

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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 Nos. 2005AP3038
2006AP1296**

Cir. Ct. No. 2004FA361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

NANCY H. ROUSH,

PETITIONER-RESPONDENT,

v.

WILLIAM S. ROUSH, JR.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Order affirmed; order reversed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. In these consolidated appeals, William Roush, Jr. appeals from two orders of the circuit court disposing of post-divorce disputes. In appeal no. 2005AP3038, William appeals from an October 25, 2005 order dividing the proceeds from the sale of the marital home pursuant to the judgment of divorce, depositing William's share of the proceeds into a WIS. STAT. § 767.30(2) (2003-04)¹ security fund, ordering additional funds deposited into the security fund due to William's failure to meet his post-divorce financial obligations, and awarding his ex-wife, Nancy Roush, attorney fees. In appeal no. 2006AP1296, William appeals from an April 24, 2006 order finding him in contempt for failing to pay child support and maintenance from January through March 2006, imposing jail time and purge conditions, and awarding Nancy attorney fees. We affirm the 2005 order. However, we reverse the 2006 contempt order because it is based on an erroneous application of the law.

¶2 William and Nancy divorced in 2005 after an almost twenty-year marriage. The judgment of divorce required William to pay monthly child support and maintenance and equally divided the anticipated net proceeds from the sale of the marital home. The judgment calculated William's share of the net sale proceeds as \$74,485. One-half of William's share of the net proceeds from the sale of the marital home was to be deposited in a WIS. STAT. § 767.30(2) security fund because William had been unreliable in the support of the family and security

¹ WIS. STAT. § 767.30 was in effect on the date that the orders from which these appeals are taken were entered as well as when the January 2005 judgment of divorce was entered. Section 767.30 was renumbered to § 767.77 pursuant to 2005 Wis. Act 443, §§ 137, 239, with an effective date of January 1, 2007. All relevant subsections remain the same. All subsequent references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

was required to assure payment of child support and maintenance. The remaining one-half of the proceeds was to be distributed to William.

¶3 In calculating William's share of the sale proceeds, the court made certain assumptions about the home's sale price and the costs of sale. In the end, however, those assumptions did not hold true. As a result, a hearing was held in October 2005 to address the disposition of the reduced amount of sale proceeds.

Appeal no. 2005AP3038

¶4 At the October 2005 hearing, the circuit court addressed the disposition of the sale proceeds. Nancy reported that William had not paid child support and maintenance for August and September 2005. In light of William's payment history, Nancy asked the court to add his share of the net sale proceeds to the security fund established in the judgment of divorce. Nancy also sought attorney fees for her efforts to achieve William's compliance with the judgment of divorce.

¶5 William argued that the judgment of divorce unconditionally awarded him a minimum of \$74,485 from the sale proceeds.² William further argued that he was unable to pay child support and maintenance at the established levels, and he offered an excuse for not having filed a motion seeking modification of those payments.

¶6 The court accepted Nancy's accounting of the sale proceeds and expenses as reasonable and turned to William's claim that the judgment of divorce

² On appeal, William goes so far as to argue that if the house had sold for \$10, he would still be owed \$74,485.

unconditionally awarded him \$74,485 as his share of net sale proceeds. The court stated that it had intended to achieve an equal property division. However, the judgment of divorce did not address the scenario facing the court and the parties: the net sale proceeds were less than expected. The court found that an equal division could only occur if the \$74,485 payment anticipated by the judgment of divorce was reduced. Therefore, the court approved a reduced payment to William.

¶7 Because William did not pay child support or maintenance in August and September 2005, the court ordered a portion of William's proceeds deposited into the security fund and a portion of the proceeds paid directly to Nancy as advance payment of child support and maintenance for October, November and December 2005. The court authorized the clerk of court to pay William's support obligations from the security fund if he did not pay Nancy by the tenth of each month. Because Nancy required a contribution and William had the ability to pay, the court awarded Nancy the attorney fees she incurred in attempting to enforce the judgment of divorce.

¶8 At the conclusion of the court's ruling, William complained that he could not pay child support and maintenance at the amounts established in the judgment of divorce. The court responded that William had not filed a motion to modify child support or maintenance. William conceded that, as a lawyer, he could file such a motion. The court directed William to self-help family law forms available in the courthouse.

¶9 On appeal, William complains that as part of the divorce proceedings, the circuit court attributed income to him that he cannot generate.

William neither appealed from the judgment of divorce nor moved to modify support or maintenance. Therefore, this issue is not before us on appeal.

¶10 William next argues that Nancy's September 2005 motion was insufficient to advise him of the issues before the court in October 2005 to the detriment of his procedural and substantive due process rights. We disagree. Wisconsin is a notice pleading state. *See* WIS. STAT. § 802.02 (2005-06). Under notice pleading, a party need only give the opposing party fair notice of the claim and the grounds upon which the claim is based. *Hertlein v. Huchthausen*, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986). Nancy's motion asked the court to reduce William's share of the sale proceeds by amounts William owed for child support, maintenance and medical expenses, and to require William to post additional security for payment of his post-divorce obligations. Nancy's affidavit in support of the motion sought attorney fees. Nancy's motion gave William sufficient notice of the issues.

¶11 We turn to the circuit court's disposition of the sale proceeds. William casts the circuit court's disposition as an improper amendment or modification of the judgment of divorce. What William fails to recognize is that a circuit court has authority to resolve ambiguities in a judgment of divorce should ambiguities later become apparent. *See Washington v. Washington*, 2000 WI 47, ¶14, 234 Wis. 2d 689, 611 N.W.2d 261. "Divorce judgments are to be construed as of the time of entry and in the same manner as other written instruments. The court will consider the whole record in construing a divorce judgment." *Id.*, ¶17 (citations omitted). Whether the judgment of divorce was ambiguous presents a question of law that we decide independently of the circuit court. *Id.*, ¶18.

¶12 A court also has the authority to effectuate its judgment.

WISCONSIN STAT. § 767.32(1)(a) should not be interpreted to strip a circuit court of its authority to put its judgment in effect. Without the authority to do all things necessary and proper to carry out the provisions of a divorce judgment, the judgment would have no effect. So although a circuit court may not revise or modify the final division of property, this court has recognized that by virtue of § 767.01(1) the circuit court has the power to effectuate its orders and do justice.

Washington, 234 Wis. 2d 689, ¶15 (citation and footnotes omitted).

¶13 The judgment of divorce made certain assumptions regarding the home's sale price and costs of sale. These assumptions did not prevail, but the judgment of divorce did not address such an eventuality. Under these circumstances, the judgment could mean one of two things: an unconditional payment of \$74,485 to William or an equal division of the actual net sale proceeds. Therefore, the judgment of divorce was ambiguous and to effectuate the circuit court's intent to equally divide the sale proceeds, the shares to the former spouses had to be recalculated. The court properly clarified the judgment. *Id.*, ¶19. Moreover, the court retained jurisdiction over the house proceeds until the proceeds were distributed. *Morrisette v. Morrisette*, 99 Wis. 2d 467, 470, 299 N.W.2d 590 (Ct. App. 1980). We conclude that the court properly resolved an ambiguity in the judgment of divorce which would have left William with more than one-half of the net sale proceeds contrary to the court's intention to equally divide the sale proceeds.

¶14 William complains that his share of the sale proceeds was usurped by the circuit court and applied directly to child support, maintenance and attorney

fees with the balance placed in the security fund.³ The court's decision to divert William's share of the proceeds to Nancy and the security fund is supported in the record. The court previously found that William was not meeting his support obligations. By diverting William's share of the proceeds to Nancy and the security fund, the court effectuated the support provisions of the judgment of divorce.

Appeal no. 2006AP1296

¶15 In appeal no. 2006AP1296, William appeals from an April 2006 order finding him in contempt for failing to pay child support and maintenance from January through March 2006, imposing jail time and purge conditions, and awarding Nancy attorney fees.

¶16 In February 2006, Nancy moved the circuit court to find William in contempt for failing to comply with the judgment of divorce. Nancy alleged that William failed to pay child support and maintenance for January 2006, and failed to pay medical and other expenses for the children. Nancy alleged that since August 2005, support payments had been obtained from the security fund, and the fund was in danger of exhaustion by August 2006. Nancy sought additional security for William's post-divorce obligations and attorney fees for her efforts to enforce the court's orders.

¶17 William opposed the contempt motion, arguing that he was not able to pay child support and maintenance at the established levels because he did not

³ William did not appeal from the judgment of divorce; therefore, the existence of the security fund is not subject to challenge in this appeal.

earn \$145,000, the income attributed to him at the time of the divorce. William argued that his income was actually \$50,365, and that Nancy had received all payments due her. However, once again, William failed to move the circuit court to modify his support obligations.

¶18 At the hearing, Nancy testified that she obtained monthly support payments from the security fund for January through March 2006, and the fund had been reduced by more than half. William testified that he had neither the income nor other resources to make the payments required by the judgment of divorce.

¶19 The court found that William was aware of his post-divorce obligations, and he did not meet those obligations; rather, payments had to be made from the security fund. William's failure to pay was intentional. The court found that William had \$50,592 in a money market account⁴ from which he could have paid his support obligations. Despite being reminded by the circuit court of the procedure, William did not seek modification of his obligations via a motion. William also did not substantiate his claim that he had been ill and that illness had reduced his income, and he did not offer a comprehensive explanation about his earnings or inability to increase his earnings. Because William did not establish an inability to meet his obligations, he was in contempt. The court set purge conditions⁵ and awarded Nancy \$1250 in attorney fees. The court required

⁴ The proceeds of a liquidated 401(k) account.

⁵ Among other things, the purge conditions required William to transfer the money market funds to the security fund or serve a jail sentence, and to make subsequent child support and maintenance payments to the clerk of circuit court.

William to make his future support payments from cash-on-hand, not from the security fund.

¶20 On appeal, William does not dispute that he violated the judgment of divorce by not making monthly support payments directly to Nancy. He challenges the contempt finding because he lacks the income to pay support and because funds remained in the security fund at the time the circuit court found him in contempt.

¶21 In *Roush v. Roush*, No. 2006AP2128, unpublished slip op. (Wis. Ct. App. Mar. 26, 2008), we held that a party who funds a WIS. STAT. § 767.30(2) security fund cannot be held in contempt for not making support payments directly to the party receiving support. *Id.*, ¶25.⁶ It is clear from the record that there were sufficient funds in the security fund to cover support payments at the time Nancy brought her contempt motion. The record indicates that at the time of the contempt hearing, the security fund had a balance of approximately \$29,000; William's monthly child support and maintenance obligation was \$4402. Therefore, the circuit court lacked authority to hold William in contempt for failing to pay Nancy directly. The contempt order must be reversed.

¶22 In conclusion, we affirm the October 2005 order relating to the disposition of the proceeds from the sale of the house. We reverse the April 2006 order holding William in contempt. No costs to either party.

By the Court.—Order affirmed; order reversed.

⁶ We cite this unpublished court of appeals case as the law of the case. WIS. STAT. RULE 809.23(3) (2005-06).

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

