

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 24, 2013

Diane M. Fremgen
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. 2011AP2552

Cir. Ct. No. 2009FA250

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

PETER F. STACHOW,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

CASSANDRA K. STACHOW,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Peter Stachow appeals and Cassandra Stachow cross-appeals from an order amending the judgment of divorce to address the parties' respective liability for 2010 taxes, interest and penalties ("2010 tax

liability”). After the 2010 tax returns were filed, Cassandra learned that the parties had significantly underpaid their 2010 taxes, yielding a joint tax obligation in excess of \$35,000. Cassandra sought relief under WIS. STAT. § 806.07 (2011-12)¹ from the requirement in the judgment of divorce that she bear half of any 2010 tax liability. After an evidentiary hearing, the circuit court ruled that there was “a little bit of fault on each side here,” and assigned 25% of the 2010 tax liability to Cassandra and 75% to Peter. Because the circuit court’s findings were not adequate to support this decision, we remanded to the circuit court for additional findings of fact. Based upon the circuit court’s additional findings and after considering further argument from the parties, we affirm the circuit court’s order assigning 25% of the 2010 tax liability to Cassandra and 75% to Peter.

¶2 On appeal, Peter and Cassandra both challenge the circuit court’s 75%-25% allocation. We are not required to address appellate arguments in the manner in which the parties have framed the issues. *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). To the extent we do not address a party’s argument, that argument is deemed rejected. *Id.* (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

¶3 The divorce trial was held on March 3-4, 2011. At that time, Peter filed a second financial disclosure statement, which was marked as an exhibit at trial. Peter’s financial disclosure statement listed many debts, but it did not disclose any 2010 tax liability. The parties agreed to a 50%-50% split of the 2010 tax liability or refund. The judgment of divorce was entered on March 30, 2011.

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

¶4 The 2010 tax returns were timely filed in April 2011.² The returns indicated a federal tax liability of \$28,832 and a state tax liability of \$6196 plus interest and penalties. The returns showed an underpayment of estimated taxes. On April 19, 2011, Cassandra moved the circuit court under WIS. STAT. § 806.07³ for relief from her agreement to pay one-half of the 2010 tax liability because her agreement was predicated on her assumption that Peter had made all estimated quarterly tax payments as was his past practice. Peter's March 2011 financial disclosure statement did not disclose that he underpaid the 2010 estimated tax payments or that there would be a tax liability for 2010. Cassandra argued that, under these circumstances, it would be inequitable to require her to pay one-half of the 2010 taxes.

¶5 At the hearing on Cassandra's WIS. STAT. § 806.07 motion, the accountant, Peter Bray, testified that he calculated the estimated tax payments, and he did not instruct Peter to underpay the estimates he prepared for 2010.⁴ Bray gave Peter the 2010 estimates with the Stachows' completed and filed 2009 returns.

¶6 Before Cassandra testified, the circuit court inquired of her what information she possessed when she agreed to share liability for the 2010 taxes.

² The record at the evidentiary hearing on Cassandra's WIS. STAT. § 806.07 (2011-12) motion for relief from the divorce judgment establishes that due to an error in the accountant's office, the 2010 returns were filed without Cassandra's signature. She learned that the 2010 returns had been filed when she called the accountant to inquire about the returns.

³ Cassandra's WIS. STAT. § 806.07 motion did not specify the subsection of this statute under which she sought relief. This omission does not impede our analysis.

⁴ The record does not reveal the 2010 estimated tax payments calculated by the accountant and given to Peter.

She replied that discovery closed in June 2010, the divorce trial was postponed, and the court declined in December 2010 to reopen discovery to update the parties' financial information. Cassandra relied on Peter's March 2011 financial disclosure statement, which did not disclose either the 2010 tax liability or Peter's failure to pay estimated taxes in the amounts calculated by the accountant. Peter always handled the parties' taxes, Bray calculated the estimates, and Peter paid the estimates in full for the seven years before 2010. She would not have agreed to the 2010 tax plan had she known that Peter underpaid the estimated taxes. It is undisputed that the 2010 returns were filed without Cassandra's knowledge or signature.

¶7 Peter's testimony was, at times, contradictory and confusing. Peter never underpaid estimated taxes before 2010. He testified that Bray calculated and provided him with the 2010 quarterly estimated tax payments. While Peter did not tell Bray that he expected reduced income in 2010, Peter contended that Bray gave him estimated tax figures for the second through fourth quarters of 2010 that were \$7000 less than what Peter paid in the first quarter of 2010. Although Peter earned \$40,000 more in 2010 than in 2009, he paid less in estimated quarterly tax payments. In what appears to be contradictory testimony, Peter also testified that the business did not do as well in 2010, at odds with the \$40,000 income increase over 2009. At the time of the March 2011 divorce trial, Peter did not have draft 2010 tax returns or any indication that there would be an underpayment.

¶8 At the close of evidence, Peter argued that Cassandra never inquired about the status of the 2010 taxes at the divorce trial, although she could have done so. He also argued that the parties earned the 2010 income and owed taxes on it even if he underpaid the estimated taxes. Cassandra countered that Peter's

conduct should relieve her from the 2010 tax liability. She also argued that she did not have the resources to pay the tax obligation.

¶9 The circuit court found “a little bit of fault on each side here” and apportioned the tax liability 75% to Peter and 25% to Cassandra.⁵ The court did not make any other findings or cite any other evidence to support its finding of “a little bit of fault on each side here.” We concluded that the circuit court did not make adequate findings to support this decision. Therefore, we remanded to the circuit court for additional findings of fact addressing the following questions:

(1) What facts support the circuit court’s determination that there was “a little bit of fault on each side here?” What facts support the circuit court’s apparent determination that Cassandra was a little bit at fault? Why did the circuit court allocate 25% of the 2010 tax liability to Cassandra and 75% to Peter?

(2) Did Peter disclose the underpaid estimated taxes and the 2010 tax liability to Cassandra at or before the March 2011 divorce trial or did Cassandra otherwise have reason to know that the estimated taxes had not been paid and that there would be a 2010 tax liability instead of a refund? What role, if any, did Peter’s failure to so disclose in his final financial disclosure statement (exhibit 6 at the March 2011 divorce trial) play in the circuit court’s 75%/25% allocation?

¶10 On remand, the circuit court found that Cassandra was “a little bit” at fault and assessed her 25% of the tax liability because she agreed outside of court and outside the partial marital settlement agreement to an equal split of the 2010 tax liability or refund. The court found that “why [Cassandra] changed her mind and agreed to be responsible for any tax liability was not clear.” Even

⁵ The circuit court required the parties to equally share tax preparation costs. We affirm this ruling. Regardless of how the 2010 tax liability is apportioned, the parties still had to incur tax preparation fees.

though Peter did not disclose to Cassandra at the March 2011 divorce trial that he underpaid the 2010 estimated taxes, the court reasoned that Cassandra could have found out that Peter had not paid the estimated taxes, but it was not clear that “she ever thought to do so.” Because Peter was at fault for not following the accountant’s estimated tax payment guidance and this failure caused the tax liability, the court allocated 75% of the tax liability to Peter. The court declined to impose 100% of the tax liability on Peter because the parties’ taxes were considered as part of the equal property division and Cassandra received most of the cash accounts in the divorce, while Peter received less liquid assets.

¶11 With regard to the impact on the 75%-25% allocation of Peter’s failure to disclose the tax liability in his final financial disclosure statement, the court concluded that nothing in WIS. STAT. § 767.127 governing financial disclosure statements requires a party to disclose a possible tax liability or refund. Both Peter and Cassandra appeal.

¶12 We review whether the circuit court erroneously exercised its discretion in granting Cassandra relief under WIS. STAT. § 806.07 from the requirement that she bear 50% of the 2010 tax liability and reallocating 25% of that liability to her and 75% to Peter. *Schauer v. DeNeveu Homeowners Ass’n, Inc.*, 194 Wis. 2d 62, 70-71, 533 N.W.2d 470 (1995).

¶13 Peter does not challenge any of the findings on remand. Therefore, the findings adverse to Peter stand.

¶14 In post-remand argument to this court, Cassandra argues that the findings do not support the circuit court’s determination that she was “a little bit” at fault such that she should pay 25% of the 2010 tax liability. The court found that Cassandra should have inquired before agreeing to an equal split of the 2010

tax liability. Cassandra counters that she could not have found out more about the taxes because the circuit court denied her request to reopen discovery.⁶ A discovery bar did not preclude inquiring of Peter regarding the 2010 taxes before stipulating or raising the question before the court at the final divorce hearing.

¶15 Cassandra argues that she is being forced to pay taxes on Peter's personal past income. She is wrong. First, at the time of the divorce, Cassandra agreed to share the 2010 tax liability. Although she now seeks to be relieved of that agreement due to Peter's conduct, her "personal past income" argument is inconsistent with the position she took in the circuit court. *Siegel v. Leer, Inc.*, 156 Wis. 2d 621, 628, 457 N.W.2d 533 (Ct. App. 1990) (a party cannot take inconsistent positions). Second, the 2010 taxes were assessed on income from a year during which the parties were married, and the income was marital.

¶16 Cassandra complains that while the circuit court intended to equalize the parties' income, the 75%-25% split upsets that decision. The court explained on remand that it imposed the 75%-25% split after considering the equal property division, but that other factors were also relevant to the decision.

¶17 Cassandra asks us to remand a second time for more findings: that Peter deliberately underpaid the 2010 estimated taxes against the advice of his accountant, Peter failed to disclose the underpayment to Cassandra, she could not have discovered the underpayment, and Peter should pay all of the taxes and penalties. There is no indication that Cassandra sought these findings in the circuit court at the time of the proceedings on remand. We will not remand.

⁶ Cassandra does not challenge the circuit court's discovery ruling on appeal. The record does not contain a transcript of this ruling.

¶18 Cassandra argues that even though she had an accountant during the divorce, Peter had to provide accurate financial information in his financial disclosure statement. Peter's failure to disclose was not the circuit court's only consideration. While the court assessed Peter with a larger portion of the 2010 taxes because he did not disclose, the court also found that Cassandra should have asked some questions before agreeing to bear one-half of the 2010 tax liability.

¶19 We conclude that the circuit court's findings are sufficient to justify its discretionary decision to grant Cassandra relief from the judgment of divorce and impose a 75%-25% split of the 2010 taxes and penalties. Essentially, the court found that leaving the parties at a 50%-50% split of the tax liability was unfair to Cassandra because Peter did not pay the estimated taxes, as was his prior habit, and as his accountant had directed him to do. But, assessing Peter with 100% of the liability was not fair to him because Cassandra agreed to bear a portion of the tax liability or receive a portion of a tax refund apparently without confirming the status of the parties' 2010 taxes. And, the circuit court reasoned that Cassandra received more liquid assets in the property division than Peter received. In other words, Peter's failure to disclose was not the circuit court's only consideration on remand and did not absolve Cassandra from all liability for the 2010 taxes.⁷

¶20 No WIS. STAT. RULE 809.25 costs on appeal to either party.

By the Court.—Order affirmed.

⁷ For these reasons, we need not reach whether WIS. STAT. § 767.127 required Peter to disclose the 2010 tax liability or his failure to make estimated tax payments at the time of the trial.

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

