

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 1, 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. 96-2450-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE MARRIAGE OF: ROXANNE L. (WONG)
HEFTI,**

PETITIONER-RESPONDENT,

V.

CHUN WING WONG,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Chun Wing Wong appeals from an order denying his motion, under § 806.07(1)(h), STATS., to reopen a trial court order and judgment on child support. The issue is whether the trial court properly exercised

its discretion by refusing to reopen the matter. We conclude that the court's order was a proper exercise of discretion, and therefore affirm.¹

Wong's father lives in California. In 1984, according to Wong, his father was concerned that the father's anticipated marriage might fail. Therefore, he decided to protect his property from potential division under California law by transferring two real estate holdings to Wong. When Wong divorced Roxanne Hefti in 1990, she quit claimed any interest in the real estate and the parties' stipulation identified that property as Wong's by his father's gift. The divorce judgment also awarded Hefti custody of the parties' child, and Wong's child support obligation was stipulated as a set weekly amount.

Sometime later in 1990, Wong quit claimed the real estate back to his father. Hefti went on AFDC in 1991 and, in September 1991, Wong's child support order was modified, again by stipulation, to 17% of his income.

In the latter part of 1993, the State commenced a contempt action against Wong for failure to pay child support since the September 1991 order. The matter was heard in March 1994. Counsel was appointed to represent Wong.

At the hearing, the State's attorney began questioning Wong about the 1990 property transfers. Wong expressed surprise and some confusion, before attempting to explain the arrangement with his father. The court then ruled that because Wong had reported those properties as gifts in the divorce, the court would assume he profited from them, and ordered him to pay support out of those profits. Meanwhile, Wong's counsel remained silent and did not object to the

¹ This is an expedited appeal under RULE 809.17, STATS.

surprise introduction of this issue, nor the court's summary disposal of it. As a result, without notice or a meaningful opportunity to defend, Wong ended up with an order and judgment requiring him to pay the State 17% of the assessed value of the two properties. That amount was calculated at \$57,000, although the State has since waived its claim to all but \$15,000, representing the amount of AFDC Hefti received above what Wong paid in support while she was on welfare.

Wong went on active military duty shortly after the hearing. He stated that he assumed counsel would straighten out what he believed was a misunderstanding. In November 1994, after returning from duty, he learned that counsel had done nothing for him, and that he remained obligated for the additional child support. He retained counsel at that point, who filed a § 806.07, STATS., motion in May 1995, thirteen and one-half months after the original order was signed. The trial court denied relief, resulting in this appeal.

Wong necessarily brought his motion under § 806.07(1)(h), STATS., the "any other reasons" provision of § 806.07(1), because all other provisions of that section were either inapplicable or time barred. To obtain relief under § 806.07(1)(h), the moving party must show that extraordinary circumstances justify relief, and must also show that relief was sought within a reasonable time. *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis.2d 618, 625-26, 511 N.W.2d 868, 871 (1994). A determination of extraordinary circumstances depends on whether the judgment was a result of a conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the case on the merits outweighs the finality of judgment; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it

inequitable to grant relief. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis.2d 536, 552, 363 N.W.2d 419, 427 (1985). In determining a reasonable time for bringing the motion, courts must engage in a comprehensive review of all factors relevant to “reasonableness,” including the extraordinary circumstances alleged, the reasons for the delay, and any prejudice to the other party. *Cynthia M. S.*, 181 Wis.2d at 627-28, 511 N.W.2d at 872. We will reverse the trial court’s decision only if there has been an erroneous exercise of discretion. *Id.* at 624, 511 N.W.2d at 871.

Wong arguably demonstrated extraordinary circumstances justifying relief from the order and judgment. The State’s claim to a share in the deemed value of the real estate was raised, litigated and decided with no advance notice to Wong, who was plainly surprised by it and unprepared to defend against it at the March 1994 hearing. Nevertheless, he received no assistance from counsel, who never objected to the lack of notice or otherwise meaningfully assisted Wong on the issue before the court ruled on it. As a result, relevant facts concerning the real estate transactions, which may conceivably have changed the court’s mind, were never presented. Additionally, the State has not advanced any claim of prejudice if the matter were relitigated.²

Wong failed, however, to demonstrate that he brought his motion within a reasonable time. In September 1994, Wong was served an order to show cause why he had not complied with other parts of the trial court’s March 1994

² During the trial court proceeding to reopen, Wong also argued that the State could not claim support based on a 1990 transaction under a September 1991 support order. Under § 767.32(1m), STATS., a court may not revise retroactively child support or adjust the amount of arrearages due, except to correct calculation errors. However, Wong has not raised this issue on appeal. Wong has also abandoned his argument that the deemed profit from the disposal of assets awarded in a divorce should not be considered income for child support purposes. *See State v. Maley*, 186 Wis.2d 125, 128, 519 N.W.2d 717, 718 (Ct. App. 1994).

order. Wong concedes that no later than November 1994, he realized that he had a problem with the order. He retained counsel at that time, and appeared on the order to show cause in December 1994. Nevertheless, he did not file his motion to vacate until May 15, 1995. Even conceding that a delay until November 1994 was reasonable, Wong has offered no explanation why he delayed another six months before seeking relief. Without any explanation for that delay, we cannot hold that the trial court erroneously denied relief under § 806.07(1)(h), STATS. Although the trial court focused exclusively on the extraordinary circumstances test, and deemed it unnecessary to reach the timeliness issue, we may independently review the record to determine if it provides a basis for the trial court's exercise of discretion other than the reason provided. *State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983). We do so here because Wong arguably showed extraordinary circumstances, but utterly failed to show that he reasonably delayed his motion.

By the Court.—Order affirmed.

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

