COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2010

David R. Schanker
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. 2008AP595 **Cir. Ct. No. 2001FA53**

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

IN RE THE MARRIAGE OF:

TRACEY ANN HALSTED,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

STEVEN SCOTT GILBERTSON,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Steven Scott Gilbertson appeals and Tracey Ann Halsted cross-appeals from circuit court orders enforcing the property division incorporated into their 2004 judgment of divorce, denying Halsted's request for

attorney's fees from Gilbertson due to overtrial, and denying Halsted's reconsideration motion relating to attorney's fees. We affirm the orders in all respects.

¶2 Halsted and Gilbertson were divorced in 2004. The circuit court's September 2003 memorandum decision was incorporated into the 2004 judgment of divorce.[1] The memorandum decision addressed property division and made the following provision for the proceeds from the sale of the marital residence: "[T]he proceeds shall be applied to the property tax obligation first, then to Mr. Gilbertson's legitimate and provable expenses incurred to sell the property, and then the balance is to be divided equally." However, in later dividing the parties' assets and calculating Gilbertson's equalization payment on the property division, the memorandum decision included the equity in the marital residence among the assets awarded to Gilbertson while simultaneously requiring the residence to be sold and the equity equally divided. Neither party appealed or sought relief from the judgment of divorce incorporating this error.[2]

¶3 After entry of the judgment of divorce, Gilbertson repeatedly contacted the circuit court with concerns about various post-divorce matters, but he never raised the defect described above. Likewise, Halsted did not bring this defect to the circuit court's attention. The residence was sold in April 2004, but Gilbertson did not pay Halsted any of the proceeds. In January 2007, Gilbertson moved the circuit court to enforce the property division by requiring Halsted to

[1] The Honorable Paul B. Higginbotham wrote the 2003 memorandum decision. A successor judge, the Honorable James L. Martin, entered the 2004 judgment of divorce.

[2] Hereafter, we refer to the property division decision as included in the judgment of divorce.

pay him various sums because the residence sold for less than contemplated by the circuit court at the time of the divorce.

¶4 In November 2007, another successor judge heard Gilbertson's motion and addressed the defect in the judgment of divorce.[3] The successor judge aptly described the error: if the original judge intended to equally divide the property, the judge's "method of calculating the equalizing payment while at the same time ordering the house proceeds to be divided guaranteed that his intent would not be accomplished." The parties agree that the judgment of divorce is defective in this respect.

¶5 The court noted that to the extent the judgment contained an error, the parties should have timely appealed or sought relief from the judgment. The court could not modify the property division because such was barred by WIS. STAT. § 767.59(1c)(b) (2007-08).[4] The court sought to effectuate the original judge's intent to divide the equity in the marital residence after proper expenses of sale. The court concluded that even though the memorandum decision incorporated in the judgment contained an error, the error did not render the judgment ambiguous.

¶6 Based upon information submitted by the parties, the court found that the equity was $38,196, and Gilbertson owed Halsted $19,098, or one-half of the equity. The court rejected Gilbertson's contention that the judgment required Halsted to pay him any amount to effectuate the property division.

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[3] The Honorable Michael N. Nowakowski presided in 2007.

[4] All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶7 The circuit court rejected Halsted's request for attorney's fees due to overtrial by Gilbertson. The court noted that given the sizable equalization payment imposed upon Gilbertson by the court's determination that he owed Halsted $19,098, Gilbertson did not have the ability to contribute to Halsted's attorney's fees.

¶8 Halsted moved the circuit court to reconsider its refusal to award attorney's fees due to overtrial. In reviewing the history of the litigation after 2003, the circuit court determined that Gilbertson's court filings since May 2007 were frivolous and amounted to overtrial. Nevertheless, the court refused to award Halsted attorney's fees because Gilbertson was unable to pay given his other obligations.

¶9 On appeal, Gilbertson argues that the judgment of divorce was ambiguous, the original court intended an equal division, and the successor court's remedy did not effectuate that intent. On cross-appeal, Halsted argues that the circuit court should have required Gilbertson to contribute to her attorney's fees due to overtrial.

¶10 The parties concede that the judgment of divorce contains an error. However, neither party appealed from the judgment of divorce or sought relief from it. And, the circuit court had no authority to modify the judgment of divorce to correct the error. *See* WIS. STAT. § 767.59(1c)(b)[5] (court may not revise or modify a judgment or order relating to a final property division).

[5] Formerly, WIS. STAT. § 767.32(1)(a) (2003-04).

¶11 We do not agree with Gilbertson that the judgment of divorce is ambiguous. "Ambiguity exists when the language of the written instrument is subject to two or more meanings, either on its face or as applied to the extrinsic facts to which it refers. Determining whether an ambiguity exists is a question of law." ***Washington v. Washington***, 2000 WI 47, ¶18, 234 Wis. 2d 689, 611 N.W.2d 261 (footnotes omitted). The original court required the parties to divide the equity proceeds equally and required Gilbertson to make an equalization payment based upon including the equity in Gilbertson's estate. The terms, although conflicting, are clear and not susceptible to different meanings.

¶12 Both parties asked the circuit court in 2007 to enforce the judgment of divorce, and the court had to determine what the judgment provided given the error contained within it. The original court made clear that the proceeds would be reduced by "expenses reasonably incurred and substantiated upon the sale of the residence. This credit shall be taken at the time of closing and upon a settlement of accounts between [Hasted] and [Gilbertson]." The original court went on to rule: "Once the marital residence is sold, the proceeds shall be applied to the property tax obligation first, then to [Gilbertson's] legitimate and provable expenses incurred to sell the property, and then the balance is to be divided equally." There is nothing ambiguous about this plan, notwithstanding the inconsistency between equally dividing the equity proceeds and including the equity in the property division for purposes of calculating Gilbertson's equalization payment. The job of the successor court was to effectuate this plan. To award Gilbertson an equalization payment from Halsted would require re-writing the judgment of divorce, which neither the circuit court nor this court may do. *See* WIS. STAT. § 767.59(1c)(b).

¶13 We turn to Halsted's cross-appeal seeking attorney's fees due to Gilbertson's overtrial. The circuit court determined that Gilbertson was unable to pay attorney's fees. Halsted argues that ability to pay should not determine whether to award fees for overtrial.

¶14 We may affirm the circuit court for other reasons. *Cf.* ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984) (we may affirm if the circuit court reached the right result for the wrong reason). We are not bound by the manner in which a party frames an issue. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). When we review a circuit court ruling, we examine not just the four corners of the ruling itself, but also the manner in which the issues evolved in the circuit court. *See* ***Jacquart v. Jacquart***, 183 Wis. 2d 372, 383-84, 515 N.W.2d 539 (Ct. App. 1994).

¶15 We analyze the overtrial issue in the context of the entire proceeding. It is undisputed that the judgment of divorce contained an error in the execution of the equal property division. Halsted had post-divorce counsel; Gilbertson was *pro se* for a substantial period. Gilbertson never paid any proceeds from the 2004 sale of the marital residence to Halsted; Halsted did not seek contemporaneous relief from the circuit court for Gilbertson's failure to pay over proceeds. Once the parties' dispute regarding the division of the sale proceeds came to the circuit court in 2007, the circuit court needed to address the error in the judgment of divorce.

¶16 Attorney's fees for overtrial are in the nature of a sanction. *See* ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985). Here, the parties required the intervention of the circuit court to enforce the

judgment of divorce. Therefore, under the totality of the circumstances, a sanction in the form of a contribution to Halsted's attorney's fees was not appropriate.

¶17 No costs to either party.

By the Court.—Orders affirmed.

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