COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1676 **Cir. Ct. No. 2014FA125**

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

IN RE THE MARRIAGE OF:

MARY M. MAHAFFEY,

JOINT-PETITIONER-APPELLANT,

V.

MICHAEL C. MAHAFFEY,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for Pierce County: JOSEPH D. BOLES, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Mary Mahaffey appeals an order denying her motion to reopen her divorce judgment pursuant to WIS. STAT. § 806.07 (2015-16).[1] We conclude the circuit court properly exercised its discretion when it determined that Mary failed to demonstrate "extraordinary circumstances" warranting relief from the judgment. Accordingly, we affirm.

BACKGROUND

¶2 Mary and Michael Mahaffey were married in March 1991 and have two adult children. On July 30, 2014, they jointly petitioned for divorce. The parties agreed on all issues, including the property division and a $1000 limited-term monthly maintenance award to Mary. They retained attorney Lars Loberg to assist them with drafting a marital settlement agreement (MSA), which he accomplished based on a handwritten document the parties provided. This drafting was completed approximately one to two months before the final divorce hearing.[2]

¶3 The final hearing was held before a court commissioner on January 22, 2015. Loberg examined both Mary and Michael at the hearing. Mary affirmed that Loberg's representation was limited to drafting the agreement she and Michael had reached, and she testified that the MSA's terms were fair and reasonable to her. At the conclusion of the hearing, the commissioner granted the divorce and adopted the parties' MSA as its order regarding maintenance and

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Michael testified the parties received a copy of the drafted MSA at a meeting with Loberg in September 2014. Based on Mary's testimony, it is clear she was aware of the MSA's terms prior to the final hearing.

property division. The commissioner later entered a judgment adopting its oral ruling.

¶4 Mary subsequently obtained separate counsel and, on November 23, 2015, filed a motion to reopen the judgment.[3] Among other things, Mary argued Loberg's simultaneous representation of both parties in the divorce action was grounds for reopening the judgment. In addition, Mary argued the MSA's terms were "grossly inequitable" such that she was entitled to relief.

¶5 The circuit court held an evidentiary hearing on Mary's motion, at which Loberg, Mary and Michael testified. Loberg testified he first met with the parties on July 24, 2014, at which time he explained that he could only represent the parties if they agreed on all issues. Loberg told them if they disagreed or wished to have individual legal advice, they would be required to find separate counsel and Loberg would withdraw from his representation.

¶6 Prior to the final hearing and the MSA's execution, Loberg had discussed with the parties the finality of property division, the types of property subject to division, and what specific items of property they wished to divide. He also informed them of the presumption of equally dividing property that governs in divorce proceedings. With respect to maintenance, Loberg prepared a Mac Davis calculation based on information the parties provided.[4] After some negotiation with one another in Loberg's presence, the parties agreed that Michael

[3] The following day, Loberg withdrew from the representation. Michael also subsequently obtained separate counsel.

[4] Loberg testified he told the parties Mac Davis is a "tax-based formula that the courts use to attempt to equalize the disposable income, but the court then has latitude to deviate from those benchmarks or guidelines."

would pay Mary $1000 per month in maintenance for a fifteen-year term. Neither Mary nor Michael disputed Loberg's testimony, and they affirmed it in many respects.

¶7 The circuit court rendered its decision after post-hearing briefing by the parties. The court concluded Loberg was not engaged in prohibited simultaneous representation. Rather, it found Loberg was acting merely as a scrivener, hired to draft a written document that reflected the parties' agreement on all issues related to the divorce. The court specifically found that Loberg told the parties they could seek separate representation and that the parties had ample time before the final hearing to review the MSA's terms, either on their own or with the assistance of independent counsel.

¶8 The circuit court also rejected Mary's arguments relating to the MSA's provisions. It first found the MSA's terms were fair and equitable. It also concluded there was scant proof that Mary's assent to the MSA was involuntary, finding Mary had not "proved that she was forced in any way to do this" and there was not sufficient evidence to grant relief from the judgment. Ultimately, the court concluded Mary had simply changed her mind about her bargain, and it emphasized that matters such as these should be treated with finality. Accordingly, the court denied Mary's motion. She now appeals.

DISCUSSION

¶9 WISCONSIN STAT. § 806.07 provides a circuit court with discretionary authority to grant relief from a judgment. ***Spankowski v. Spankowski***, 172 Wis. 2d 285, 290, 493 N.W.2d 737 (Ct. App. 1992). This includes the discretionary authority to reopen a divorce proceeding after a divorce

judgment has been entered. *See* ***Conrad v. Conrad***, 92 Wis. 2d 407, 413-14, 284 N.W.2d 674 (1979).

¶10 Subsection (1) of the statute identifies numerous reasons justifying relief from a judgment. Here, Mary's motion before the circuit court invoked only WIS. STAT. § 806.07(1)(h), which allows for reopening the judgment for "[a]ny other reasons justifying relief from the operation of the judgment."[5] Relief may be obtained under paragraph (1)(h) only if "extraordinary circumstances" exist. ***Spankowski***, 172 Wis. 2d at 291.

¶11 In addressing a WIS. STAT. § 806.07 motion, the circuit court must balance the need for finality against the individual litigant's need for relief from an unjust judgment. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 552, 363 N.W.2d 419 (1985). "Because subsection (h) invokes the sensibilities of the court, the court must consider a wide range of factors" when deciding whether to grant a motion. ***Id.*** These factors include: (1) whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) whether the judgment in question represented a judicial consideration of the merits; and (4) whether there are intervening circumstances making it inequitable to grant relief. ***Id.*** at 552-53.

¶12 Mary appears to argue the circuit court erroneously exercised its discretion because, as a matter of law, one attorney "representing" both parties to a

[5] Certain portions of Mary's briefs suggest she believes relief is warranted under subsections other than subsection (h). However, she does not develop any argument on these other provisions, and we will not address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

divorce action presents a sufficiently "extraordinary circumstance" to warrant reopening a judgment. The circuit court, however, specifically found that attorney Loberg's representation was limited to scrivener duties pertaining to matters on which the parties had already agreed. Although Mary presents numerous authorities, including portions of certain Supreme Court Rules and comments to those Rules, she does not dispute the basic proposition that an attorney can limit his or her representation to scrivener duties without running afoul of the ethics code. For purposes of this opinion, we assume this proposition is correct, as we do not develop arguments on a party's behalf. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

¶13 Rather, Mary's principal argument appears to be that attorney Loberg exceeded his role as a scrivener, thereby creating a conflict that prohibited his joint representation. Her claim, broadly speaking, is that Loberg supplied legal advice to the parties, which he could not ethically do as a mere scrivener. Mary asserts Loberg did this by: (1) including in his fee agreement "substantial legal advice" regarding the predivorce disposition of the marital home; and (2) providing the parties with the Mac Davis worksheets showing potential maintenance calculations.

¶14 We cannot ascertain whether Loberg's fee agreement contains impermissible legal guidance because, as Michael points out, the fee agreement is not in the record. Mary responds that Loberg testified at the evidentiary hearing on her motion regarding the pertinent parts of that agreement. All that Loberg stated, however, was that the parties signed a fee agreement; there was no discussion whatsoever of whether that agreement contained impermissible legal guidance to the parties. Moreover, Mary does not argue that the general

statements of "black letter" law Loberg provided during their in-person meetings—such as the presumption of an equal division of property—constitute impermissible legal advice. *See* ***id.***

¶15 Mary has also failed to establish attorney Loberg's assistance in disposing of the parties' marital home contemporaneously with the divorce was problematic. It is undisputed Loberg, shortly before the divorce petition was filed, helped the parties transfer their marital residence to their children by warranty deed, with Michael reserving a life estate for himself. However, the circuit court specifically found, contrary to Mary's assertions, that the parties agreed to this disposition and Loberg was representing both of them regarding this real estate transfer. The court also found they agreed that Loberg would draft a deed accomplishing the transfer. Mary has provided no basis for us to conclude the circuit court's factual findings on these matters are clearly erroneous. Under these circumstances, we cannot conclude Loberg exceeded his role as scrivener based upon his provision of what Mary now characterizes as "estate planning" services.[6]

¶16 Finally, it is undisputed that attorney Loberg prepared a maintenance worksheet for the parties using the Mac Davis calculator. Such computer programs do "nothing more than make the necessary calculations, such as after-tax income and the effect of tax exemptions, faster and more accurate. The results of

[6] As such, we necessarily also reject Mary's argument that attorney Loberg was ethically prohibited from joint representation under ***Mathias v. Mathias***, 188 Wis. 2d 280, 286-87, 525 N.W.2d 81 (Ct. App. 1994). In that case, we held, as a matter of law, that "estate planning which is reasonably contemporaneous with initiation of divorce proceedings is substantially related to issues which may arise in those proceedings," and therefore it was error for the circuit court not to disqualify the wife's law firm, which had previously performed estate planning for the husband. ***Id.*** In this case, Loberg did not provide "estate planning" functions for one of the parties; he merely assisted with the parties' joint demand to transfer property to their children.

the computer program are entirely dependent on the inputted numbers." ***Bisone v. Bisone***, 165 Wis. 2d 114, 122-23, 447 N.W.2d 59 (Ct. App. 1991). These programs are the equivalent of performing calculations using a calculator or pencil and paper. ***Id.*** We cannot conclude that Loberg crossed the threshold into providing impermissible "legal advice" by merely making the parties aware of the Mac Davis results for calculating maintenance.

¶17 Mary also argues the circuit court should have granted her motion to reopen because the terms of the MSA are inequitable to her. The MSA, she argues, was "so grossly unfair and one-sided that the circuit court had the discretion (if not the duty) to reopen the divorce judgment." However, it is well established that "[t]he fact that a settlement appears by hindsight to have been a bad bargain is not sufficient by itself to set aside a judgment." ***Spankowski***, 172 Wis. 2d at 292. Thus, even if the MSA benefitted Michael "to the tune of over $38,000," as Mary contends—a contention Michael disputes—this alone would not constitute "extraordinary circumstances" warranting a reopening of the judgment.[7] At a minimum, we cannot conclude the circuit court erroneously exercised its discretion in rejecting Mary's "inequity" argument.

¶18 Perhaps recognizing this rule, Mary appears to attack the validity of the MSA as a contract. Namely, she argues her assent to the MSA was involuntary and was the result of her former husband's "underlying control and power dichotomy." The circuit court expressly rejected this argument, finding

[7] Moreover, the circuit court recognized the MSA resulted in a property division that "[w]asn't exactly 50/50," but it concluded the division was not so inequitable that it would rise to the level of warranting relief from the judgment.

there was insufficient evidence of any sort of power disparity to warrant relief from the judgment.

¶19 Mary does not argue that the circuit court's conclusion regarding the voluntariness of her assent was unsupported by the evidence. Nor does she argue the court's findings regarding the historical facts were clearly erroneous. Indeed, there appears to be little in the way of record support for her argument that she was forced—by subtle or overt means—to sign the MSA. Attorney Loberg testified it was his impression that Mary was not being pressured and that she understood and agreed with what the parties were doing. Other than a few questions regarding who handled the finances in the marriage, Mary was never asked directly about the alleged power disparity at her motion hearing.

¶20 Mary points to the MSA's terms, the "timeline of events," and alleged correspondence between Loberg and the Mahaffeys in support of her arguments regarding her vulnerability and the involuntariness of her assent. First, the circuit court concluded the MSA's terms, though somewhat more beneficial to Michael, were not unreasonable or inequitable. Second, Mary does not explain in her appellate briefs how the "timeline of events" supports her claims, and the circuit court specifically found there was ample time to review the MSA and for either of the parties to submit the document to third-party review. Finally, the "correspondence" to which Mary refers does not appear to be part of the record; at a minimum, her brief lacks record citations to that material.[8]

[8] After Michael pointed out this absence of record support in his response brief, Mary replied that her briefing to the circuit court discussed in detail both the correspondence and the parties' fee agreement with Loberg. Merely referencing these matters in her briefing, however, is insufficient proof. *See* ***Horak v. Building Servs. Indus. Sales Co.***, 2012 WI App 54, ¶3 n.2, 341

(continued)

¶21 Moreover, we note Mary was given the opportunity to disclaim the MSA at the final divorce hearing. At that hearing, attorney Loberg asked numerous questions to establish, on the record, that her assent was voluntarily given and that she agreed with the MSA's terms:

> Q Now, this is a joint divorce, so what our office was hired to do is to draft the agreement that the two of you reached; is that right?
>
> A Yes.
>
> Q You understand that, at any point, either you or Mike could have said, this is nuts, I'm going to find somebody to talk to, I need my own advice on this matter?
>
> A Correct.
>
> Q And you haven't exercised that option. Instead, you've agreed to move forward as stated in the agreement; is that right?
>
> A Yes.
>
> Q And do you believe these terms to be fair and reasonable?
>
> A I do.

In light of this testimony, and Mary's subsequent failure to present any evidence regarding the alleged power imbalance and involuntariness of her assent to the

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Wis. 2d 403, 815 N.W.2d 400 (noting attorneys' arguments are not evidence). There was an evidentiary hearing in this case, which provided Mary ample opportunity to submit any documents pertinent to her motion.

Attorney Loberg was questioned briefly regarding whether he met with either party separately from the other. He testified all meetings were held jointly, but he acknowledged that Michael had sent some emails in which he provided financial documents Loberg had requested. He did not know whether Michael had copied Mary on the emails, but Loberg provided all documents to Mary by email, in writing, or by showing them to her at their meetings. Loberg's testimony does not support a conclusion that Mary's assent to the MSA was involuntarily given.

MSA, we cannot conclude the circuit court erroneously exercised its discretion on this issue.

¶22 In all, we conclude the circuit court did not erroneously exercise its discretion when denying Mary's motion to reopen the divorce judgment. Mary has not established that Loberg engaged in prohibited dual representation, that the MSA and divorce judgment were so grossly unfair and one-sided as to warrant reopening the judgment, or that her assent to the MSA was rendered involuntarily. Accordingly, we affirm the circuit court's conclusion that there are no "extraordinary circumstances" presented in this case to warrant relief under WIS. STAT. § 806.07(1)(h).

By the Court.—Order affirmed.

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