

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

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Cornelia G. Clark  
Acting Clerk, Court of Appeals  
of Wisconsin

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**No. 99-1427**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**ROBERT A. SMITH,**

**PETITIONER-RESPONDENT,**

**V.**

**JANET H. SAHAGIAN,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 DYKMAN, P.J. Janet H. Sahagian appeals from a judgment of divorce awarding her a \$56,544 property division equalizing payment from her

former husband, Robert A. Smith, and from the order denying her motion for reconsideration. Janet argues that the trial court erroneously exercised its discretion by excluding Robert's checking account from the marital estate and by valuing her savings account five months before the date of divorce. She also contends that the trial court's findings regarding the value of Robert's business on the date of marriage were clearly erroneous. We agree. Accordingly, we reverse and remand with directions to reevaluate the property division based on the conclusions set forth in this opinion.

### **I. Background**

¶2 Janet and Robert were married on July 8, 1994. On May 11, 1998, Robert petitioned for divorce. On June 10, 1998, the family court commissioner issued a temporary order restraining both parties "from transferring, encumbering, selling, disposing or destroying his, her or their property without permission of the court."

¶3 On November 12, 1998, the trial court held a one-day divorce trial. At the opening of the trial, Janet and Robert agreed that the main issue was the method by which their property should be divided. They also agreed that there was little dispute as to the value of the assets to be divided. As Robert's attorney explained, "there are many facts that [we] have been able to agree to, and I will be walking [Robert] through many of them. And if Janet feels that there are some facts in dispute with regard to the nature and value of assets, then I think she will interrupt me and ask me not to lead."

¶4 Robert proposed that each party be awarded the value of the assets they brought to the marriage, plus one-half of the increase in their total net worth during the marriage. He submitted several exhibits supporting his proposed

property division. On Exhibit 8, Robert outlined the details of his proposed property division. He first listed what he said were his and Janet's assets at the time of the divorce. From that he subtracted their liabilities to arrive at a net worth for each as of the date of their divorce. He then subtracted what he asserted was each party's net worth at the time of marriage to determine their increase in net worth during the marriage. Based on the figures he used on Exhibit 8, he offered to pay \$56,544 to Janet as an equalizing payment.

¶5 In the section of Exhibit 8 detailing the parties' individual assets at the time of divorce, Robert listed a "US Bank Money Fund" of his at \$22,351 and a "Teacher's Credit Union Savings" account of Janet's at \$12,348. Robert also submitted his U.S. Bankcorp Investments account summary from September 30, 1998 and Janet's Teacher's Credit Union account statement from June 30, 1998, listing those amounts.<sup>1</sup> Under cross-examination, Robert also testified that his personal checking account contained approximately \$14,000 three weeks before the divorce trial, but only about \$2,700 at the time of trial. He said that he did not list his or Janet's checking accounts on Exhibit 8 because "we determined that at the date of the temporary order we had been granted the use of our individual accounts."

¶6 To demonstrate the accuracy of the figure he listed as his date-of-marriage net worth on Exhibit 8, Robert submitted Exhibit 2, his calculation of his net worth at the time he married Janet.<sup>2</sup> On Exhibit 2, Robert listed the various

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<sup>1</sup> On Exhibit 8, Robert lists Janet's savings account at \$12,348, but Janet's account statement lists it at \$12,384. We conclude that the difference is negligible.

<sup>2</sup> On Exhibit 2, Robert lists his net worth in July 1994, the time he and Janet married, as \$302,214. On Exhibit 8, Robert lists his July 1994 net worth as \$301,958. We conclude that the difference in the two figures is negligible.

assets he owned at the time of their marriage and then subtracted the mortgage he had at the time to arrive at his July 1994 net worth. At the time he married Janet, Robert owned a business called American Entertainment. In the assets Robert listed on Exhibit 2 are entries for “American Entertainment,” valued at \$26,543 and “Note from American Entertainment,” valued at \$101,349. Robert testified that the \$26,543 was the book value of his company at the time of marriage, and the \$101,349 represented loans he made to the company. He also submitted American Entertainment’s balance sheet from December 31, 1994. In a section titled “Other Liabilities,” the balance sheet has entries for “N/P—Smith #1,” in the amount of \$41,649.63, and “N/P—Smith #2,” in the amount of \$22,648.86. In a section titled “Capital,” the balance sheet has entries for “Robert Smith, Capital,” at \$1,000, and “Net Income,” at \$88,513.43. The balance sheet lists American Entertainment’s total capital as \$26,543.24.

¶7 Janet and Robert did not submit a written stipulation to the trial court, but, during Robert’s testimony, Janet’s attorney said:

Your Honor, if it will make things go more quickly, [Robert’s attorney] and I have gone over all these numbers and the basis and—for them and the documentation in support of them. I’m not quarreling with any of the numbers on Exhibit [2], I think it is the net worth statement.

We’re arguing about what ought to be done, but not about these numbers.

Later in the testimony, Janet’s attorney stated that “once again I am not quarreling with these numbers if you don’t want to supply the documentation to the Court.” However, Janet’s attorney cross-examined Robert about the loans to American Entertainment and later argued that including the loans as one of his assets at the time of marriage would give him “double credit.” She also objected to Robert’s

use of the June 30, 1998 value for Janet's savings account instead of the value on the date of divorce.

¶8 The trial court adopted Robert's proposed property division and incorporated Exhibit 8 into the judgment of divorce. The court concluded that Janet and Robert agreed on the value of their assets at the time of marriage and divorce. Janet filed a motion to reconsider, arguing that the trial court had miscalculated the property division. The court denied the motion, concluding that there were no grounds on which to modify the judgment because the parties had disclosed all their assets and liabilities, and had stipulated to their net worth at the time of marriage. Janet appeals.

## II. Analysis

### A. *Standard of Review*

¶9 The division of property in a divorce, including the valuation of the marital estate, is within the trial court's discretion. *See Forester v. Forester*, 174 Wis. 2d 78, 91, 496 N.W.2d 771 (Ct. App. 1993). We will not interfere with the trial court's division of property unless it erroneously exercised its discretion. *See Gardner v. Gardner*, 190 Wis. 2d 216, 236, 527 N.W.2d 701 (Ct. App. 1994). We will sustain the trial court's decision if 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." *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993).

¶10 In evaluating a marital estate, the trial court's determination of an asset's value is a finding of fact. *See Preuss v. Preuss*, 195 Wis. 2d 95, 107, 536 N.W.2d 101 (Ct. App. 1995). We will not set aside such a finding unless it is

clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98);<sup>3</sup> *Preuss*, 195 Wis. 2d at 107.

*B. The Bank Accounts*

¶11 Janet argues that the trial court erred in valuing the marital estate by failing to include Robert's checking account and by valuing her savings account on the wrong date. She contends that the court had no reason to exclude Robert's checking account. She also asserts that the checking account should be valued at \$14,374, the amount it contained three weeks before trial, rather than at \$2,763, the amount it contained at the time of trial, because Robert should have curbed his spending during the divorce. Finally, she contends that the trial court erred in valuing her credit union savings account at \$12,348, the amount it contained in June of 1998, when it only contained \$9,847 at the time of divorce.

¶12 Robert contends that the trial court properly exercised its discretion by excluding both his and Janet's checking accounts because the parties had been granted the use of their personal accounts during the pendency of the divorce. He asserts that Janet also spent a significant portion of her checking account funds before the divorce trial. He also argues that the trial court properly exercised its discretion by valuing his and Janet's savings accounts on the date of the temporary order because the temporary order prohibited them from disposing of their assets.

¶13 The issues of whether the trial court properly exercised its discretion by excluding Robert's checking account and by using the June 1998 value for Janet's savings account both turn on the date the trial court chose to value the

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<sup>3</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

marital estate. Usually, a marital estate is valued on the date of divorce. *See Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). However, “when conditions over which a party has little or no control arise, such special circumstances can warrant deviation from the rule.” *Id.*

¶14 We conclude that the trial court erroneously exercised its discretion by valuing Janet’s savings account on June 30, 1998, because the court failed to consistently value the marital assets on one date. Apparently, the court deviated from using the date of divorce because, by adopting Exhibit 8, the court used a value for Robert’s money fund from September 30, 1998 and a value for Janet’s savings account from June 30, 1998. The court did not explain why it used values from two different dates for the two accounts. A trial court can value different assets in the marital estate on different dates, but it must have a rational reason for doing so. *See Friebe v. Friebe*, 181 Wis. 2d 285, 300-01, 510 N.W.2d 767 (Ct. App. 1993). When Janet objected to Robert’s use of her June 30, 1998 savings account statement, the trial court said, “let’s not argue about it. We’ll leave it. I will allow it to be received at this time,” but gave no explanation. From the record, we cannot discern a rational reason for using different dates for different assets.

¶15 We also conclude that the trial court erroneously exercised its discretion by excluding Robert’s checking account because we cannot discern any reason that the amount in each parties’ checking account on the valuation date should not be included in the marital estate. Without having a valuation date as a starting point, we cannot determine what value should have been placed on the parties’ checking accounts or whether Janet or Robert might have deliberately dissipated the money in their accounts to prevent a fair property division.

¶16 We do not agree that the trial court properly valued Janet's savings account in June 1998 or excluded Robert's checking account based on the temporary order. If the trial court used June 1998 as the valuation date because the temporary order prohibited disposing of assets after that date, then it should have valued all assets in June, including the checking accounts. However, the court valued different assets on different dates, making it impossible to determine whether it made an accurate assessment of the marital estate.

¶17 Accordingly, we reverse and remand with directions to value the assets of the marital estate on a specific date. If the trial court chooses to deviate from the date of divorce for the reasons given in *Sommerfield*, or to use different valuation dates for different assets, as contemplated in *Friebel*, it should provide a rational explanation for doing so. After selecting a valuation date or dates, the trial court is instructed to revalue Robert and Janet's checking and savings accounts.

### *C. The Loans To American Entertainment*

¶18 Janet argues that the trial court's calculation of Robert's date of marriage net worth was clearly erroneous. She contends that Robert counted the \$101,349 in loans to American Entertainment as a personal asset on Exhibit 2, but did not count the loans as a liability to the company when determining American Entertainment's value. She asserts that, had Robert accounted for American Entertainment's \$101,349 liability, the company's value would have been much less than \$26,543. As a result, by accepting Robert's assertion that American



Entertainment was worth \$26,543, the trial court overestimated his date-of-marriage net worth.<sup>4</sup>

¶19 Robert contends that the \$26,543 figure for American Entertainment's date-of-marriage value was correct because the December 1994 balance sheet from which the figure is derived accounts for the \$101,349 in loans. He asserts that the loans are accounted for in the section "Other Liabilities," under the entries "N/P – Smith #1" and "N/P – Smith #2," and in the section "Capital," under the entry "Net Income." He explains that these three entries total \$152,811.92, more than accounting for the \$101,349 liability.<sup>5</sup>

¶20 We conclude that the trial court's calculation of Robert's date of marriage net worth was clearly erroneous. The trial court accepted Robert's assertion that, on the July 1994 date of marriage, American Entertainment was worth \$26,543 and American Entertainment owed him \$101,349. In support of his assertion of American Entertainment's value, Robert submitted the company's

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<sup>4</sup> Janet does not take issue with Robert's use of American Entertainment's \$26,543 "book value." The term "book value" has no commonly accepted meaning, but a corporation's book value can be defined as the difference between its assets and liabilities. See Annotation, *Meaning of "Book Value" of Corporate Stock*, 51 A.L.R.2d 606, 608, 610 (1957). Book value is based on the historical cost of the assets, and thus can differ greatly from the current fair market value. See *State ex rel. Wisconsin River Power Co. v. Board of Review of Armenia*, 125 Wis. 2d 94, 96, 370 N.W.2d 580 (Ct. App. 1985); *Soo Line R.R. Co. v. DOR*, 89 Wis. 2d 331, 357, 278 N.W.2d 487 (Ct. App. 1979), *aff'd*, 97 Wis. 2d 56, 292 N.W.2d 869 (1980). Since Janet takes issue only with whether the \$26,543 figure included Robert's loans to American Entertainment, we need not address whether using the company's book value in the first place resulted in an accurate calculation of its value.

<sup>5</sup> In his brief, Robert actually asserts that the entries "N/P—Smith #1," "N/P—Smith #2" and "Robert Smith, Capital" total \$152,811.92. However, on the balance sheet, "N/P—Smith #1" is listed at \$41,649.63, "N/P—Smith #2" is listed at \$22,648.86, and "Robert Smith, Capital" is listed at \$1,000. Those three entries total only \$65,298.49. We assume that Robert meant to use the entry for "Net Income," listed at \$88,513.43, because when it is substituted for "Robert Smith, Capital," the total is \$152,811.92.

balance sheet from December 1994. However, we do not agree that the balance sheet accounts for the company's \$101,349 liability to Robert. The balance sheet has entries for "N/P – Smith #1" and "N/P –Smith # 2" that total \$64,298.49. These entries may account for part of Robert's loan to the company. However, it is unclear why the rest of the loans would be accounted for in the section titled "Capital," under an entry for "Net Income." The discrepancy may have resulted because the value listed for the loans on Exhibit 2 is from July 1994, but the balance sheet from American Entertainment is from December 1994. Perhaps, by December, American Entertainment had repaid, or Robert had forgiven, some of the loans. However, if Robert used the December value for American Entertainment on Exhibit 2, he also should have used the December balance on the loans.

¶21 We reverse because the record does not support the finding that, on the date of marriage, American Entertainment was worth \$26,543 and also owed Robert \$101,349. We cannot determine from the balance sheet Robert submitted, or from any other part of the record, at what level his loans to American Entertainment stood at the time the company was worth \$26,543. As a result, we cannot reevaluate Robert's date-of-marriage net worth. Therefore, we remand with directions to make further findings regarding the extent of American Entertainment's liabilities to Robert at the time the company was worth \$26,543 and to recalculate Robert's date of marriage net worth accordingly. The trial court may take further evidence if it deems it necessary.

#### *D. Stipulations*

¶22 Robert contends that Janet and he stipulated to all of the figures on Exhibit 2 regarding his date-of-marriage net worth and to the value of their assets

at the time of divorce, thus stipulating to the value of each item she has contested on appeal. Although there was no written stipulation, he asserts that Janet's attorney's statements at trial that she was "not quarreling" with the numbers amounted to a stipulation. He also points out that the trial court found that Janet and he had stipulated to the value of their assets at the time of marriage and divorce.

¶23 Generally, "oral stipulations made in open court, taken down by the reporter, and acted upon by the parties and the court are valid and binding." *Wyandotte Chems. Corp. v. Royal Elec. Mfg. Co.*, 66 Wis. 2d 577, 589, 225 N.W.2d 648 (1975). Such stipulations are contractual in nature and the trial court must construct them in the manner that best effectuates the parties' intentions. *See Cummings v. Klawitter*, 179 Wis. 2d 408, 415, 506 N.W.2d 750 (Ct. App. 1993), *overruled on other grounds by Johnson v. ABC Ins. Co.*, 193 Wis. 2d 35, 532 N.W.2d 130 (1995). If the language of the stipulation is ambiguous, the trial court may consider extrinsic evidence to determine the parties' intentions. *See id.* Language is ambiguous if it is reasonably susceptible of more than one meaning. *See id.* Whether a stipulation was entered into validly and the construction of a stipulation are both questions of law that we review de novo. *See Estate of Cavanaugh v. Andrade*, 191 Wis. 2d 244, 264, 528 N.W.2d 492 (Ct. App. 1995), *rev'd on other grounds*, 202 Wis. 2d 290, 550 N.W.2d 103 (1996); *Cummings*, 179 Wis. 2d at 415.

¶24 We conclude that Janet did not stipulate to the value placed on her credit union savings account, to the exclusion of Robert's checking account, or to the date-of-marriage value of American Entertainment or Robert's loans to the company. Janet's attorney stated on the record twice that she was "not quarreling" with the numbers Robert presented, but we do not agree that those statements

amounted to a valid stipulation regarding the issues now on appeal. Janet's attorney cross-examined Robert regarding the exclusion of his checking account and regarding his loans to American Entertainment. She also objected to the use of Janet's June 30, 1998 statement to value her credit union savings account. Finally, at the close of trial she argued that including Robert's loans to American Entertainment as a date of marriage asset would give him "double credit." Considering these actions, we cannot conclude that both parties "acted upon" the alleged stipulation regarding these issues.

¶25 Even if the stipulation were valid, its terms are ambiguous. Janet's attorney's statement that she was "not quarreling" with the numbers lends itself to a number of reasonable interpretations. Other than those statements and Robert's attorney's statement at the start of trial, there is no clear record of exactly what the parties stipulated to. Looking beyond the sparse words of the alleged stipulation, Janet's cross-examination of Robert regarding his checking account and the loan to American Entertainment, her objection to the use of the June 1998 value for her savings account, and her argument regarding the "double credit" for Robert's loans demonstrate that she did not intend to agree to the value Robert placed on those assets.

¶26 For the reasons set forth above, we reverse. We remand with directions to reevaluate the property division based on the instructions contained in this opinion.

*By the Court.*—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.



