COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2015

Diane M. Fremgen
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. 2014AP1356 **Cir. Ct. No. 1986FA532**

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

IN RE THE MARRIAGE OF:

JAMES R. STERR,

PETITIONER-APPELLANT,

V.

KATHY E. STERR-MACKE P/K/A KATHY E. STERR,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. James Sterr appeals an order of the circuit court, which granted Kathy Sterr-Macke's motion to enforce a 1989 judgment of divorce

and awarded Kathy monthly payments from James's pension. Kathy asserts that the appeal is frivolous and has moved for costs, fees, and attorney fees pursuant to WIS. STAT. RULE 809.25(3) (2013-14).[1] For the reasons set forth below, we affirm the order of the circuit court, but deny the motion for costs, fees, and attorney fees under RULE 809.25(3).

BACKGROUND

¶2 A judgment of divorce was entered as to James and Kathy on May 2, 1989. James was employed by Wisconsin Power and Light (WP&L), now known as Alliant Energy. The judgment of divorce provided that Kathy would be entitled to a portion of James's pension benefits, "to begin at such time as the same are paid or payable" to James. The judgment further provided that James's interest "shall be evidenced by a Qualified Domestic Relations Order which shall be made by the Court and approved by Wisconsin Power and Light." A qualified domestic relations order (QDRO) was filed with the court on March 14, 1989. Both the divorce judgment and the QDRO contained a formula for calculating Kathy's benefit amount.

¶3 In July 2012, Kathy received a letter from Alliant Energy stating that Alliant had determined that the 1989 QDRO did not meet applicable statutory and regulatory requirements. Alliant Energy requested that Kathy and James submit an amended QDRO. On June 4, 2013, Kathy filed a Motion to Enforce Judgment, seeking a court order requiring James to cooperate in the preparation, submission, and implementation of an amended QDRO. James opposed the motion, arguing

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

that it was barred by the 20-year statute of repose in WIS. STAT. § 893.40. The circuit court granted Kathy's motion, ruling that she was entitled to $500.62 per month from James's pension plan. The court further ordered the parties to cooperate in the preparation, submission, and implementation of an amended QDRO. James now appeals.

DISCUSSION

¶4 On appeal, James argues that the circuit court erred in ruling that the 20-year statute of repose in WIS. STAT. § 893.40 did not bar Kathy's motion to enforce the divorce judgment. Application of a statute of repose is a question of law that this court reviews de novo. *See* ***Johnson v. Masters***, 2013 WI 43, ¶13, 347 Wis. 2d 238, 830 N.W.2d 647.

¶5 James asserts that, in reaching its decision, the circuit court erroneously relied upon ***Johnson***. While we agree with James that ***Johnson*** involved a different set of facts than those in the present case, ***Johnson***'s general principles are instructive regarding the intersection of family law and the statute of repose in WIS. STAT. § 893.40.[2] In ***Johnson***, the parties were divorced in 1989. ***Johnson***, 347 Wis. 2d 238, ¶7. The former husband, Masters, had a pension plan through the Wisconsin Retirement System (WRS), but did not retire until 2009. ***Id.***, ¶¶4, 8. The 1989 judgment of divorce contained a provision that required the filing of a QDRO with WRS, even though, in 1989, state statute prohibited WRS members from assigning their benefits to other parties and did not include

[2] A case that is distinguishable on its facts may nonetheless be instructive. *See, e.g.*, ***Milwaukee Deputy Sheriff's Ass'n v. Clarke***, 2009 WI App 123, ¶21, 320 Wis. 2d 486, 772 N.W.2d 216.

provisions for QDROs. ***Id.***, ¶¶3-6. Soon thereafter, through the passage of 1989 Wis. Act 218, the legislature authorized WRS to accept QDROs, but the new law initially did not apply retroactively to divorces that occurred prior to the new law's effective date, April 28, 1990. ***Johnson***, 347 Wis. 2d 238, ¶6. It was not until May 2, 1998, that legislation was passed that permitted WRS to accept QDROs for marriages terminated between January 1, 1982, and April 28, 1990. ***Id.***

¶6 When Masters retired, the former wife, Johnson, took steps to obtain a valuation of the pension and draft a QDRO to obtain her portion of Masters' pension. ***Id.***, ¶8. However, she was notified by WRS that Masters' authorization was required to release his pension information. ***Id.***, ¶9. Johnson filed a motion in the circuit court for an order requiring Masters to release his pension information. ***Id.*** Masters moved to dismiss the motion on the grounds that Johnson was barred by the statute of repose, WIS. STAT. § 893.40, from enforcing the divorce judgment. ***Johnson***, 347 Wis. 2d 238, ¶10. The circuit court granted his motion, and Johnson appealed. ***Id.***, ¶¶11-12.

¶7 We certified the case to the Wisconsin Supreme Court, which reversed the circuit court's decision and held that Johnson's motion was not barred by WIS. STAT. § 893.40. ***Johnson***, 347 Wis. 2d 238, ¶¶1, 12, 26. The court stated: "In family law matters especially, courts often encounter provisions in orders that create continuing obligations that may very well extend beyond 20 years, such as support, maintenance, property transfers, agreements for the sale of property, and educational expenses payments." ***Id.***, ¶22. To avoid an absurd and unreasonable interpretation of the statute of repose, the ***Johnson*** court construed § 893.40 to begin running, as to the QDRO provision in the parties' divorce judgment, on the date the law changed to permit the action contemplated in the judgment which, in that case, was May 2, 1998. ***Johnson***, 347 Wis. 2d 238, ¶26.

¶8 In this case, as in ***Johnson***, interpreting WIS. STAT. § 893.40 to begin running on the date of the divorce judgment, thus barring Kathy's ability to enforce the judgment now, would produce absurd and unreasonable results. The language of the divorce judgment makes clear that, at the time the judgment was entered, the parties contemplated that James would not be retiring right away, but at some undetermined date in the future, as evidenced by the equation set forth in the judgment for calculating the amount of Kathy's benefit. Under the terms of the judgment, Kathy did not have a right to receive any of James's pension benefits until "such time as the same are paid or payable" to James, who did not retire until December 2013.

¶9 Kathy could not have filed a motion to enforce the pension provision in the judgment of divorce within the 20-year period contemplated by WIS. STAT. § 893.40 because, throughout that time period, James had not yet retired. Before James retired, the divorce judgment contemplated only that a QDRO would be "made by the Court and approved by Wisconsin Power and Light." The circuit court found that Kathy had filed the original QDRO with WP&L and that WP&L had not rejected it. James fails to point to anything in the record that would indicate that this finding was clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985) (we will not reverse findings of fact unless clearly erroneous).

¶10 In light of all of the circumstances, applying the 20-year statute of repose, beginning at the time the divorce judgment was entered, would render the pension provision in the judgment meaningless and would "'def [y] both common sense and the fundamental purpose' of the statute." ***Johnson***, 347 Wis. 2d 238, ¶21 (quoted source omitted). We agree with the circuit court that Kathy's motion to enforce the divorce judgment was not barred by WIS. STAT. § 893.40.

¶11 We turn next to James's argument that the circuit court erred in calculating the benefit amount to be awarded to Kathy. We disagree. The circuit court's calculations are supported by the record. Both the divorce judgment and the original QDRO contain the same formula for calculating Kathy's benefit. That formula specifies that Kathy is entitled to one-half of James's total benefit as of the date of retirement, multiplied by the following fraction:

$$\frac{\text{Number of months of marriage (186)}}{\text{Number of months of employment}}$$

¶12 We disagree with James that there is anything ambiguous about how Kathy's portion of the pension was to be calculated. The length of the parties' marriage, 186 months, is undisputed. It is also undisputed that James worked for WP&L and, subsequently, Alliant Energy, for a total of 563 months, beginning in January 1967 and ending as of December 1, 2013. Application of the formula contained in the divorce judgment and original QDRO results in 186/563, or 33%. The circuit court divided this number by two, arriving at 16.5%, since the formula specified that, for the relevant time period, Kathy was entitled to only one-half of James's pension benefit. A senior benefit analyst for Alliant Energy testified that, as of June 2013, James's benefit was $3,034.04 per month, and that it was frozen at that amount. Thus, the circuit court correctly determined that Kathy was entitled to $500.62, or 16.5% of $3,034.04, per month from James's pension.

¶13 Finally, we turn to Kathy's motion for costs, fees, and attorney fees for a frivolous appeal. The rules of appellate procedure authorize this court to award costs, fees, and attorney fees as a sanction for a frivolous appeal when the appeal was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or when the party or the party's attorney knew or should have known that the appeal "was without any reasonable basis in law or

equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c). We award costs and attorney fees only when we deem an appeal to be frivolous in its entirety. *See* ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14. In this case, we are not persuaded that the appeal is frivolous in its entirety. As explained in our discussion of ***Johnson***, 347 Wis. 2d 238, the facts of that case are distinct from the facts before us here. Although we ultimately have concluded that the principles of ***Johnson*** apply under the circumstances, we are not persuaded that James's attempt to distinguish that case is frivolous and, thus, the motion for costs, fees, and attorney fees is denied.

By the Court.—Order affirmed.

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