COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2565

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

SCHUTZE LAW OFFICES,

PLAINTIFF-APPELLANT,

V.

JOSEPH GOUGH,

DEFENDANT-RESPONDENT,

SUSAN LYNN GOUGH,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] The Schutze Law Office appeals a summary judgment in favor of Joseph Gough in which the trial court held Schutze could not recover attorney fees incurred by Joseph's former wife when Schutze represented her in the divorce action and in bankruptcy proceedings. The court concluded that the attorney fees did not fall within either WIS. STAT. § 766.55(2)(a) or (b) (1997-98),[2] and therefore could not be recovered from Joseph. We conclude the trial judge was correct and affirm.

¶2 The facts of this case are undisputed. Schutze represented Susan Gough in the divorce action. On the day of the final hearing in the divorce and just prior to the hearing, he filed a bankruptcy petition on her behalf. The day after the divorce was granted, he instituted a small claims action against Joseph[3] for $5000, the amount owed for services he provided Susan in the divorce and the bankruptcy action prior to the date of divorce.[4] The divorce judgment awarded Susan child support and held maintenance open for six years to allow Joseph to pay off the marital debt before determining the amount, but it did not allocate responsibility for attorney fees. On his motion for summary judgment, Schutze argued that Joseph was liable for the attorneys fees under both WIS. STAT. § 766.55(2)(a) and (b) because that debt was incurred prior to the date of divorce.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98).

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] Schutze initially filed a small claims action against both Susan and Joseph Gough. A default judgment was entered against her by the court commissioner, but apparently the discharge in bankruptcy proceeding applied to this judgment.

[4] Schutze asserts that the debt consisted of $1200 for bankruptcy services and $3800 for divorce services; however, we do not find these amounts in the affidavits submitted to the trial court on the motion for summary judgment.

¶3 WISCONSIN STAT. § 766.55 of the Wisconsin Marital Property Act (WMPA) provides in relevant part:

> (1) An obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family….
>
> (2) After the determination date all of the following apply:
>
> (a) A spouse's obligation to satisfy a duty of support owed to the other spouse or to a child of the marriage may be satisfied only from all marital property and all other property of the obligated spouse.
>
> (b) An obligation incurred by a spouse in the interest of the marriage or the family may be satisfied only from all marital property and all other property of the incurring spouse.
>
> ….
>
> (d) Any other obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, may be satisfied only from property of that spouse that is not marital property and from that spouse's interest in marital property, in that order.
>
> (2m) Unless the dissolution decree or any amendment to the decree so provides, no income of a nonincurring spouse is available for satisfaction of an obligation under sub. (2) (b) after entry of the decree. Marital property assigned to each spouse under that decree is available for satisfaction of such an obligation to the extent of the value of the marital property at the date of the decree. If a dissolution decree provides that the nonincurring spouse is responsible for satisfaction of the obligation, the obligation may be satisfied as if both spouses had incurred the obligation.

¶4 The trial court concluded that the attorney's fees were not incurred to satisfy the duty of support within the meaning of WIS. STAT. § 766.55(2)(a) and were not incurred in the interest of the family under § 766.55(2)(b). Rather, the trial court held that the attorney fees were an individual obligation, falling under

§ 766.55(2)(d), and therefore could only be satisfied from Susan's property, not Joseph's. The court therefore granted summary judgment in Joseph's failure.

¶5 On appeal Schutze contends the trial court erred in concluding that neither WIS. STAT. § 766.55(2)(a) nor (2)(b) applies. Because the facts are undisputed, we are presented with a question of law which we review de novo.[5] ***Wisconsin Coalition for Voter Participation, Inc. v. State Elections Bd.***, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999), *review denied,* 2000 WI 2, 607 N.W.2d 293. However, we benefit from the trial court's thorough analysis of the issues.

¶6 We first address Schutze's argument that Joseph is obligated to pay for Susan's attorney's fees because the debt incurred is one incurred to satisfy a duty of support pursuant to § 766.55(2)(a). In ***St. Mary's Hosp. Med. Ctr. v. Brody***, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994), we looked to WIS. STAT. § 765.001(2) to define the duty of support within the meaning of WIS. STAT. § 766.55(2)(a). Section 765.001(2) declares that husbands and wives "owe to each other mutual responsibility and support," and that "[e]ach spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of … the other spouse." We observed that this provision modified the common law doctrine of necessaries, which had imposed primary personal liability on a husband for necessaries for the support of the family, by imposing personal liability on both spouses. ***St. Mary's***, 186 Wis. 2d at 108-09. We concluded in ***St.***

[5] Schutze contends the trial court did not decide the issues with respect to the bankruptcy fees, only with respect to the divorce fees. We read the court's decision to apply to both, but even if it did not, since our review is de novo, we resolve the issues as to both categories of fees.

Mary's Hospital that a spouse's necessary medical treatment comes within the doctrine of necessaries and, therefore, payment for those bills is an obligation imposed equally upon both spouses. ***Id.*** at 109.

¶7 Under the common law doctrine of necessaries, an item or service was a necessity if it was reasonably needed by the wife or member of the family. ***Sharpe Furniture, Inc. v. Buckstaff***, 99 Wis. 2d 114, 122, 299 N.W.2d 219 (1980). In ***Sharpe***, the court determined that a sofa for the family household was reasonably needed by the family. ***Id.*** at 123.

¶8 We conclude that this common law framework for analyzing whether an item or service comes within the doctrine of necessaries is applicable to WIS. STAT. §§ 765.001(2) and 766.55(2)(b). We agree with the trial court that attorney fees incurred by one spouse to divorce another, and incurred by one spouse to file a bankruptcy petition on the morning of the final divorce hearing, are not "necessaries" for the adequate support and maintenance of the other spouse, or the spouses' children. We agree with the trial court that the manner in which attorney fees for a divorce are categorized under bankruptcy law is not relevant to an interpretation and application of §§ 765.001(2) and 766.55(2)(a). Similarly, the Wisconsin cases permitting attorney fees to be awarded in divorce actions based on need and ability to pay have no bearing on this issue. *See, e.g.,* ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996); *see also* WIS. STAT. § 767.262.

¶9 We next address Schutze's argument that the attorney fees are an obligation incurred by a spouse in the interest of the family under WIS. STAT. § 766.55(2)(b). Schutze points to the presumption in § 766.55(1) that all obligations incurred during the marriage are presumed to be incurred in the

interest of the marriage or family. Schutze argues that the obligation was incurred in the interest of the family because child support issues were involved in the divorce proceeding and because the bankruptcy was necessary so that Susan could protect what little earnings she had from garnishment in order to support her children.[6]

¶10 "Obligation … in the interest of the family" is not defined in the statute or case law. We will assume without deciding that it is ambiguous in the context of this case. Statutory language is ambiguous when capable of being understood in two or more different senses by reasonably well-informed persons. *See* ***State v. Setagord***, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997). We therefore look to the subject matter, object, context, scope and history of the statute in order to ascertain legislative intent. ***Id.***

¶11 In order to resolve the ambiguity, we consider the purposes of WMPA in relation to the purposes of the divorce statute, chapter 767. WMPA is based on the Uniform Marital Property Act (UMPA), ***Kuhlman v. Kuhlman***, 146 Wis. 2d 588, 591, 432 N.W.2d 295 (Ct. App. 1988), and the prefatory note to UMPA emphasizes that it has nothing to do with divorce proceedings; "it takes the parties to the door of the divorce court … leaving to existing dissolution procedures in the several states the selection of the appropriate procedures for dividing property." ***Id.*** (citing Unif. Marital Property Act, Prefatory Note, 9A U.L.A. 100 (1987)). The legislative history of WMPA demonstrates the same intent that WMPA not change Wisconsin divorce law. *See* ***id.*** at 592-93.

[6] There is no factual material on Susan's income or expenses. However, we accept as a reasonable inference from the bankruptcy filing that she filed bankruptcy to protect her income from creditors.

¶12 In a divorce action, the court does the following: divides the property that is subject to division under WIS. STAT. § 767.255 between the spouses on an equitable basis after considering the statutory factors, *see* ***Kuhlman***, 146 Wis. 2d at 591-93; allocates responsibility for debts; provides for the support of one spouse by the other after the divorce in the form of maintenance if the court, within the exercise of its discretion, decides that is appropriate after considering the statutory factors, *see* WIS. STAT. § 767.26; if there are children, orders "either or both parents to pay an amount reasonable or necessary to fulfill a duty to support a child," WIS. STAT. § 767.25(1)(a); and may order either party to pay for the attorney fees of the other, based on need and ability to pay. *See* WIS. STAT. § 767.262 and ***Johnson***, 199 Wis. 2d at 377. All of these decisions made by the court in a divorce action relate to the relationship between the spouses, and between each spouse and his or her children, after the dissolution of the family unit by divorce.

¶13 The court in Susan's and Joseph's divorce action had the authority to order that Joseph contribute to Susan's attorney fees, if requested by Susan and if the case law under WIS. STAT. § 767.262 supported such an order, but it did not do so. The court decided upon a division of property and debts, the amount of child support, and the holding open of maintenance based on the parties' financial circumstances on the day of divorce and taking into account Joseph's ability to pay off the marital debts. Schutze's interpretation of WIS. STAT. § 766.55(2)(b) in effect modifies these decisions, because it makes Joseph liable for Susan's divorce attorney fees out of his share of the division of the marital assets, and it further diminishes those assets by the bankruptcy fees, which were incurred prior to the date of divorce but which, apparently, were not assigned as an obligation of Joseph in the divorce action. We conclude that this interpretation of

§ 766.55(2)(b) is inconsistent with the purpose of the WMPA, which is to govern spouses' ownership of property and obligations for debts during the marriage and at their death, and is not to affect the law governing the dissolution of the marriage. ***Kuhlman***, 146 Wis. 2d at 592-93. We therefore hold that the obligation for attorney fees incurred by Susan were not incurred in the interest of the family within the meaning of § 766.55(2)(b).[7]

¶14 We do not agree with Schutze that ***Kotecki & Radtke v. Johnson***, 192 Wis. 2d 429, 531 N.W.2d 606 (Ct. App. 1995), provides support for his position. There we held a law firm could institute a separate action in small claims to recover attorney fees for services provided the wife during a divorce, where the attorneys withdrew during the divorce, even though the firm had not first asked the court presiding over the divorce action to resolve the fee dispute at the time it withdrew. ***Id.*** at 441-42. We expressly did not rule on the issue whether the former husband's wages could be garnished as marital property to satisfy the default judgment against the wife for the unpaid attorney fees because there were unresolved issues of fact. Among those, we noted, were whether the court in the divorce action had "issued any orders regarding payment of contribution for attorney fees in the final divorce judgment." ***Id.*** at 444-45. Schutze reads this to imply that if there is no order, as in this case, the lawyer may satisfy the obligation from the former husband's marital proper. Although we believe it implies just the opposite—if the court did not so order, the attorney may not do so—the more important point is that we did not resolve the issue whether the former husband's marital property could be reached to satisfy the judgment for the unpaid fees.

[7] Schutze does not provide us with any cases from other states decided under statutes based on the UMPA that support his position, and we have been unable to locate any.

¶15 We conclude the trial court correctly decided that Susan's debt to Schutze for attorney fees fell within neither WIS. STAT. § 766.55(2)(a) nor (b), but rather within subsection (d). Summary judgment dismissing the complaint was therefore proper.

By the Court.—Judgment affirmed.

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