and making a further reduction for income tax consequences for interest paid to Pam on the note. The valuation of the note was clearly erroneous in light of the parties' stipulation.

Pam argues that the stipulation's provision that she pay Peter one-half of the $2000 payments she received on the note acted as a "reducing clause." The stipulation provided that "[e]very $1,000 payment that she makes to him from subsequent $2,000 payments received by her hereafter will be a dollar-to-dollar credit to her in the property division where it will be the same as if she had paid him that much in an equalization payment." To read the language as Pam does would be to double count the $1000 payments by giving her a credit against the equalization payment and also creating a reduction in the note's principal value by virtue of payments on the note. The stipulation is clear that the value of the note was frozen and Pam's $1000 payments were "an advanced payment in the property division."

The parties' stipulation also provided that Pam would pay all of the income tax on the interest received on the note. The reduction in the note to account for tax consequences was contrary to the stipulation. Pam argues the double negative—that there was no agreement that she would not be reimbursed for the taxes she paid on the interest received. The court cannot enforce an agreement not made. The stipulation was to freeze the value; any reduction was contrary to the stipulation. Therefore, we reverse the trial court's valuation of the promissory note.

Peter next argues that the trial court's refusal to consider who was responsible for real estate taxes on the parties' joint residence in the years that Pam lived there alone was contrary to the stipulation entered in the record of

May 19, 1994. We agree. The transcript of the May 19 hearing reflects that the real estate taxes issue was going to be "reserved" and that "[p]eople are free to make whatever arguments they want to on that issue when we finally have to resolve it." Peter tried to argue to the trial court that the real estate taxes were Pam's responsibility. The trial court ruled that it was not an issue at trial because the taxes had already been paid. Even though Peter may have no meritorious claim as to why Pam is responsible for the real estate taxes, the trial court cut off proof or argument on the issue. The stipulation reserved the issue for trial. On remand it must be considered and resolved.

A final issue arises under the pretrial stipulation. The parties agreed that new real estate purchased from a split of the sale proceeds from the parties' joint residence would be excluded from the marital estate. Peter got $37,000 of the sale proceeds and invested some in a condominium in Pewaukee, Wisconsin, and some in a house in Conover, Wisconsin. Pam got $30,000 of the sale proceeds and had not invested the funds in a new residence at the time of the divorce. The trial court excluded the value of the Pewaukee condominium from the marital estate. It included, however, the equity Peter had in the Conover house. The court concluded that the parties had not intended to exclude from the marital estate multiple investments made with the sale proceeds and that the parties only intended to provide a method for each party to purchase a new residence upon the sale of the joint residence. We see no grounds for this distinction in the stipulation of the parties. Charging Peter with the equity in the Conover house, which includes the amount he invested from the sale proceeds, has the effect of double counting the distribution of those proceeds to him. *See* ***Forester v. Forester***, 174 Wis.2d 78, 92, 496 N.W.2d 771, 777 (Ct. App. 1993) (double counting an asset is not permitted). Peter and Pam were each to be "charged" with the sale proceeds distributed to them. When Peter is charged with his share and then charged with the total equity in the Conover house where a portion of the proceeds went, he has been twice charged with that amount. This is unfair particularly in light of the fact that Pam was never charged for the proceeds of the sale she received.[4] The inclusion of the equity in the Conover property in the marital estate is reversed.

[4] The stipulation was that Peter would take $37,000 and Pam would take $30,000 of the sale proceeds and that "[t]hey'll each be charged with that amount of money. And she still owes him $7,000 out of her half later on. That seven is the same seven, but he'll be charged with 37; she'll be charged with 30. And then she still owes him the $7,000." It is not clear from the record whether this calculation of the stipulation was in fact done.

Peter challenges the valuation of his interest in his former business, Great Lakes Trucking. The valuation of a particular marital asset is a finding of fact which we will not upset unless clearly erroneous. *See* ***Liddle v. Liddle***, 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987); *see also* § 805.17(2), Stats.

Peter sold his interest in Great Lakes Trucking during the pendency of the divorce action. Pam's expert valued the business based on the sale price of Peter's stock, Peter's partnership interest in business real estate, and Peter's receipt of a 1993 Ford Explorer. The expert also included the value of a six-month consulting contract Peter obtained when he sold his interest. The trial court found that including the value of the consulting contract was appropriate because it was part of the sale. There is no evidence contradicting the expert's valuation. The trial court's finding is not clearly erroneous.

The final issue is the award of retroactive child support. A trial court has no authority to retroactively create a support obligation. *See* ***Strawser v. Strawser***, 126 Wis.2d 485, 489, 377 N.W.2d 196, 198 (Ct. App. 1985). However, a trial court may enforce a stipulation of the parties for support under the doctrine of estoppel. *See* ***Harms v. Harms***, 174 Wis.2d 780, 784-85, 498 N.W.2d 229, 231 (1993). Peter conceded that he had agreed to pay $204 per week in child support during the pendency of the action. He further stipulated at trial that the arrearage was $7460.56. The elements of estoppel, action which induces detrimental reliance, are present here. We affirm the trial court's award of child support.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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