

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-2990

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DONNA R. CATALANO,

PETITIONER-RESPONDENT,

V.

GILBERT A. CATALANO,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J. Gilbert A. Catalano appeals from an order dismissing his motion for contempt against his former wife, Donna R. Catalano.¹

¹ Cases involving contempt of court under WIS. STAT. ch. 785 are decided by a single judge of the court of appeals. See WIS. STAT. § 752.31(2)(h) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 statutes.

Gilbert contended that Donna had failed to comply with the judgment of divorce directing her to pay certain “Section 71 spousal support” payments. Donna defended on the grounds that she had discharged the debt in bankruptcy. The family court ruled that the bankruptcy court had exclusive jurisdiction over the matter. Alternatively, the court ruled that the debt represented property division payments that were dischargeable in bankruptcy.

¶2 We reverse. We hold that the family court had jurisdiction to address Gilbert’s contempt motion. We further hold that Donna was equitably estopped from asserting her discharge in bankruptcy as a defense to Gilbert’s contempt motion because she expressly agreed not to discharge the debt in bankruptcy. We remand for further proceedings.

Facts and Procedural History

¶3 The facts and procedural history of this case, although lengthy, are not in dispute. Donna commenced this divorce action on April 3, 1997. The parties resolved all of the issues by a marital settlement agreement. The final hearing has held on December 10, 1997. By this agreement, each party waived maintenance. They also agreed to a property division. Section VI of the agreement is entitled “Cash-To-Balance And § 71 Payments.” In relevant part, this section of the agreement recites the following:

Because of his decreased earning since terminated from C. Catalano Co. Inc. Gilbert needs either spousal support from Donna or payment of \$21,000 from which to supplement his income, primarily need [sic] to provide him housing. Due to her financial problems with her business, Donna is unable to either sell the residence or pay Gilbert cash-to-balance the division of the marital estate. Therefore, Donna shall pay Gilbert \$500 per month for 50 months, commencing January 1, 1998, as spousal support, either as a support credit in that amount or as a § 71 payment, depending on whether Gilbert is living in the residence or not. That is, the support shall be in kind for

each such month during which Gilbert is living in the residence, and as a § 71 payment due on the first day of each month that Gilbert will not be living in the residence. Any partial month shall be prorated accordingly.

Gilbert shall be permitted to occupy the residence until at least May 31, 1998. Donna shall give Gilbert at least 60 days notice to vacate, in writing. That is, if she chooses to convert the in kind support to § 71 payments, she shall deliver the notice by April 2, 1998.

¶4 At the final hearing in the divorce, both parties testified regarding the marital settlement agreement. Under questioning by her trial attorney, the following exchange took place with Donna:

Q. And you understand that you are, in spite of that, assuming responsibility, even if you lost everything, to pay Gilbert the sum of \$21,000 as part of the settlement of this marriage.

A. Yes.

Q. *And that obligation cannot under any circumstances be discharged in bankruptcy?*

A. *I understand that.*

Q. So even if you lose everything, your house, your rental property, the business, everything, you owe Gilbert this sum of money?

A. Yes. [Emphasis added.]

¶5 Later, under questioning by Gilbert's attorney, the following exchange took place with Donna:

Q. What we're doing now is coming up with the Section 71 payment plan that gets the same thing done, it has both a property division and a support component in it, and that's why it's not dischargeable in bankruptcy. Do you understand and accept that?

A. Yes.

¶6 Following the parties' testimony, the family court approved the parties' marital settlement agreement as "fair and equitable to both sides." In the

court's findings of fact, it found the marital settlement agreement "to be fair and reasonable" and the agreement was incorporated by attachment into the judgment.

¶7 As of January 1, 1998, Gilbert was still living in the residence that had been awarded to Donna. Pursuant to the settlement agreement and the divorce judgment, Gilbert's continued residence represented an in-kind payment by Donna of \$500 per month to be credited against the payments called for in the agreement and the judgment. Thereafter, Donna directed Gilbert to vacate the residence and Gilbert did so on June 1, 1998. Pursuant to the settlement agreement and the judgment, this triggered Donna's obligation to make actual payments to Gilbert in the amount of \$500 per month.

¶8 However, Donna failed to make any of these payments. Instead, she filed a Chapter 7 bankruptcy petition on June 19, 1998.² Her schedule of nonsecured debts included her divorce judgment obligation owed to Gilbert. Gilbert objected to the discharge of this debt in the bankruptcy court, but his objection was filed too late. On September 15, 1998, the bankruptcy court issued its Discharge Of Debtor to Donna, discharging her from all of her "dischargeable debts."

¶9 On January 4, 1999, Gilbert filed a motion with the family court seeking an order holding Donna in contempt for her failure to make the payments called for in the judgment. New counsel represented Donna in this proceeding. Prior to the taking of any testimony, Donna objected to the proceeding on jurisdictional grounds, arguing that exclusive jurisdiction was with the bankruptcy court and that the discharge in bankruptcy foreclosed any further proceedings in

² Different counsel represented Donna in the bankruptcy proceedings.

state court. Gilbert responded that the bankruptcy discharge did not deprive the family court of its jurisdiction over a contempt motion. Gilbert also contended that the debt was one for spousal support which cannot be discharged in bankruptcy.

¶10 The family court ruled that it did not have jurisdiction. The court stated that Gilbert should have timely objected in the bankruptcy court. The court also observed that the marital settlement agreement did not clearly state that Donna's obligation was spousal support in the form of maintenance. The court also lamented that it had not been provided with a transcript of the final hearing. Despite its ruling, the court scheduled a further hearing for purposes of additional argument and clarification.

¶11 In the interim, a transcript of the final hearing was prepared. At the further hearing, the family court expressed some reservations about its prior ruling in light of Donna's agreement not to discharge the debt in bankruptcy. At the conclusion of the hearing, the court set a briefing schedule. For the most part, the parties' ensuing briefs echoed the arguments they had already made to the family court. Gilbert argued that Donna was discharged only from her "dischargeable debts" and that her debt to Gilbert was not such a debt because it represented a spousal support obligation in the form of maintenance. Gilbert also contended that Donna was barred under the doctrine of promissory estoppel from asserting her discharge in bankruptcy as a defense because she had expressly agreed not to discharge the debt and had obtained benefits from Gilbert in exchange for that promise. Donna again argued that the family court did not have jurisdiction or, alternatively, that the debt represented a property division payment which was dischargeable in bankruptcy.

¶12 In a bench decision on October 1, 1999, the family court confirmed its original ruling that it did not have jurisdiction in the matter. Alternatively, the court ruled that the debt represented a property division obligation that was dischargeable in bankruptcy. The court did not address Gilbert's promissory estoppel argument.

¶13 Gilbert appeals.

Discussion

¶14 Our discussion will be shorter than our recital of the case's facts and procedural history.

¶15 We first address the family court's ruling that it did not have jurisdiction. For purposes of this discussion, we will assume that the bankruptcy court had exclusive jurisdiction over the dischargeability of Donna's debt to Gilbert. And we will further assume that the debt represented a property division obligation that was covered by the bankruptcy court's discharge of Donna's "dischargeable debts." But these assumptions did not deprive the family court of jurisdiction. This was a divorce case, not a bankruptcy case. The statutes vest the family courts of this state with subject matter jurisdiction over divorce cases, including any postjudgment proceedings. Thus, this case turned not on the threshold question of the family court's jurisdiction. Rather, this case turned on whether Donna could assert her discharge in bankruptcy as an affirmative defense to Gilbert's contempt motion. This is a subtle but important distinction. We hold that the family court had jurisdiction to adjudicate this contempt matter.

¶16 Thus, we turn to the merits. We begin by pointing out that the terms of Donna's obligation to Gilbert are not defined only by the parties' marital settlement agreement. Were that the case, we would likely affirm the family

court's ruling (assuming the debt represents a property division obligation) because the agreement does not recite any promise by Donna not to discharge the debt in bankruptcy. However, at the final hearing on December 10, 1997, Donna expressly agreed that she would not discharge the debt in bankruptcy. Therefore, the full agreement between the parties is not only Donna's agreement to pay the money, but her further agreement not to discharge the debt in bankruptcy.

¶17 Next, we point out the parties' negotiations that produced the agreement. Donna conceded at the final hearing that one of the potential issues in the case was whether some \$31,000 gifted to her and invested in the parties' home had been transmuted such that the investment had become a marital asset and subject to property division. Donna conceded that Gilbert was "giving up" on that issue under the agreement. In addition, Donna conceded that another potential issue was Gilbert's demand that she sell her business, or borrow against it, and pay him \$21,000 of the proceeds. In lieu of that immediate payment, Gilbert instead agreed to accept payment on a deferred basis under the spousal support or § 71 payments set out in the marital settlement agreement. In his testimony, Gilbert also stated that in exchange for the agreement he had "given up certain rights, especially as regards the gift, evaluation of the house and perhaps even spousal maintenance right for continued jurisdiction."

¶18 Clearly, without Donna's stipulation that she would not discharge the property division debt in bankruptcy, she could assert the discharge as a defense to Gilbert's motion. However, in *Bliwas v. Bliwas*, 47 Wis. 2d 635, 178 N.W.2d 35 (1970), where a father agreed to support a child beyond the age of majority, our supreme court said:

[W]e hold that the enforcement of a family court order, which would not be enforceable without a prior stipulation of the parties that it be made part of the decree, rests not so

much in the enforcement of a contractual obligation or even extension of jurisdiction of the court, as it does in recognizing that a person who agrees that something be included in a family court order, especially where he receives a benefit for so agreeing, is in a poor position to subsequently object to the court's doing what he requested the court to do.

Id. at 639-40. The *Bliwas* court concluded:

[T]he appellant father, who stipulated and consented that the family court enter an order for contribution by him for the education of his son beyond the son's twenty-first birthday, is estopped from now challenging the right of the family court to do exactly what he joined his wife in requesting the court to do.

Id. at 641.

¶19 The supreme court reiterated this principle in *Rintelman v. Rintelman*, 118 Wis. 2d 587, 348 N.W.2d 498 (1984), where the husband agreed to pay maintenance to his former wife for her lifetime, even if she should remarry. *See id.* at 590. The court said, "In other similar situations this court has held that when a party to a divorce agrees to a certain disposition of the parties' financial obligations and the agreement is made a part of the judgment of the court, the party is thereafter estopped from seeking release from the terms of the agreement." *Id.* at 594.

¶20 Equitable estoppel, which focuses on the conduct of the parties, requires:

(1) action or non-action, (2) on the part of the one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment.

Riccitelli v. Broekhuizen, 227 Wis. 2d 100, 113, 595 N.W.2d 392 (1999); *see Schmitz v. Schmitz*, 70 Wis. 2d 882, 888, 236 N.W.2d 657 (1975).

¶21 Here, by her actions, Donna promised not to discharge her property division debt in bankruptcy. Gilbert relied on that promise by abandoning certain claims. Now Donna seeks to deprive Gilbert of the benefit of his bargain (his right to the § 71 payments) and yet retain her benefits under the agreement. That clearly operates to Gilbert's detriment.

¶22 This case is not about jurisdiction, waiver or the nature of the payments called for in the marital settlement agreement. This case is about fundamental fairness and the enforceability of divorce judgments that incorporate and adopt the agreements of the parties. The doctrine of equitable estoppel covers this very kind of situation.

Conclusion

¶23 We conclude that the family court had jurisdiction to address Gilbert's contempt motion. We further conclude that Donna is equitably estopped from asserting her discharge in bankruptcy as a bar to Gilbert's motion. We reverse the family court order and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

