

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2008

David R. Schanker
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. 2007AP1891-FT

Cir. Ct. No. 2003FA236

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

BARBARA JEAN ZINGG, N/K/A BARBARA JEAN HANSON,

PETITIONER-APPELLANT,

v.

MARK R. ZINGG,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM.¹ Barbara Hanson appeals an order denying her motion to reopen her divorce judgment and her petition for a constructive trust. We affirm for the reasons discussed below.

BACKGROUND

¶2 Hanson and Mark Zingg were divorced in 2004. The divorce judgment incorporated a partial marital settlement agreement dealing with the property division. Hanson was a registered nurse, and Zingg was the sole owner of Zingg Design, an architectural and interior design business. The parties had agreed during negotiations to use Zingg Design's financial records from 2000 to 2002 for the purpose of calculating Section 71 payments to Hanson. Those records included balance statements showing all of the business's assets and liabilities for the three agreed upon years, including four bank accounts. Zingg also provided a financial disclosure statement at the November 3, 2004 divorce hearing which gave a net value of \$53,479 for Zingg Design without specifying the business's assets or liabilities. Zingg had prepared his financial disclosure statement using 2003 tax documents, which had been finalized about two weeks before the hearing, and he informed Hanson that he had excluded accounts receivable from the net value for his business, since they were already accounted for in the income stream.

¶3 In 2005, Hanson moved to reopen the judgment and petitioned to create a constructive trust based on an allegation that, on his financial disclosure statement, Zingg had failed to disclose business accounts worth about \$270,000.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (2005-06). All further references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

She based her allegation on a balance sheet showing the assets and liabilities of Zingg Design as of October 31, 2004.

¶4 Following discovery, Zingg moved to dismiss the motion and petition. The circuit court heard argument on Zingg’s motion to dismiss and asked the parties whether they agreed to certain facts, after which it orally denied Hanson’s petition and motion. The court pointed out that the parties had engaged in extensive discovery with each side having its own attorney and accountant, and that they had “explicitly waived their right to engage in further discovery or secure any further appraisals” in their settlement agreement. Hanson’s accountant stated that he had received all of the information he had requested and nothing was withheld. He did not evaluate the value of Zingg’s business because he had not been asked to do so. Hanson agreed that she had not asked her accountant to perform an independent evaluation of the value of the business and that there was nothing preventing her from doing so. Hanson also agreed that the balance sheet showing figures for October 2004 had not actually been prepared until some time after the divorce hearing and that the last full year for which information was available at the time of the divorce hearing was 2003. The court concluded that Hanson was not entitled to reopen the judgment based on newly discovered evidence under WIS. STAT. § 806.07(1)(b) or misrepresentation under para. (c) and, since there was no misrepresentation, there was also no basis for a constructive trust under WIS. STAT. § 767.27.² The court subsequently denied a

² WISCONSIN STAT. § 767.27 was renumbered and amended by 2005 Wis. Act 443, §§ 68, 121, and 123, and is now WIS. STAT. § 767.127 (2005-06). None of the changes to the statute are relevant here.

motion to reconsider reopening the judgment based on a mistake under § 806.07(1)(a) or the catchall provision under para. (h), and Hanson appeals.

DISCUSSION

Need For An Evidentiary Hearing

¶5 Hanson first argues that the circuit court erred in denying her motion to reopen the judgment and petition for a constructive trust without holding an evidentiary hearing. However, the purpose of an evidentiary hearing is to resolve disputed issues of material fact. *See, e.g., Midwest Developers v. Goma Corp.*, 121 Wis. 2d 632, 652-53, 360 N.W.2d 554 (Ct. App. 1984) (no hearing on damages was required following a default judgment where opposing party had not disputed claimed amount). Here, after both parties had submitted materials such as affidavits and depositions and had argued their positions to the court, the court asked the parties whether or not they agreed with a series of factual propositions. The court then properly relied upon those stipulated facts for its decision. Hanson has not identified any additional disputed facts raised by her motion or petition which the circuit court still needed to resolve to make its rulings. Therefore, we are not persuaded that the court needed to hold an evidentiary hearing.

Relief From Judgment

¶6 WISCONSIN STAT. § 806.07(1) allows the circuit court to reopen a judgment based upon:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

... [or]

(h) Any other reasons justifying relief from the operation of the judgment.

Motions under paras. (a) or (c) must be made within one year. WIS. STAT. § 806.07(2). We review the circuit court's decision whether to reopen a judgment under the standard for discretionary decisions, considering only whether the court reasonably considered the facts of record under the proper legal standard. *See Nelson v. Taff*, 175 Wis. 2d 178, 187, 499 N.W.2d 685 (Ct. App. 1993).

¶7 Here, Hanson did not make her request to set aside the judgment under para. (a) based upon a mistake until she amended her motion, more than a year after the judgment had been entered. Because the request was untimely, the court was not required to grant relief on that basis.

¶8 The circuit court reasonably denied relief under para. (b) for newly discovered evidence based on its findings that Hanson was given all of the materials she asked for—including balance sheets that showed earlier amounts in the bank accounts she claimed were excluded from the financial disclosure statement—and chose not to ask for more information relating to the valuation of the business. In other words, Hanson failed to exercise the due diligence required by WIS. STAT. § 805.15(3)(b) in discovering the information she later claimed she should have been given.

¶9 The circuit court reasonably denied relief under para. (c) for fraud based on its findings that Zingg did not know—and could not have known—what the actual 2004 figures for his business were going to be at the time of the divorce

hearing, and that the parties had agreed to rely on the numbers from earlier years for their negotiations. That is, even if the figure Zingg used on his financial disclosure sheet for the valuation of his business as of the date of the divorce hearing later turned out to be inaccurate, there was simply no basis to find that Zingg had acted fraudulently by relying upon earlier figures, as the parties had agreed to do. Furthermore, there was no basis for finding that the additional money in the business accounts in October 2004 could not properly have been treated as income for that year—from which, according to unrefuted deposition testimony, some significant business expenses had yet to be deducted—rather than included in the net value of the business for purposes of property division.

¶10 Finally, Hanson claims the circuit court erred in failing to independently consider whether her allegations constituted extraordinary circumstances justifying relief under para. (h). However, she does not present a developed argument as to what facts allegedly constitute extraordinary circumstances, given the circuit court’s determinations that Zingg provided all requested information and did not misrepresent the value of his business on his financial disclosure statement. In short, we see no misuse of the circuit court’s discretion in refusing to reopen the judgment.

Constructive Trust

¶11 WISCONSIN STAT. § 767.27(5) provides that a court shall grant a constructive trust “upon a finding of a failure to disclose ... assets as required under sub. (1),” which includes “full disclosure of all assets owned in full or in part by either party separately or by the parties jointly.” WIS. STAT. § 767.27(1).

¶12 The circuit court held that Zingg did not fail to disclose because he made all of the necessary information about his business available to Hanson’s

accountant, and then provided “almost a proforma or perfunctory document” to comply with WIS. STAT. § 767.27. The court’s finding that Zingg had satisfied his obligation to disclose his assets was based on a reasonable interpretation of the statute, and was supported by the record. Zingg had disclosed all of the bank accounts for his business on the balance sheets from 2000 to 2002 during discovery, and he plainly treated the money in those accounts as income on his financial disclosure statement. He disclosed his income on the financial disclosure statement based on the last tax year for which information was available at the time of the hearing. We therefore agree with the circuit court’s determination that Hanson failed to establish any basis for a constructive trust.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

