

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2007

A. John Voelker
Acting 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. 2006AP824

Cir. Ct. No. 1996FA1706

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE MARRIAGE OF:
JOHN V. UTTERBACK,**

PETITIONER-RESPONDENT,

v.

NANCY L. HONAKER F/K/A NANCY UTTERBACK,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
JAMES L. MARTIN, Judge. *Reversed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM Nancy Honaker appeals from a circuit court order granting John Utterback's motion to terminate her postdivorce support payments upon her remarriage because the payments were not nonmodifiable Section 71

payments.¹ Because Utterback previously stipulated to these payments, his request for relief from those payments constituted an inconsistent position in the circuit court. Therefore, Utterback was judicially estopped from seeking relief from the payments, and the circuit court erred in granting such relief. We reverse.

¶2 The parties were divorced in 1998. The judgment of divorce contained the following provision relating to maintenance:

Maintenance: [Utterback] waives maintenance now and forever. The issue of maintenance and taxable or non-taxable section 71 payments to [Honaker] is left open at this time pending the Court's receipt of additional information from Social Security. On a temporary basis, commencing October 1, 1998 and until further order of the court, [Utterback] shall pay to [Honaker] the sum of \$226 per month as non-taxable Section 71 payments. Such payments shall not be includable in [Honaker]'s income nor shall they be deductible for tax purposes by [Utterback]. This specific authority to award section 71 payments has been granted to this court by stipulation of the parties. [Utterback] is ordered to file for disability benefits from Social Security and for supplemental Security Income. Upon receipt of the determination of disability by the Social Security Administration, the court will schedule a hearing for the final determination of maintenance/Section 71 payments.

¶3 Thereafter, the circuit court entered an order on May 1, 2003, requiring Utterback to pay Honacker “non-taxable maintenance in the amount of \$620.00, as non-taxable Section 71 payments ... for a period of four (4) years, retroactive to October 18, 2001, terminating on October 17, 2006. Such payments shall not be includable in [Honaker's] income nor shall they be deductible for tax purposes by [Utterback].” In a footnote to this order, the circuit court observed

¹ Section 71 refers to a section of the Internal Revenue Code relating to alimony and separate maintenance payments. 26 U.S.C. § 71 (2005).

that the parties had stipulated to this treatment of postdivorce support, and that this stipulation was incorporated into the judgment of divorce. The court went on to note that “[t]his court has no authority to change what the parties agreed to. That agreement is binding.”²

¶4 In July 2004, Utterback moved the circuit court to terminate the support payments under WIS. STAT. § 767.32(3) (2003-04) because Honaker had remarried.³ Among other objections to the motion, Honaker argued that Utterback was judicially estopped from seeking to terminate the support payments. The court concluded that the support payments were improperly cast as nonmodifiable Section 71 payments. Therefore, the court deemed the payments maintenance and, pursuant to WIS. STAT. § 767.32(3), terminated the payments upon Honaker’s remarriage.⁴ Honaker appeals.

¶5 The circuit court did not address Honaker’s judicial estoppel argument. We are not barred from addressing this argument because the facts upon which Honaker relies are undisputed. Whether to apply the doctrine of estoppel to undisputed facts presents a question of law which we determine independently of the circuit court. *Nichols v. Nichols*, 162 Wis. 2d 96, 103, 469 N.W.2d 619 (1991).

² This order was entered by the Honorable Paul B. Higginbotham.

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. WISCONSIN STAT. § 767.32(3) provides:

After a final judgment requiring maintenance payments has been rendered and the payee has remarried, the court shall, on application of the payer with notice to the payee and upon proof of remarriage, vacate the order requiring such payments.

⁴ This order was entered by the Honorable James L. Martin.

¶6 Judicial estoppel prevents a litigant from asserting inconsistent positions in a legal proceeding. *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). “First, the later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position—a litigant is not forever bound to a losing argument.” *Id.* at 348 (citation omitted). The doctrine of judicial estoppel recognizes that “[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error.” *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989).

¶7 We need not decide whether the circuit court correctly ruled that Utterback’s support payments were not Section 71 payments because the parties agreed and elected to treat Honaker’s postdivorce support as Section 71 payments. Section 71 payments are periodic support payments, not statutory maintenance payments. *See Ross v. Ross*, 149 Wis. 2d 713, 714-15, 721, 439 N.W.2d 639 (Ct. App. 1989). The applicable section of the tax code, 26 U.S.C. § 71, permits “nonmodifiable limited term periodic spousal support.” *Patrickus v. Patrickus*, 2000 WI App 255, ¶9, 239 Wis. 2d 340, 620 N.W.2d 205. The parties are deemed to have known this when they entered their stipulation for Section 71 payments. *Cf. State v. DeKeyser*, 221 Wis. 2d 435, 451, 585 N.W.2d 668 (Ct. App. 1998), *overruled on other grounds, State v. Veach*, 2002 WI 110, ¶118, 255 Wis. 2d 390, 648 N.W.2d 447 (counsel is expected to know the law relevant to the case, particularly when it is so closely tied with the defense strategy).

¶8 The parties’ stipulation set a short term for the Section 71 payments and did not specify any circumstances under which the payments would terminate

short of the set term. Further, the Section 71 payments could not have been ordered by the circuit court in the judgment of divorce but for the parties' agreement to settle their financial affairs in such a manner. *Ross*, 149 Wis. 2d at 719-21. It is not appropriate for Utterback to agree to Section 71 payments for a set term and then seek relief from that agreement. Utterback cannot seek modification of the terms of the stipulation.⁵ See *Nichols*, 162 Wis. 2d at 105.

By the Court.—Order reversed.

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

⁵ We note that the parties were married for almost twenty years and agreed to four years of Section 71 payments.

