

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0718-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01FA000309

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

DAWN K. LARSON,

JOINT-PETITIONER-RESPONDENT,

v.

RUSSELL T. LARSON,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Russell Larson appeals from an order denying his motion to vacate his divorce judgment.¹ The issues are whether the trial court properly exercised its discretion on his motion for WIS. STAT. § 806.07 (2001-02) relief. We conclude that the trial court properly exercised its discretion, and therefore affirm.

¶2 Russell and his former wife, Dawn Larson, began cohabiting in 1995 and married in 1998. The couple initially lived in a residence Russell purchased in 1991 (the Wiley house). In 1996, they moved to another home purchased in Russell's name (the Hollywood Road house). In 1998 they moved to a third home (the Two Mile Avenue house), keeping the other two for rental income.

¶3 Russell and Dawn jointly petitioned for divorce in July 2001. They could not agree on a property settlement, however, and the matter went to trial. The main issue in dispute was Dawn's claim to one-half of the combined equity in the three homes identified above, notwithstanding the fact that two were purchased in Russell's name well before the marriage. Dawn based her claim on her testimony that (1) she helped extensively remodel the Wiley house, and contributed toward mortgage payments and other expenses after she began living there; (2) the parties purchased the Hollywood Road house from the proceeds of a joint account, and jointly shared its income and expenses; (3) the parties purchased the Two Mile Avenue home at the time of the marriage, and again shared its income and expenses; and (4) that all of their financial affairs were "completely and utterly commingled since 1995." Since the parties agreed that Russell would

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

keep ownership of the three properties, and given the other marital property he intended to keep, and the marital debts she intended to assume, Dawn sought an equalization payment of approximately \$42,500.

¶4 Russell disputed Dawn's contribution to the cost and upkeep of the Wiley and Hollywood Road properties, and suggested a substantially smaller equalization payment, in the neighborhood of \$5,000. During arguments at the close of testimony, the court closely questioned Russell's attorney concerning the commingling issue, noting that marital income almost certainly contributed to payments on the rental property mortgages. The court offered counsel a few minutes to compute the amounts involved, and the proceeding temporarily adjourned. The clear implication of the court's remarks was its dissatisfaction with Russell's proposed equalization payment.

¶5 When the proceeding reconvened, counsel for Dawn announced a settlement, whereby Russell would satisfy Dawn's property claim with an equalization payment of \$20,700. The court asked Russell's attorney if that was correct, and counsel confirmed the agreement. The court approved it and entered judgment accordingly.

¶6 Three weeks later, Russell moved for relief from the judgment under WIS. STAT. § 806.07(1)(a). At the hearing on his motion he testified that when he entered the stipulation he did not understand the applicable law on cohabitation and property brought to a marriage. He also testified that his attorney did not adequately explain these matters to him, and that he agreed to the stipulation only because counsel advised him that he would likely have to pay Dawn a higher sum if the trial court decided the issue. He asserted that these circumstances established that the stipulation was the result of mistake, inadvertence, surprise or

excusable neglect. The trial court denied the motion, finding that Russell did, in fact, have the necessary information and understanding to enter the stipulation.

¶7 One may seek WIS. STAT. § 806.07 relief from a divorce action property award, even if the parties stipulated to that award. *Hutjens v. Hutjens*, 2002 WI App 162, ¶27, 256 Wis. 2d 255, 647 N.W.2d 448, *review denied* 2002 WI 111, 256 Wis. 2d 66, 650 N.W.2d 842. We review the trial court’s decision on a § 806.07 motion under the erroneous exercise of discretion standard. *Id.* We will affirm an exercise of discretion if the trial court demonstrates a rational mental process based on the facts of record and the applicable law, and the result is reasonable. *See Trieschmann v. Trieschmann*, 178 Wis. 2d 538, 541-42, 504 N.W.2d 433 (Ct. App. 1993) (quoting *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981)).

¶8 Russell first contends that a proper exercise of discretion required the trial court to vacate the judgment, because the court failed to question Russell, at trial, on his understanding of the stipulation. He cites *Conrad v. Conrad*, 92 Wis. 2d 407, 415-16, 284 N.W.2d 674 (1979) for the proposition that a trial court must, in his words, “examine the parties directly on the record before approving the [property] stipulation to insure that the parties understand the terms of the stipulation and that their consent is voluntary.” However, while *Conrad* recommends a direct colloquy, it does not mandate one. The trial court’s failure to conduct a colloquy in that case was but one of several circumstances causing the supreme court to reverse and remand for WIS. STAT. § 806.07 relief from a

divorce stipulation.² The issue remains, in all cases, whether the trial court reasonably determined that the alleged grounds for vacating the judgment were either present or absent.

¶9 In this case, the trial court reasonably determined that Russell did not satisfactorily demonstrate the alleged grounds of mistake, inadvertence, surprise or excusable neglect. Russell asserted that his trial counsel erroneously advised him that Dawn had a valid claim to assets accumulated during the parties' premarital cohabitation. In fact, counsel's advice to Russell was not wrong. It was well within the trial court's discretion to consider property accumulated during the cohabitation, and Dawn's contribution to accumulating it, in determining the marital property division. *See Meyer v. Meyer*, 2000 WI 132, ¶¶35-37, 239 Wis. 2d 731, 620 N.W.2d 382.

¶10 Additionally, the trial court reasonably determined that Russell understood the issues, and the terms and purpose of the stipulation. The court noted from its personal observation that during the trial:

[I]t was very obvious that Mr. Larson was aware of the issues such as the property, the value of the property, when it was purchased, how it was purchased prior to the marriage, the equity in the property, and what money was used to pay on those mortgages or leases or liens. It was also obvious that during the testimony, he was aware of the possible consequences that [were] being sought by his wife as well as the consequences that he was hoping for, and the potential effect it could have on him in the divorce.

² In *Conrad*, 92 Wis. 2d 407, 284 N.W.2d 674 (1979), unlike here, there was no trial and no postjudgment hearing; the trial court gave no reasons for denying postjudgment relief; the stipulation in question relied on outdated financial records; and the written stipulation appeared to substantially differ from the one presented orally in court. *Conrad*, 92 Wis. 2d at 414-18.

The trial court simply disbelieved Russell's postjudgment testimony to the contrary, and that was the trial court's prerogative. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979). It was Russell's burden to demonstrate sufficient grounds for WIS. STAT. § 806.07 relief. *Hansher v. Kaishian*, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977). The trial court properly exercised its discretion in determining that Russell failed to meet this burden.

By the Court.—Order affirmed.

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

