COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2018

Sheila T. Reiff
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. 2016AP2291 **Cir. Ct. No. 2013FA364**

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

IN RE THE MARRIAGE OF:

ESSA SHOUKRY YACOUB,

PETITIONER-APPELLANT,

V.

MARY ELENA YACOUB,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: JAMES M. PETERSON, Judge. *Reversed in part and cause remanded for further proceedings*.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Essa Yacoub appeals an order addressing the tax treatment of certain payments he made under a marital settlement agreement (MSA) with his ex-wife, Mary Yacoub. We conclude that, under federal law, the MSA failed to sufficiently designate the payments Essa made for Mary's COBRA insurance premiums as nontaxable events. We reverse those portions of the order in which the circuit court concluded to the contrary, required Essa to amend his 2014 and 2015 tax returns, and awarded Mary attorney's fees based, in part, upon her prevailing on that issue. We remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 Essa and Mary were divorced in February 2014. Prior to the divorce, they entered into an MSA that the circuit court approved as part of the divorce judgment. Under Section III of the MSA, entitled "Maintenance," Essa was required to make limited-term maintenance payments of $600 per month, which "shall not be modifiable in any either amount or duration." Immediately below that provision, in the same section, was a provision that stated: "Pursuant to [Internal Revenue Code] Sec. 71, the maintenance payments shall be included as income on the Respondent's [Mary's] income tax returns beginning in calendar year 2014."

¶3 Section IV of the MSA was entitled "Medical Health Care Expenses." Among other things, this section required Essa to pay for Mary's COBRA[1] insurance premiums:

> C. The Petitioner shall cooperate in timely securing an application for continuation/conversion coverage for the Respondent under his current health insurance and shall be responsible for payment of the COBRA insurance premium payable to maintain insurance coverage for Respondent, together with any and all uninsured necessary healthcare expenses such as prescriptions, copays and deductibles incurred by Respondent.[2]

Section IV did not contain any provision specifying the tax treatment of the payments Essa was to make under that section.

¶4 After the divorce was granted, the parties engaged in extensive litigation, including several contempt motions by each party. This motion practice has necessitated continual court involvement in matters related to their children and finances.[3]

¶5 In 2016, Mary filed a motion and amended motion seeking an order finding Essa in contempt for his "inaccurate reporting of alimony payments on his income tax returns for 2014 and 2015." Mary requested that Essa be required to

[1] COBRA refers to the Consolidated Omnibus Budget Reconciliation Act of 1985, which "authorizes a qualified beneficiary of an employer's group health plan to obtain continued coverage under the plan when he might otherwise lose that benefit for certain reasons, such as the termination of employment." ***Geissal v. Moore Med. Corp.***, 524 U.S. 74, 76 (1998).

[2] Section IV.C. goes on to state that Mary is responsible for insurance coverage after her COBRA coverage expires.

[3] *See, e.g.*, ***Yacoub v. Yacoub***, No. 2015AP2557, unpublished slip op. (WI App Mar. 14, 2017) (addressing issues related to a postdivorce order modifying child support and dismissing a motion for modification of spousal maintenance).

file amended income tax returns for those years. She also requested that the circuit court award her attorney fees and costs incurred in bringing the motions. Essa asserted the payments (among them the payments for Mary's COBRA insurance) fell within the Internal Revenue Code (IRC) definition of "alimony or separate maintenance payments" and were therefore income to Mary and deductible to Essa pursuant to 26 U.S.C. §§ 71 and 215 (2012).[4]

¶6 During an evidentiary hearing on the motion, testimony established that there were discrepancies between what Mary reported and what Essa reported on their respective 2014 and 2015 tax returns. Among these discrepancies, Mary did not report as income the money that Essa had paid for her COBRA insurance and out-of-pocket medical expenses, while Essa had deducted those amounts.

¶7 Following posthearing briefing, the circuit court orally granted Mary's contempt motion with respect to Essa's tax returns, although it concluded Essa had not intentionally disregarded the divorce judgment. Rather, the court concluded Essa's "deduction of the [COBRA insurance premium payments] as alimony on his 2014 and 2015 federal and state income tax returns was contrary to" the MSA's "clear terms."[5] The court reasoned that, had the parties intended to treat those payments as maintenance, the relevant payment provisions would have

[4] All references to the United States Code are to the 2012 version unless otherwise noted. On December 22, 2017, Congress repealed IRC sections 71 and 215. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11051(a), (b)(1)(B), 131 Stat. 2089 (2017). The repeals do not affect the disposition of this appeal, which concerns the time period during which both sections were in effect.

[5] The circuit court also addressed the parties' intent regarding the tax consequences of a $57,500 payment Essa had made under a qualified domestic relations order. Essa has not raised any argument regarding the tax treatment of that payment on appeal. Therefore, the court's order remains undisturbed with respect to all matters except those relating to the tax consequences of Essa's COBRA insurance premium payments.

been located in Section III, the "Maintenance" section of the MSA, or else the parties would have included an explicit statement regarding tax treatment in Section IV, just as they did in Section III.[6] As a result, the court ordered Essa to file amended tax returns.

¶8 The circuit court's oral decision was reduced to a written order, from which Essa now appeals. The order granted Mary's request for attorney's fees associated with her contempt motion in an amount to be determined. Mary requested $2857.50 in attorney's fees, representing approximately 9.5 hours of work at $300 per hour. The court found that "at least 4 hours at $300 per hour is more than reasonable for an award of attorney's fees," and it therefore awarded Mary $1200.

DISCUSSION

¶9 The parties agree this case involves the meaning of their MSA, which was incorporated into the divorce judgment. The construction of a written contract presents a question of law that we review de novo. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 30, 577 N.W.2d 32 (Ct. App. 1998). Our goal is to ascertain the parties' intentions as expressed by the contract language. ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476. If the contract is unambiguous, we apply the language as written. ***Id.*** However, if the contract's language is susceptible to more than one reasonable interpretation, we may look beyond the face of the contract and consider extrinsic evidence to ascertain the parties' intent. ***Id.***

[6] The circuit court also noted that Section VIII, entitled "Taxes," did not address the tax treatment of the COBRA premium payments.

¶10 On appeal, Mary defends the circuit court's decision on the ground that contracts are to be read as a whole. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶20, 326 Wis. 2d 729, 786 N.W.2d 78. Mary's argument is consistent with the court's reasoning: if the parties had intended the COBRA insurance premium payments to have tax consequences, they would have included a specific provision stating as much in Section IV, just as they did in Section III regarding regular maintenance payments.

¶11 As a matter of straightforward contract interpretation, we tend to agree with Mary and the circuit court. The absence of a specific provision regarding the tax treatment of the payments in Section IV, contrasted with the inclusion of such a provision in Section III, suggests the parties did not intend to treat the COBRA insurance premium payments as taxable events. However, Essa persuasively argues that this case does not turn only on principles of contract interpretation. Rather, he asserts we must view the contract in the context of the applicable federal tax law.

¶12 Essa argues that because the MSA does not explicitly state (or "designate") that COBRA insurance premium payments are not taxable, Mary is required to include those amounts in her gross income and, conversely, he may deduct them, regardless of what principles of contract interpretation would ordinarily dictate. He argues this result is compelled by the former 26 U.S.C. §§ 71 and 215. In general, the laws in existence at the time a contract is formed are incorporated into that contract. ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107, ¶60, 295 Wis. 2d 1, 719 N.W.2d 408.

¶13 Under IRC sections 71 and 215, the general rule is that "alimony or separate maintenance payments" are included in gross income by the recipient and

are deductible by the payor. *See* 26 U.S.C. §§ 71(a), 215(a). For purposes of those sections, "alimony or separate maintenance payments" are defined as any cash payment that satisfies four requirements, among them that a "divorce or separation instrument"[7] does not designate such payment as a payment that is not includable in gross income under section 71 nor allowed as a deduction under section 215. *See* § 71(b)(1)(B).

¶14 The parties cite various federal cases in support of their respective arguments. Essa primarily relies on ***Richardson v. C.I.R.***, 125 F.3d 551 (7th Cir. 1997). There, the court, interpreting the word "designate" in the federal tax statute, concluded: "For a legal instrument to make known directly that a spouse's payments are not to be treated as income, we believe that the instrument must contain a clear, explicit and express direction to that effect." ***Id.*** at 556. The court went on to note that, although the state court that had entered the relevant divorce order appeared to assume there would be no tax consequences to the payments it had ordered, this did not permit the federal taxing authorities to ignore the plain language of the statute.[8] ***Id.*** at 556-57. ***Baker v. C.I.R.***, 79 T.C.M. (CCH) 2050 (2000), also supports Essa's argument. There the tax court noted the congressional amendments to 26 U.S.C. § 71 in 1984 were meant to eliminate subjective inquiries into intent and the nature of payments in favor of a simpler, more objective test. In doing so, the court concluded "the statutory language of

[7] There appears to be no dispute that the MSA sufficed as a "divorce or separation agreement" under 26 U.S.C. § 71(b)(2).

[8] Although a state court had entered the divorce order at issue, the case was before the Seventh Circuit Court of Appeals on appeal from a decision of the tax court. ***Richardson v. C.I.R.***, 125 F.3d 551, 553-54 (7th Cir. 1997).

section 71(b)(1)(B) does not allow designations by attenuated implication." ***Baker***, 79 T.C.M. (CCH) 2050, at *3.

¶15 There are also authorities arguably supporting Mary's position. The tax court, for example, has stated that a divorce or separation instrument need not mimic the statutory language to accomplish a "designation" under 26 U.S.C. § 71. *See* ***Estate of Goldman v. C.I.R.***, 112 T.C. 317, 323 (1999), *aff'd sub nom.* ***Schutter v. C.I.R.***, 242 F.3d 390 (10th Cir. 2000). Rather, the divorce or separation instrument is sufficient if the "substance of such a designation is reflected in the instrument." ***Id.*** Moreover, even the ***Richardson*** court expressed surprise that no tax regulations explained what a divorce or separation instrument must do to "designate" tax treatment of particular payments, ***Richardson***, 125 F.3d at 556 n.3, and it suggested that the Commissioner of Internal Revenue would do a great service to state divorce courts and practitioners by addressing this "common tax problem," ***id.*** at 557 n.4.

¶16 Oddly, despite both parties relying on these various tax authorities, neither party has cited the tax court opinion that, in our view, resolves the issue presented here. In ***Medlin v. C.I.R.***, 76 T.C.M. (CCH) 707 (1998), the tax court considered a marital settlement agreement that required the husband to make monthly maintenance payments; it also required him to provide his ex-wife with new automobiles and to make payments associated with her use of such vehicles.[9] ***Id.***, *1-2. The agreement stated that all of the maintenance payments were "fully taxable as income" to the wife and deductible from the husband's income, but it

[9] The agreement also required that the husband maintain the wife as a beneficiary on his medical insurance policy. These payments were not considered by the tax court with respect to the matter at issue in this appeal, and therefore we do not discuss them further.

contained no tax instructions whatsoever with respect to the payments for the automobiles. ***Id.*** The wife in ***Medlin*** presented an argument quite similar to the one Mary makes here: that the parties implicitly designated the automobile payments as nontaxable because the agreement contained an explicit provision regarding the taxable nature of the maintenance payments, but they failed to include any such provision with respect to the automobile payments. ***Id.***, *4.

¶17 The tax court rejected the wife's argument. Although its analysis was fairly cursory, it held that under ***Richardson***'s rationale, "[t]he regulations do not provide for and we do not interpret this statutory language [in 26 U.S.C. § 71] to allow designations by implication as Alexandra contends." ***Medlin***, 76 T.C.M. (CCH) 707, at *4. Given the tax court's clear rejection of the rationale Mary embraces in this appeal, we are compelled to reverse the circuit court's order requiring Essa to amend his tax returns with respect to his COBRA insurance premium payments. Consequently, we also reverse the court's award of attorney fees. On remand, the court shall exercise its discretion anew regarding any request for an award of attorney fees in light of the rulings in this opinion.

By the Court.—Order reversed in part and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16)