COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP165-AC **Cir. Ct. No. 2002FA6**

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

IN RE THE MARRIAGE OF:

YVONNE L. DIEKVOSS, F/K/A YVONNE L. LUNDT,

PETITIONER-RESPONDENT,

V.

RONALD E. LUNDT,

RESPONDENT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Ronald Lundt appeals an order reopening a judgment of divorce. Lundt challenges the circuit court's modification of the property division and the determination of the amount and duration of

maintenance. Lundt also challenges a finding that he perpetrated a fraud on the court and insists he is entitled to a new trial on that issue. Additionally, Lundt also appeals an award of attorney fees to his ex-wife, Yvonne Diekvoss. Finally, Lundt argues the circuit court judge erred when he refused to recuse himself. We affirm.

¶2 Lundt and Diekvoss were married on October 26, 1987, and divorced on March 20, 2002. The parties represented themselves in the divorce proceedings and filed a joint petition for divorce. The financial disclosure statement was almost entirely incomplete: only the first page, showing the parties' income, was completed. No assets of any kind were listed. The parties signed the final page. The March 20, 2002 divorce hearing was held before an acting family court commissioner, who proceeded with the incomplete financial disclosure and without confirming adequate disclosure. The commissioner allowed property division issues to go unresolved on the parties' representation that they would "work that out" later. The commissioner also failed to address maintenance.

¶3 In August 2002, Diekvoss contacted an attorney to pursue personal property she had not received from Lundt following the divorce. A letter was sent to Lundt demanding the return of the personal property and requesting that Lundt contact the attorney within seven days to discuss the exchange of the items. The letter indicated that if Lundt did not contact the attorney within the specified time period, the attorney "shall file a Petition with the court to reopen the divorce action to discuss an equitable division of real estate and all personal belongings." Lundt failed to respond to the letter. Initially, Diekvoss took no action with regard to property division or maintenance. However, it later became evident to the circuit court during a hearing on Diekvoss's pro se motion for contempt in October 2005, that deficiencies and irregularities existed from the March 20, 2002 hearing. Diekvoss then filed a motion to reopen the judgment of divorce, which

the court granted on March 21, 2006. A "reopened final hearing" took place on August 16, 2006. Lundt filed post-hearing motions requesting, among other things, a new trial and relief from judgment on various grounds, which were denied. Lundt also renewed a previous motion for recusal. This appeal follows.

¶4 Lundt argues the circuit court erroneously reopened the divorce judgment under WIS. STAT. § 806.07(1)(h),[1] which provides for reopening a judgment for "[a]ny other reasons justifying relief from the operation of the judgment." Under § 806.07(1)(h), a motion for such relief may be had if "extraordinary circumstances" exist and the motion is made "within a reasonable time." ***Hutjens v. Hutjens***, 2002 WI App 162, ¶26, 256 Wis. 2d 255, 647 N.W.2d 448. Section 806.07(1)(h) is based on Fed. R. Civ. P. 60. ***Ennis v. Ennis***, 88 Wis. 2d 82, 91, 276 N.W.2d 341 (Ct. App. 1979). We have concurred with the federal interpretation that this provision must be liberally construed to allow relief from judgment "whenever such action is appropriate to accomplish justice." ***Id.*** This is similar to an "interest of justice" standard. ***Conrad v. Conrad***, 92 Wis. 2d 407, 418, 284 N.W.2d 674 (1979).

¶5 Lundt insists that no "extraordinary circumstances" justify relief and the motion to reopen was not brought within "a reasonable time." Lundt also claims that Diekvoss waived her right to reopen the judgment because she retained an attorney within six months of the March 20, 2002 divorce judgment but then took no action to reopen for several years. We are unpersuaded.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 A court's order providing relief from judgment under WIS. STAT. § 806.07 will not be reversed on appeal unless the court erroneously exercised its discretion. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). We will not find an erroneous exercise of discretion if the record shows that the circuit court exercised its discretion and that there is a reasonable basis for the court's determination. ***Id.*** at 542. The function of this court is not to exercise discretion in the first instance but to review the circuit court's exercise of discretion. *See* ***Franke v. Franke***, 2004 WI 8, ¶55, 268 Wis. 2d 360, 674 N.W.2d 832.

¶7 As we recently stated in ***Hutjens***, the timeliness of motions under WIS. STAT. § 806.07(1)(h) is "not subject to … bright–line rules." ***Hutjens***, 256 Wis. 2d 255, ¶28. Some factors the court may consider include whether the judgment was the result of a conscientious, deliberate and well-informed choice; the adequacy of counsel's representation; whether there has been a decision on the merits; whether there is a meritorious defense; and whether intervening circumstances make it inequitable to grant relief. ***Id.***

¶8 Here, the record reflects the circuit court understood and properly applied the correct legal analysis to the facts of record. As the court stated in its memorandum decision:

> In fact, based on an analysis of the factors set forth in ***Hutjens***, it is hard to imagine a judgment that should carry less weight than the original judgment in this case. In no way was it based on a "well-informed choice," neither party was represented by counsel, there was no decision made by a magistrate deciding the merits of any issue in the case….

¶9 While it may appear at first blush that bringing a motion to reopen four years after a judgment is an unreasonably long period of time, the record

supports the court's conclusion that the circumstances of this case were extraordinary. The circuit court noted "glaring omissions" in the original divorce hearing. The court observed that the findings and conclusions of the original divorce judgment were incomplete. The judgment purported to incorporate a "stipulation" of the parties; however, even a cursory review of the final hearing transcript revealed the alleged agreement to be woefully incomplete. The financial disclosure documents the parties filed listed none of their assets. Moreover, the parties apparently appended to their joint petition for divorce a typed paper which was signed by them and which stated: "I Yvonne L Diekvoss and Ronald E. Lundt have agreed upon splitting all personal property, assets, and debts. This has been completed." However, the transcript from the March 20, 2002 final hearing revealed that this document was never brought to the attention of the acting family court commissioner.

¶10 As the circuit court correctly observed, a court commissioner has an important oversight function regarding private agreements between parties to a divorce to ensure that the terms are equitable. WISCONSIN STAT. § 767.34(1) authorizes parties to a divorce to stipulate to a division of property "subject to the approval of the court."[2] As our supreme court recently stated in ***Franke***: "While 'the parties [to a divorce] are free to contract, … they contract in the shadow of the

[2] WISCONSIN STAT. ch. 767 was substantially renumbered and revised by 2005 Wis. Act 443. Section 767.34(1) was formerly § 767.10(1).

court's obligation to review the agreement on divorce to protect the spouses' financial interests on divorce.'" ***Franke***, 268 Wis. 2d 360, ¶39 (citation omitted).[3]

¶11 In its memorandum decision, the circuit court in the present case quoted ***Miner v. Miner***, 10 Wis. 2d 438, 443, 103 N.W.2d 4 (1960):

> The court has the same serious duty to examine carefully such agreements or stipulations against the background of full information of the economic status and resources of the parties as it has in making a determination without the aid of such an agreement. The parties should be examined to determine if they understand the provisions and the effect of the agreement, that it was fairly and voluntarily entered into and was not made with any concessions by either party that the suit would be uncontested. There is no such thing in this state as a divorce by consent or agreement. The parties cannot by stipulation proscribe, modify, or oust the court of its power to determine the disposition of property, alimony, support, custody, or other matters involved in a divorce proceeding. When a court follows and adopts an agreement of the parties making it a part of its judgment, the court does so on its own responsibility, and the provisions become its own judgment.

¶12 The circuit court concluded that "given the lack of information presented and the incompleteness of the stipulation, there was simply no way any presiding magistrate could have performed his or her duty under ***Miner***."

¶13 We agree that without a listing and valuation of the assets, the commissioner could not begin to determine if the agreement was fair and equitable to both parties. Indeed, the record here is devoid of any question asked of either party as to whether they even understood what their agreement was. And, without

[3] Indeed, the court in ***Franke*** noted that when a stipulation failed to address certain property in the wife's name, a circuit court's refusal to open a judgment under WIS. STAT. § 806.07 constituted an erroneous exercise of discretion. ***Franke v. Franke***, 2004 WI 8, ¶21 n.7, 268 Wis. 2d 360, 674 N.W.2d 832 (citing ***Conrad v. Conrad***, 92 Wis. 2d 407, 413, 284 N.W.2d 674 (1979)).

a listing and valuation of the property, whatever alleged agreement existed could not be enforced. Not surprisingly, the circuit court found the purported agreement to split the personal property was never carried out and much of the property was not actually exchanged. In fact, the transcript of the March 20, 2002 hearing revealed a disparate property division. Among other things, Diekvoss had no knowledge of the existence of Lundt's pension and the court found Lundt concealed over $60,000 of equity in the marital home.[4]

¶14 Significantly, the circuit court found that "a pattern of fabrication permeated the entire [original divorce] proceedings." The court also found "overreaching … so flagrant that it cries out for a finding of 'extraordinary circumstances.'" The court's findings in this regard are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Given the unprecedented circumstances of this case, the court did not erroneously exercise its discretion in reopening the case.

¶15 Lundt argues that in ***Ennis,*** we held three years was not a reasonable time in the context of an attempt to reopen a divorce judgment. However, in ***Ennis*** the entire controversy arose out of a single scrivener's error that income figures were net rather than gross. The plaintiff made no claim that she was misled in any way by the mistaken reference to gross rather than to net income, nor did she claim the defendant withheld any financial information from her prior to trial, the disclosure of which would have made the original stipulation unfair in any respect. The tax returns were signed by her prior to the original trial, and she provided copies of both to her counsel prior to the commencement of the

[4] In addition, although this was more than a fifteen-year marriage, the acting court commissioner failed to address maintenance. As such, maintenance could not have been knowingly and intelligently waived.

proceedings. We noted she offered no reason why she waited almost three years to challenge the divorce judgment. We therefore held her motion for relief was not brought "within a reasonable time." ***Ennis***, 88 Wis. 2d at 91.

¶16 To the contrary, Diekvoss was not represented by counsel at the time of the original divorce judgment and the court found that Lundt failed to disclose financial information and committed a fraud upon the court. The family court commissioner also committed deficiencies and irregularities in violation of the fundamental duties of a commissioner in a divorce proceeding. Here, the record supports the court's decision to reopen the divorce judgment.

¶17 Lundt insists Diekvoss waived her right to reopen. Lundt argues Diekvoss was represented by a lawyer within six months of the divorce judgment and that Diekvoss made "a well-informed choice not to disturb the March 20, 2002 divorce judgment." We disagree. There is no evidence in the record as to the scope of the representation in August 2002, when Diekvoss contacted an attorney to write Lundt a letter demanding that he turn over items of personal property that she had not received following the original divorce judgment. Lundt improperly speculates that Diekvoss made an informed choice not to more vigorously pursue the matter at that time. However, the fact that Diekvoss subsequently filed a pro se motion to compel supports the circuit court's inference that she had no more money for attorney fees. Furthermore, there is no evidence Diekvoss was informed of the assets undisclosed by Lundt until the circuit court noticed the glaring omissions in the original divorce judgment. As a result, we agree with the circuit court's conclusion that it "is difficult to fault Ms. Diekvoss...."

¶18 Lundt next argues "intervening circumstances" make it inequitable to reopen, including his remarriage and the adoption of his new wife's children.

The circuit court considered the intervening circumstances Lundt cited and concluded that upon close scrutiny the circumstances "evaporated." The court noted that from a pure economic standpoint Lundt was better off with the earning capacity of his new wife. Additionally, although Lundt had a legal obligation to support his new wife's children, the court adjusted for that factor in the calculation of maintenance. The court also noted that another intervening circumstance, Lundt's dramatic increase in income, "was understandably omitted from counsel's list because it does not support Mr. Lundt's position." We reject Lundt's contention that intervening circumstances made it inequitable to reopen the matter.

¶19 Lundt next argues he did not perpetrate a fraud on the court. Lundt suggests that WIS. STAT. § 806.07(2), which does not limit the power of the court to set aside a judgment for fraud on the court, does not apply in this case. Lundt contends that "[b]ecause of the trial court's citation of WIS. STAT. § 806.07(2)'s 'fraud on the court' rule, a new trial on this issue would impact the outcome of this case."

¶20 Lundt represented to the commissioner on March 20, 2002, that there was no equity in the marital home. Lundt also stated in an affidavit dated January 26, 2007, that at the time of the original divorce hearing he sincerely believed there was little or no equity in the home. However, the circuit court concluded that Lundt made an inconsistent statement under oath at his deposition when he was asked: "What do you think you had in equity in the home at the time of the divorce?" Lundt testified that "[a]t the time of the divorce I was guessing 35 to $40,000." The court concluded this was "a devastating contradiction in Mr. Lundt's testimony." Lundt replies that earlier deposition testimony made clear that he was relying on a "post-divorce appraisal to attempt to reconstruct his pre-divorce knowledge of equity in the marital home." Because we hold the court

did not erroneously exercise its discretion in reopening the matter under WIS. STAT. § 806.07(1)(h), we need not reach the issue of whether another independent basis for reopening applies, such as § 806.07(2).

¶21 Lundt next argues the circuit court erroneously exercised its discretion in awarding maintenance to Diekvoss. The original final hearing of March 20, 2002 did not discuss or consider maintenance, and Lundt concedes Diekvoss never waived maintenance. Lundt challenges the amount and duration of maintenance awarded by the circuit court.

¶22 We will sustain a decision on maintenance if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). It need not be a lengthy process. While reasons must be stated, they need not be exhaustive. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct App. 1991).

¶23 Multiple statutory factors support the award of maintenance in this case. Specifically, the court stated that three factors were most significant. First, the length of the marriage was more than fifteen years. Second, there was a significant disparity of incomes between the parties and that disparity widened since the original final hearing because of the increase in Lundt's earnings. Third, it was not feasible that Diekvoss could become self-supporting at a standard of

living reasonably comparable to that enjoyed during the marriage. *See* WIS. STAT. §§ 767.56(1), (5), (6).[5]

¶24 The court noted that Diekvoss planned to resume her education in nursing, but "appeared to be beaten down, lacking in self-confidence, and having a poor self-image." Moreover, she had been out of school for many years and the waiting list to get into nursing school was lengthy. In awarding indefinite maintenance, the court noted: "If Ms. Diekvoss succeeds in her stated goal and becomes a nurse, maintenance can be terminated at that point." The court incorporated appropriate considerations and its award of maintenance was not an erroneous exercise of discretion.

¶25 Lundt insists that Diekvoss's current cohabitation was not adequately considered by the court. Cohabitation is an appropriate factor to consider to the extent it impacts or changes the recipient spouse's economic status. ***Van Gorder v. Van Gorder***, 110 Wis. 2d 188, 198, 327 N.W.2d 674 (1983). The circuit court properly focused on the economic impact of the cohabitation and stated: "Counsel for Mr. Lundt introduced no evidence on this point." The court's allowance for cohabitation was not an erroneous exercise of discretion.

¶26 Lundt next argues the circuit court erroneously exercised its discretion in awarding Diekvoss $6,522.32 in attorney fees. The circuit court in a divorce action may award attorney fees to one party based on the financial resources of the parties, because the other party has caused additional fees by overtrial, or because the other party refuses to provide information which would

[5] Formerly known as WIS. STAT. § 767.26(1), (5), (6). *See supra*, note 2.

speed the process along. ***Randall v. Randall***, 2000 WI App 98, ¶22, 235 Wis. 2d 1, 612 N.W.2d 737.

¶27 Here, there can be no serious dispute that Lundt is in a better position to pay attorney fees than Diekvoss. The circuit court also concluded the fees awarded to Diekvoss were occasioned by Lundt's "lack of candor and overreaching." The court stated:

> This is the most flagrant case of overreaching in a divorce that I have encountered in over 30 years on the bench. Mr. Lundt took complete control of the original final hearing. Realizing that his wife wanted out of their marriage, he had her sign away her interest in the marital home. Then, at the final hearing he represented to the acting family court commissioner, that there was no equity in the home, willfully concealing over $60,000 of equity. While that was the most blatant example of his lack of candor with the court, it was by no means his last. As we have seen, within 60 days of the final hearing, Mr. Lundt cashed in a life insurance policy and pocketed over $3,500 and never accounted for any of it to his former wife. When asked about it in deposition and at final hearing, he lied.

¶28 Lundt claims it is inequitable to require him to pay attorney fees, and that "[a]ctually Ms. Diekvoss's attorney fees were occasioned by her failure to seek to have the March 20, 2002 property division redone in August of 2002." We rejected Lundt's waiver argument regarding Diekvoss's failure to seek to reopen the original divorce judgment in August 2002. Lundt's argument regarding the inequity of attorney fees is similarly rejected. The court did not erroneously exercise its discretion in requiring Lundt to contribute towards Diekvoss's attorney fees.

¶29 Finally, Lundt claims the circuit court erred by refusing to recuse itself. Lundt argues the court's "strong pattern of bias polluted its determinations

of fact and law throughout this case." The record does not support Lundt's contention of bias.

By the Court.—Judgment and orders affirmed.

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