**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

June 9, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**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* § 808.10 and RULE 809.62, STATS.**

**No. 97-1178**

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

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**IN RE THE MARRIAGE OF:**

**TRIS S. TREVIRANUS,**

**PETITIONER-APPELLANT,**

**V.**

**JAY TREVIRANUS,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Tris S. Treviranus appeals from the trial court's "Order Enforcing Judgment," entered subsequent to the trial court's judgment granting a divorce to her and Jay Treviranus. Tris argues that the trial court: (1) erroneously exercised discretion "by failing to render any form of decision setting

forth its reasoning process or articulating the facts it relied on in reaching its decision;" (2) "made an error of law in ruling that it does not have jurisdiction to revise a property division judgment of divorce" under § 806.07, STATS.; and (3) "erroneously exercised its discretion by failing and refusing to determine the proper date of divorce value of the parties' retirement plans." (Capitalization and italicization omitted.) We affirm.

On August 27, 1996, the trial court granted Tris and Jay a divorce based on their stipulation resolving all issues, including child custody and placement, support, maintenance, and property division. Tris and Jay also stipulated to the division of the marital estate, allocating certain assets to each and providing for the "equal division" of the balance. As Tris explains, "[t]he issues on this appeal relate solely to the valuation of the assets in the marital estate."

At the August 27 hearing, Jay's counsel advised that the stipulation was "90 percent a written stipulation," but that "the only portion that is being modified orally is the paragraph dealing with property division." As relevant to this appeal, Jay's counsel then made the only references to the disputed retirement plans:

> [Tris] will also get assigned to her both Prudential accounts. There's two Prudential IRAs. They will both be assigned to her and the cash value of any existing life insurance. She will also get her 401-K, and [Jay] will receive his pension.
>
> These factors in the property division will then be calculated to determine the disparity from the 50/50 division. It is expected that [Jay] will then owe her one half of the difference between the two awards of the property division, and he will pay that out of the proceeds from the home, so that there will be accomplished an equal division of the property in this matter.

Tris's counsel then confirmed, "That's my understanding … that the entire estate will be divided 50/50 in the manner indicated by [Jay's counsel] …."

Tris contends that "[n]o values for any of the retirement assets appear in the record of the final stipulation hearing." She further contends, however, that Jay's counsel submitted a proposed divorce judgment listing specific values including those of the retirement accounts. On October 8, 1996, Tris's counsel filed a letter, dated October 4, 1996, objecting to the proposed judgment and, on October 15, 1996, filed a motion seeking relief from the stipulation.

Tris maintains that "[o]n October 28, 1996, the trial court denied [her] October 15th motions, and also denied [Jay's] motion to enter the judgment, stating on the record that the court would 'take under advisement' the proposed judgment." She asserts that the trial court signed the divorce judgment on February 19, 1997, and entered it on February 26, 1997, "without addressing any of the objections raised by Tris by letter dated October 4, 1997 [sic]."

Jay disputes the account of Tris's appellate counsel, pointing out that she did not represent Tris in the trial court. He maintains:

> As there is no transcript of the October 28, 1996 hearing in the Appellate record[,] Jay relies on the written order of the court dated December 9, 1996, dismissing the motion of [Tris] and taking only the counter motion of [Jay] "under advisement". Nowhere does Jay find support for Tris' assertion that the court would "take under advisement" the proposed Judgment.

On February 28, 1997, Jay filed a motion to enforce the divorce judgment. Tris objected and filed affidavits stating, among other things, that she was unaware that the divorce judgment had been entered. On March 17 and 18,

1997, the trial court held a hearing on Jay's motion to enforce the judgment and, in the process, considered extensive testimony regarding the parties' disputes about the value of certain assets. Jay's counsel made several concessions regarding certain miscalculations and adjusted them accordingly. The parties continued to disagree, however, on several issues, including the ownership of some of their children's property, the tax treatments applied to their IRAs, and the values of their retirement plans. Their primary disagreement derived from the different values of Jay's retirement plan, depending on the date used for its valuation.

At the conclusion of the March hearing, the trial court ordered the parties to submit proposed findings of fact and conclusions of law. The parties did so. Without providing any oral or written decision, the trial court signed Jay's proposed findings, conclusions, and Order Enforcing Judgment, on April 1, 1997.

Tris argues "that the use, in the judgment of divorce, of a value for Jay's retirement plan that was more than a year and five months old constituted a 'mistake, inadvertence, surprise or excusable neglect'" under § 806.07(1)(a), STATS. She explains that, under § 767.27(1), STATS., parties to a divorce must provide "full disclosure of all assets" and, she contends, "Jay furnished a value for his retirement plan which was a year and five months old, in a sworn financial statement which attested that the value was only one year old." Thus, she maintains, "[t]he trial court failed to properly exercise its discretion when it failed to explain why it was somehow not necessary to use a date of divorce value for the retirement plan…. [T]he trial court … has perpetuated the mistake created by the use of this woefully out of date value," resulting in the undervaluation of Jay's pension plan by at least $13,192.60.

"[A] property division determination rests within the sound discretion of the trial court and will not be disturbed on appeal unless an [erroneous exercise] of discretion is shown." ***Schinner v. Schinner***, 143 Wis.2d 81, 97, 420 N.W.2d 381, 387 (Ct. App. 1988). Whether a judgment should be vacated because of mistake, inadvertence, surprise, or excusable neglect under § 806.07, STATS., is also a discretionary determination which we will not reverse absent an erroneous exercise of discretion. *See* ***Breuer v. Town of Addison***, 194 Wis.2d 616, 625, 534 N.W.2d 634, 638 (Ct. App. 1995). An erroneous exercise of discretion occurs when, in fact, a trial court fails to exercise discretion and the record provides no reasonable basis for the trial court's determination. *See* ***id.*** at 625, 534 N.W.2d at 638-39.

Admittedly, this case provides sharply contrasting indications of whether the trial court properly exercised discretion. On the one hand, the record is replete with the trial court's comments evincing its impatience with Tris's motion and cutting off her presentation of some of the evidence she was attempting to offer. Thus, we understand Tris's claim that "[f]rom the start, the trial court was antagonistic and hostile to her requests." On the other hand, the trial court did, in fact, conduct a lengthy hearing at which the parties were able to offer almost everything they intended and, on appeal, Tris does not challenge any of the trial court's evidentiary rulings.

Similarly, the record leaves considerable doubt about the trial court's view of the law and its authority to entertain Tris's requests. On the one hand, as Tris vigorously argues, the trial court declared that § 767.32, STATS., "makes crystal clear that I can't do, even if I wanted to, what you [counsel for Tris] ask me to do." If, as Tris contends, the trial court thus foreclosed consideration of her motion for relief from the judgment under § 806.07, STATS., the trial court did

indeed run afoul of ***Spankowski v. Spankowski***, 172 Wis.2d 285, 290, 493 N.W.2d 737, 740 (Ct. App. 1992) (notwithstanding the limitation on the court's continuing jurisdiction to modify property division under § 767.32(1), STATS., "a family court has authority to modify a property division under sec. 806.07, Stats."). On the other hand, the trial court never clarified whether, when, or to what extent it was limiting its authority to consider Tris's motion. After all, the trial court did conduct the requested hearing, did modify some of the valuations in the original divorce judgment, and, in the order enforcing the judgment, specifically found "that there has been no showing of mistake, inadvertence or excusable neglect," and concluded that "[t]he court is without jurisdiction to revise the judgment and the judgment is not a product of mistake, inadvertence or excusable neglect."

Critically, although Tris faults the trial court's process and decision in many ways, she never challenges its factual finding "that there has been no showing of mistake, inadvertence or excusable neglect." Thus, that finding stands and all but obviates the need for any further review of Tris's arguments. That is, the trial court's unchallenged finding removes Tris's motion from the ***Spankowski*** exception, and returns her requests to the realm of § 767.32, STATS., where her requested relief is unavailable.

If, however, we were to generously interpret any or all of Tris's arguments as implicitly challenging the trial court's finding, Tris's claims still would fail for at least two reasons. First, she represents that the trial court initially acted on her motion at a hearing of October 28, 1996, but fails to provide the transcript of that hearing. *See* ***State Bank v. Arndt***, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986) (burden on appellant to ensure that record is sufficient to address issues raised on appeal). We must assume, therefore, that the

October 28 hearing supports the trial court's discretionary determination. *See* ***Suburban State Bank v. Squires***, 145 Wis.2d 445, 451, 427 N.W.2d 393, 395 (Ct. App. 1988) (in the absence of transmitted record, we will assume facts necessary to sustain the trial court's decision).

Second, although Tris offers any number of equitable reasons why a more current valuation of Jay's retirement account and more consistent tax treatment of some assets would have been fair, she fails to: (1) counter the evidence that the trial court used the most current asset information available, based on the parties' financial disclosure statements, at the time it granted the divorce; (2) offer any authority that would require an updating of the available information; and (3) refute Jay's argument that by not objecting to any of the valuations, tax treatments, or property ownership determinations based on the financial disclosure statements and reached after lengthy discussions preceding the stipulation, she waived her current claims. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

Tris acknowledges that "Wisconsin law requires that all assets be valued as of the date of divorce." *See* ***Schinner***, 143 Wis.2d at 98, 420 N.W.2d at 388. Tris has failed to establish any failure of the trial court to do so, based on her stipulation. "The fact that a settlement appears by hindsight to have been a bad bargain is not sufficient by itself to set aside a judgment." ***Spankowski***, 172 Wis.2d at 292, 493 N.W.2d at 741.[1]

[1] Tris also argues that certain property should have been exempted from the 50/50 division because it either belonged to the children, or was given to her as a gift, or was sold at auction. Her arguments, however, are brief and unclear, and do not counter Jay's response that, in the trial court, she never claimed that the property should be exempt from the 50/50 division.

*By the Court.*—Order affirmed.

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