COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0924

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

IN RE THE MARRIAGE OF:

JANICE L. EDWARDS,

PETITIONER-RESPONDENT,

v.

JEFFERY A. EDWARDS,

RESPONDENT-APPELLANT.

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

Before Vergeront, Roggensack and Deininger, JJ.

DEININGER, J. Jeffery Edwards appeals a judgment divorcing him from Janice Edwards which incorporates the terms of a marital settlement agreement the parties had entered into. He claims the trial court erred in not

relieving him from the terms of the marital settlement agreement after he repudiated one of its provisions prior to the court's approval of the agreement. We agree with Jeffery that, under existing precedent, he should have been allowed to contest the issue he wished to, notwithstanding his prior agreement to the contrary. Accordingly, we reverse the judgment and remand for further proceedings regarding what contribution, if any, Jeffery must make toward day care expenses for the minor child of the parties, over and above the amount of child support he was ordered to pay.

BACKGROUND

The facts relevant to this appeal are straightforward and undisputed. Janice commenced this action for divorce on June 13, 1997. She and Jeffery executed a "Marital Settlement Agreement" on September 15, 1997, which was approved by the family court commissioner and filed with the court on September 17th. At the time, Janice was represented by counsel but Jeffery was not. A stipulated divorce hearing was scheduled for November 14, 1997. Prior to that date, however, Jeffery retained counsel, and proceedings were set over until January 26, 1998.

The marital settlement agreement addressed all issues—custody and placement of the parties' minor child, child support, maintenance, property division, attorney fees, insurance and tax issues. It provided, among other things, that Jeffery would pay seventeen percent of his gross income as child support, and that, in addition, he would "pay directly to [Janice] the sum of $80.00 bi-weekly to offset child care expenses." The agreement states that its terms and provisions "may be incorporated by the court in the pending divorce action between the parties in the conclusions of law and judgment to be entered therein; however, this

agreement shall independently survive any such judgment …." It also contains the following paragraph:

> **XV. SURVIVAL OF AGREEMENT AFTER JUDGMENT**
>
> Both parties agree that the provisions of this agreement shall survive any subsequent judgment of divorce/legal separation and shall have independent legal significance. This agreement is a legally binding contract, entered into for good and valuable consideration. It is contemplated that in the future either party may enforce this agreement in this or any other court of competent jurisdiction.

Finally, the agreement also makes at least one reference to "the terms and conditions of *this stipulation*" (emphasis added).

At the start of the divorce hearing, Janice argued that Jeffery should be bound by the marital settlement agreement unless he could show that it was inequitable. Jeffery maintained that the agreement was not binding until approved by the court, and that he could repudiate some or all of its provisions at will, since the agreement had not yet been approved by the court. The court concluded that the agreement was distinguishable from the stipulation we reviewed in ***Norman v. Norman,*** 117 Wis.2d 80, 342 N.W.2d 780 (Ct. App. 1983), and that the rationale of ***Button v. Button***, 131 Wis.2d 84, 388 N.W.2d 546 (1986) should apply. Accordingly, the court determined that the marital settlement agreement was binding unless Jeffery met the burden of showing "that either [it] is unfair to him then or now or that he somehow was misled as to the financial status of [Janice]." The court then permitted Jeffery to attempt to make that showing.

Jeffery testified that he had signed the marital settlement agreement after reviewing its terms with Janice. Janice's counsel had drafted the agreement, but her counsel apparently did not discuss the agreement with Jeffery and was not

present at the time Jeffery signed it. Jeffery said that he had thought about retaining counsel prior to signing the agreement, but that he also "thought we had pretty much everything under control where I wouldn't need one." Only after re-reading the agreement after it was signed did Jeffery believe that he should seek counsel regarding the $80 bi-weekly child care payments he had agreed to, which was the only provision in the agreement he deemed unfair.[1] Finally, he acknowledged that he "thought" he had a "full and complete knowledge" of Janice's financial circumstances when he signed the agreement; that when he signed it, he thought that it was "fair"; and that he had not been threatened nor was he under the influence of drugs or alcohol when he signed the agreement.

Based on Jeffery's testimony, the court found that the marital settlement agreement, although it was "not necessarily one that the Court would order at a contested hearing, that the terms are not so unreasonable as to make it, I guess, a nullity." The court then proceeded to grant the divorce and ordered the terms of the marital settlement agreement incorporated into the judgment. Jeffery appeals.

ANALYSIS

Whether a party has knowingly and voluntarily entered into a marital settlement agreement is a question of fact which we will not disturb unless the trial court's finding is clearly erroneous. *See* § 805.17(2), STATS. Whether to approve as reasonable a divorce stipulation or marital settlement agreement is a matter

[1] Jeffery also testified that he had originally agreed to pay one-half of the day care expenses for his minor child in a prior "shared parenting agreement," which he and Janice had executed about one month before entering into the marital settlement agreement. The earlier agreement arose from the parties' participation in the "Families First" program, which apparently involves counseling and mediation regarding divorce issues affecting children.

committed to the discretion of the trial court, to which we will defer unless that discretion was erroneously exercised. *See* ***Mausing v. Mausing***, 146 Wis.2d 92, 95, 429 N.W.2d 768, 770 (1988). However, the question before us is neither of these. Rather, the only issue under review is whether the document presented to the court was an agreement binding Jeffery to its terms unless he established it was inequitable, or was it, instead, an agreed upon set of recommendations to the trial court regarding the terms to be incorporated into the divorce judgment, which Jeffery was free to repudiate until approved by the court. This is a question of law which we decide de novo.

In ***Norman v. Norman***, we held that "[a] stipulation between the parties to a divorce action 'is only a joint recommendation to the court suggesting what the judgment, if granted, is to provide.'" 117 Wis.2d 80, 81, 342 N.W.2d 780, 781 (Ct. App. 1983) (citation omitted). Such a stipulation "does not rise to the dignity of a contract." ***Id***. (citation omitted). Thus, either party "was free to withdraw from it until it was incorporated in the judgment." ***Id***. at 82, 342 N.W.2d at 781. And, if a party does make a timely repudiation of a divorce stipulation, the matter should be heard as a contested divorce. *See* ***id***.

We distinguished in ***Norman*** those "contractual agreements between the parties" recognized under § 767.255(3)(L), STATS.[2] *See* ***id***. at 82, 342 N.W.2d at 781. That subsection provides that among the factors a court is to consider when dividing property in a divorce is the following:

[2] The references in ***Norman v. Norman***, 117 Wis.2d 80, 342 N.W.2d 780 (Ct. App. 1983), and in ***Button v. Button***, 131 Wis.2d 84, 388 N.W.2d 546 (1986), are to § 767.255(11), STATS., 1981-82 and 1983-84, which has been renumbered but is worded identically to § 767.255(3)(L), STATS., 1995-96.

> (L) Any *written agreement* made by the parties before or during the marriage *concerning any arrangement for property distribution*; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

Section 767.255(3)(L), STATS. (emphasis added). The supreme court established the criteria for determining whether this type of agreement is "inequitable" in ***Button v. Button***, 131 Wis.2d 84, 388 N.W.2d 546 (1986), and the trial court applied the ***Button*** criteria in reviewing the present marital settlement agreement.

The agreement under review in ***Button*** was a postnuptial property division agreement, which had been entered into by the parties five years after their marriage and some eight years before they separated. *See* ***id***. at 90-92, 388 N.W.2d at 548-49. The only disputed issue on appeal was the property division ordered pursuant to the provisions of the postnuptial agreement, and the only question addressed by the supreme court was how "inequitableness" should be defined and analyzed. The parties did not dispute that the agreement in question was one governed by § 767.255(3)(L), STATS., *see* ***id.*** at 86 n.1, 388 N.W.2d at 547, and the court did not address the distinctions between written "property distribution" agreements under that subsection and "stipulations" authorized under § 767.10(1), STATS., which provides as follows:

> The parties in an action for an annulment, divorce or legal separation may, subject to the approval of the court, stipulate for a division of property, for maintenance payments, for the support of children, for periodic family support payments under s. 767.261 or for legal custody and physical placement, in case a divorce or legal separation is granted or a marriage annulled.

Janice argues that the trial court correctly concluded that the present marital settlement agreement was a binding "***Button***-type" agreement, citing the contractual nature of its language and recitations. She would thus have us

distinguish her agreement with Jeffery from the stipulation we reviewed in ***Norman***.[3] The ***Norman*** document is captioned "Final Stipulation," acknowledges a divorce action is pending between the parties, and includes the following recitations:

> [S]ubject to the approval of the Court, that in the event the Court grants a divorce as prayed for in the Petition, the following shall be the terms and conditions of relief in this action, to be included in the Conclusions of Law and Judgment ….
>
> ….
>
> The parties agree that the terms of this stipulation may be submitted to the Court for approval, and both parties will request the court to incorporate the terms hereof in the final judgment of divorce, and make the terms enforceable as part of such judgment. In the absence of the granting of said judgment and the approval of this stipulation, unless expressly indicated to the contrary in a specific paragraph of this stipulation, the provisions of this entire agreement shall be void and of no legal force and effect.

Janice argues that this language is far different from the contractual language contained in her marital settlement agreement with Jeffery, which we have quoted in the Background section of this opinion, and hence our holding in ***Norman*** should not apply to the present facts.

It is apparent that in drafting the present "marital settlement agreement," Janice's counsel attempted to give it the trappings of a contract, whose terms are ostensibly enforceable independent from and irrespective of court approval and incorporation into the divorce judgment. We conclude, nonetheless,

[3] The text of the ***Norman*** stipulation is not set forth in our opinion in that case. We have, however, reviewed the document for purposes of this appeal. It is contained in the appendices of the briefs filed with this court by the parties in ***Norman***. The record reflects that Janice obtained a copy of the ***Norman*** stipulation and provided it to Jeffery's counsel and the trial court at the time of the arguments regarding the issue appealed.

that the document is a stipulation under § 767.10(1), STATS., consisting of agreed-upon joint recommendations to the trial court regarding the terms of the divorce judgment. As such, the "marital settlement agreement" would become binding and enforceable only upon the court's approval and its incorporation into the judgment of divorce. *See* ***Norman***, 117 Wis.2d at 82, 342 N.W.2d at 781.

In Wisconsin, married persons may not simply negotiate and agree upon the terms of a divorce judgment, free of all court supervision and the possible modification of the agreed-upon terms by the court. *See* ***Bliwas v. Bliwas***, 47 Wis.2d 635, 638-39, 178 N.W.2d 35, 37 (1970) (holding that the family court need not accept a stipulation of the parties to a divorce but may reject it entirely or modify its terms in the interests of justice, of the minor children or of the parties themselves). Moreover,

> [t]here is no such thing in this state as a divorce by consent or agreement. The parties cannot by stipulation proscribe, modify, or oust the court of its power to determine the disposition of property, alimony, support, custody, or other matters involved in a divorce proceeding. When a court follows and adopts an agreement of the parties making it a part of its judgment, the court does so on its own responsibility, and the provisions become its own judgment.

Miner v. Miner, 10 Wis.2d 438, 443, 103 N.W.2d 4, 7 (1960). The policy rationale for this rule is that the family court "represents the interests of society in promoting the stability and best interests of the family." *See* ***Abitz v. Abitz***, 155 Wis.2d 161, 177, 455 N.W.2d 609, 616 (1990) (citation omitted).

Property division agreements under § 767.255(3)(L), STATS., which we have quoted above, are an exception to the general rule that agreements between divorcing parties constitute only recommendations to the court regarding the terms of a divorce judgment. The court's role in evaluating such property

division agreements is reduced to determining whether a previously agreed-upon property division is "equitable." *See* ***Button***, 131 Wis.2d at 94, 388 N.W.2d at 550. The present agreement is not of the type contemplated by § 767.255(3)(L), STATS., because it deals not merely with property division, but comprehensively with all of the issues in the divorce, and it was executed during the pendency of the divorce, not at some earlier time.[4] That is, despite its contractual recitations, the "marital settlement agreement" before us constitutes nothing more nor less than a stipulation under § 767.10(1), STATS., executed by the parties to a divorce action in an attempt to resolve the issues pending between them.

Moreover, even though the present marital settlement agreement purports to bind the parties and be enforceable independent of the terms of the divorce judgment, we cannot accept the notion that the agreement could be independently enforced as written if the court had seen fit to modify its terms in the divorce judgment. For example, had the trial court, in light of Jeffery's objection, eliminated the provision from the judgment requiring him to pay $80 bi-weekly toward day care expenses, we conclude that Janice could not sue Jeffery in contract to recover those sums.[5] *Cf.* ***Miner v. Miner***, 10 Wis.2d 438, 443, 103 N.W.2d 4, 7 (1960) (holding that parties to a divorce cannot "oust the court of its

[4] As we have discussed above, the ***Button*** agreement dealt only with property division and was executed several years prior to the commencement of the parties' divorce action. The supreme court did not say that a property distribution agreement must be executed prior to the commencement of a divorce action to be treated as binding under § 767.255(3)(L), STATS., but it did indicate that the "substantive fairness" of agreements contemplated under the statute should be evaluated both with respect to the time of execution and the time of divorce, implying some temporal separation between execution and the divorce proceedings. *See* ***Button,*** 131 Wis.2d at 98-99, 388 N.W.2d at 552.

[5] We emphasize that we do not intend to suggest any view regarding whether Jeffery should be ordered to pay the disputed child care expense reimbursement. That matter is to be decided by the trial court on remand.

power to determine the disposition of property, alimony, support, custody or other matters involved in a divorce proceeding"); §§ 767.32 and .325, STATS. (setting forth specific procedures and grounds for modification of child support, maintenance, custody and placement provisions in divorce judgments).

Because we have concluded that the marital settlement agreement before us is nothing more than a stipulation to recommend certain terms to the court for inclusion in the divorce judgment under § 767.10(1), STATS., we are compelled by our previous holding in ***Norman*** to reverse the present judgment and remand for further proceedings in the trial court. Under that holding, Jeffery was "free to withdraw from [the stipulation] until it was incorporated in the judgment." ***Norman***, 117 Wis.2d at 82, 342 N.W.2d at 781. He did so with respect to the issue of his contribution to day care expenses, and he is entitled to have the court decide the matter after a contested hearing on the issue.

In closing, we note that in ***Norman*** we did not discuss why a stipulation in a divorce case should be treated any differently than stipulations in other types of civil actions. Section 801.01(2), STATS., provides that the rules of procedure set forth in ch. 801-847 are to govern "in all civil actions … except where different procedure is prescribed by statute or rule."[6] Section 807.05, STATS., provides that stipulations between parties in civil actions are not binding unless made in court "or made in writing and subscribed by the party to be bound

[6] Section 767.10(1), STATS., which we have quoted above in the text of our opinion, authorizes parties to a divorce to enter into stipulations regarding all issues. The statute does not, however, "prescribe different procedure" for determining the enforceability of divorce stipulations or the grounds upon which a party may be relieved from the terms of a stipulation. Under § 767.10(1), divorce stipulations are "subject to the approval of the court." But that is true of all stipulations in civil actions, and under the proper circumstances, a party is bound by the stipulations to which the party has agreed. *See* ***Phone Partners Ltd. Partnership v. C.F. Communications Corp.***, 196 Wis.2d 702, 709-10, 524 N.W.2d 159, 161 (Ct. App. 1995).

thereby or the party's attorney," the implication being that if so subscribed, a party is bound by the stipulation. Finally, § 806.07(1), STATS., permits a court to relieve a party from a stipulation for reasons such as mistake, inadvertence, surprise, excusable neglect, newly-discovered evidence, fraud, misrepresentation, or misconduct by an adverse party. *See* ***Phone Partners Ltd. Partnership v. C.F. Communications Corp.***, 196 Wis.2d 702, 709-10, 524 N.W.2d 159, 161 (Ct. App. 1995) ("[S]tipulations of settlement may be enforced by the court and may only be avoided with the court's approval." (citing §§ 807.05 and 806.07(1), STATS.))

Our holding in ***Norman*** implicitly renders §§ 806.07 and 807.05, STATS., inapplicable to stipulations in divorce actions, but our opinion does not discuss why this should be so. As we have discussed above, a family court is not bound by the terms of a stipulation entered into by parties to a divorce. We are not certain, however, that the policy reasons underlying this principle also necessitate that a party who has entered into a divorce stipulation must be automatically relieved from the stipulation simply because he or she repudiates one or more of its provisions prior to the final divorce hearing. Here, the trial court concluded that the terms of the marital settlement agreement, while not necessarily what would have been ordered following a contested hearing, were not unreasonable. It therefore approved the agreement and incorporated it into the parties' divorce judgment, which we now reverse. The result, of course, is that Janice, who entered into the original stipulation in apparent good faith, will be required to undergo the expense and delay occasioned by a contested hearing simply because Jeffery changed his mind after executing a stipulation whose terms the trial court explicitly found to be reasonable.

Although we are bound by ***Norman***, *see* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997), we acknowledge that our discussion in

Norman is unsatisfying because it does not address why a divorcing party should not be required to make a showing under § 806.07(1), STATS., before being relieved from the terms of a stipulation.[7]

CONCLUSION

For the reasons discussed above, we reverse the judgment and remand for further proceedings consistent with this opinion. We note that Jeffery has cited only his previously agreed-upon contribution to day care expenses as the sole issue he wishes to contest. The hearing should thus be limited to that issue unless Janice, in light of Jeffery's repudiation of that aspect of their marital settlement agreement, wishes to litigate other issues regarding which she may have made concessions in view of Jeffery's agreement to share child care costs.

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

Not recommended for publication in the official reports.

[7] In ***Cook v. Cook***, the supreme court directed this court, when we encounter one of our prior decisions whose correctness we question, to certify the issue in question to the supreme court or to "decide the appeal, adhering to a prior case but stating [our] belief that the prior case was wrongly decided." 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997). While we do not go so far as to say that ***Norman*** was wrongly decided, we believe that the analysis in ***Norman*** was incomplete in that we did not address why a party to a divorce should be permitted to repudiate a stipulation at will, while parties in other civil actions must seek relief from a stipulation under § 806.07, STATS., prior to contesting one or more provisions previously agreed to.