

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 13, 1995

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. 94-0523

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

IN RE THE MARRIAGE OF:

ELIZABETH LORNITZO,  
(ELSPETH M. COLWELL),

Petitioner-Respondent,

v.

FRANK LORNITZO,

Co-Petitioner-Appellant.

APPEAL from an order of the circuit court for Dane County:  
Patrick J. Fiedler, Judge. *Affirmed.*

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

PER CURIAM. Frank Lornitzo appeals from an order clarifying a maintenance award to his former wife, Elspeth Colwell. Frank claims that his divorce stipulation with Elspeth prohibits the use of his Veteran's Administration (VA) pension to recalculate Elspeth's maintenance. We

conclude that the stipulation which provides for maintenance payments based upon "income from all sources" includes Frank's VA pension and that Frank agreed to double count his VA pension by agreeing to the terms of the stipulation. Consequently, he is estopped from claiming that income from his VA pension should be exempt from a maintenance calculation. We therefore affirm.

## BACKGROUND

Elsbeth Colwell and Frank Lornitzo were divorced in March 1983. They stipulated to a maintenance payment to Elspeth originally in the amount of \$407.08 per month. In the stipulation's property division section, Frank was given "all right, title and interest in and to his retirement account with his employer, the Veteran's Administration." The stipulation also divested Frank's and Elspeth's property rights through a mutual release of all right, title, and interest in and to the property awarded to the other.

The portion of the stipulation governing modification of the maintenance payment when Elspeth retired or reached the age of sixty-five provides:

The terms of paragraphs a & b shall continue until [Elspeth] retires or reaches age 65, whichever first occurs. Thereafter, [Frank] shall pay monthly as maintenance for [Elspeth] a sum recalculated annually as follows:

1. If [Elspeth] is eligible for and actually receiving Social Security benefits, [Frank] shall pay *one-half his monthly income from all sources* less \$500.00.

(Emphasis added.)

In 1992, Frank requested modification of maintenance and the trial court reduced Elspeth's maintenance to \$250 per month. In October 1993, just prior to her sixty-fifth birthday, Elspeth requested that the court implement the provisions of the stipulation governing modification of maintenance. The court

found that Frank's monthly income consisted of \$1,109 in wages, \$1,215 pension benefits and \$232 in social security for a total of \$2,556. The court calculated Elspeth's maintenance by dividing Frank's \$2,556 monthly income by one-half which equals \$1,278, and by reducing this amount by \$500. The maintenance award was thus set at \$778 per month. Frank appeals.

#### STANDARD OF REVIEW

Construction of a contract, including the determination of whether its terms are ambiguous, is a legal issue which we decide *de novo*. *Old Tuckaway Assoc. Ltd. Partnership v. City of Greenfield*, 180 Wis.2d 254, 280, 509 N.W.2d 323, 333 (Ct. App. 1993). A stipulation is but a form of a contract. *Cummings v. Klawitter*, 179 Wis.2d 408, 415, 506 N.W.2d 750, 753 (Ct. App. 1993). When we determine that a contract is unambiguous, we will not revise it in order to relieve a party of any agreed upon, albeit disadvantageous, terms. *Old Tuckaway*, 180 Wis.2d at 280, 509 N.W.2d at 333.

#### MAINTENANCE

Frank does not dispute that his VA pension is income. He argues, however, that if we determine that the stipulation is subject to multiple interpretations, we must conclude that the VA pension was awarded to Frank as his separate property and therefore cannot be used for maintenance purposes. He also asserts that any ambiguities in the stipulation must be construed against Elspeth.

The phrase "income from all sources" in the stipulation is clear and unambiguous. It is a broad phrase and means that the maintenance award must be based upon income from Frank's wages, social security, and VA pension. The stipulation demonstrates that Frank agreed to pay Elspeth one-half of his monthly income from all sources; there is no exception for an asset divided by the stipulation. We will not rewrite the agreement to read "income from all sources except income from Frank's Veteran's Administration pension."

Frank also argues that VA pension benefits awarded to him in the final stipulation cannot be double counted when calculating the maintenance award. We disagree. Generally, an asset may not be considered both as marital

property subject to division and as future income for the purpose of recalculating maintenance. *Hommel v. Hommel*, 162 Wis.2d 782, 788, 471 N.W.2d 1, 3 (1991). However, Frank agreed to all terms of the stipulation, including the provision expressly providing that the maintenance payments must be based upon "income from all sources." The potential income value of the VA pension was known to both parties at the time they signed the stipulation, yet this all-inclusive language was nonetheless used.

A party may be estopped from preventing the enforcement of a stipulation reduced to an order even though a trial court is without power to enter that order absent the stipulation. *See, e.g., Rintelman v. Rintelman*, 118 Wis.2d 587, 596-98, 348 N.W.2d 498, 502-03 (1984) (husband who stipulated that he would make lifetime maintenance payments is estopped from requesting termination of those payments upon wife's remarriage); *Bliwas v. Bliwas*, 47 Wis.2d 635, 639-41, 178 N.W.2d 35, 37-38 (1970) (father who stipulated that he would pay for his son's education beyond his son's twenty-first birthday was estopped from preventing its enforcement). Frank has presented no evidence that he did not enter into the stipulation freely and knowingly, or that the stipulation is unfair, inequitable, illegal or against public policy. *See Rintelman*, 118 Wis.2d at 596, 348 N.W.2d at 502-03. We conclude that Frank is estopped from challenging the stipulation and therefore affirm the trial court's order enforcing it.

*By the Court.* – Order affirmed.

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