COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1922 **Cir. Ct. No. 2003FA256**

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

IN RE THE MARRIAGE OF:

KAREN KRISTINE LEE , F/K/A KAREN KRISTINE LEE-VEITH,

PETITIONER-APPELLANT,

V.

STEVEN CHARLES VEITH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Karen Lee appeals an order modifying her divorce judgment to require Karen and her ex-husband Steven Veith to share equally in the capital gains tax liability that resulted when Steven sold real property post-divorce.

Karen argues the circuit court was precluded from modifying the unambiguous judgment regarding the property division. We agree and reverse the order.

BACKGROUND

¶2 The court orally granted a judgment of divorce on August 23, 2004, pursuant to a marital settlement agreement. A "Findings of Fact, Conclusions of Law and Judgment" was filed on December 2, 2004. As part of the marital settlement agreement incorporated into the judgment, Steven was awarded "all right, title and interest" in the marital residence/farm. The agreement also required that Steven "shall hold [Karen] harmless from any and all liability to the residential property." Karen was awarded an equalization payment secured by a promissory note and a second mortgage. Steven subsequently sold the realty. On September 20, 2005, Steven filed a "Motion for Supplementation of Final Judgment of Divorce."[1] This motion essentially sought a modification of the divorce judgment because he would be required to pay capital gains tax related to the sale of the realty.

¶3 The matter came before the court for hearing on September 27, 2005, together with various unrelated matters. Karen objected to the hearing as being untimely noticed. The court stated:

> What I'm going to do is I'm going to take it under advisement for today. Let's see if we can resolve some of the other issues today. And I'll give you an adequate time to respond. And if we need a further hearing we'll get one. But I'm going to need time to review that as well. The only thing I would say in regard to that motion relating to capital

[1] The parties engaged in numerous filings post-divorce that are not the subject of this appeal and therefore will not be addressed.

> gains, I can tell you right now, that an estimate of the tax liability is not going to be sufficient. It's just not.

¶4 Although there was no testimony or evidence taken with regard to the issue of capital gains tax liability during the September 27, 2005 hearing, the court issued a decision and order on November 1. With regard to the capital gains issue, the order stated:

> ORDER
>
> Based upon all the hearings and files herein, it is ordered as follows:
>
> 1. The Court finds that, as the business entity known as Coventry Cove Farms was awarded to the petitioner in this matter, it is equitable and proper that any tax consequence resulting from the former marital residence/real estate of the parties' attributable to depreciation for said business entity should be shared equally by the parties.

¶5 On November 4, Karen filed a "Motion to Vacate #1 of the Order Section of the November 1, 2005 Decision [and] Order." The motion was based upon the fact that Karen was given no opportunity to provide evidence before the court rendered its decision. An evidentiary hearing was commenced on February 1, 2006, and an oral decision was rendered on May 3, 2006, reaffirming its November 1, 2005 order. On May 25, 2006, the court issued a written order, and Karen now appeals.

DISCUSSION

¶6 Karen argues that WIS. STAT. § 767.32(1)(a) (2003-04)[2] precludes a circuit court from revising or modifying an unambiguous divorce judgment with

[2] References to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

respect to the division of property. Karen insists the court erred by construing the unambiguous agreement to relieve Steven from what the court viewed as disadvantageous terms. We agree.

¶7 Divorce judgments are to be construed as of the time of entry and in the same manner as other written instruments. ***Hutjens v. Hutjens***, 2002 WI App 162, ¶14, 256 Wis. 2d 255, 647 N.W.2d 448. Ambiguity exists when the language of the written instrument is subject to two or more meanings, either on its face or as applied to the extrinsic facts to which it refers. ***Washington v. Washington***, 2000 WI 47, ¶18, 234 Wis. 2d 689, 611 N.W.2d 261. A divorce judgment that is clear on its face is not open to construction. ***Id.***, ¶17. Determining whether an ambiguity exists is a question of law, which we decide independently of the circuit court, benefitting from its analysis. ***Hutjens***, 256 Wis. 2d 255, ¶15.

¶8 In ***Hutjens***, the wife entered into a stipulation that allowed a lien on the marital property to be satisfied by the husband paying her $250 monthly. No mention was made of accrual of interest on the lien. The wife subsequently sought to modify the amended judgment to reflect interest on her lien. We concluded that mere silence regarding interest did not render the divorce judgment ambiguous. ***Id.***, ¶30. We held the judgment revealed just one interpretation, that payment was to be $250 per month, with no interest provided. ***Id.***, ¶23.

¶9 Similarly, in the present case, the judgment reveals just one interpretation, that Steven was awarded "all right, title and interest in the parties' residence/farm," and in return Karen was to receive an equalization payment. The judgment specifically addressed how Steven was to make the equalization payment. No mention was made of capital gains tax liability or even the sale of

the realty, although Steven concedes in his brief that "[a]t least some of the real estate was in fact going to be sold, consisting of 19 acres with the show barn."[3]

¶10 The fact that the stipulated divorce judgment was silent concerning the capital gains tax consequences of a potential future sale of the property does not change the meaning of the agreement or render the judgment ambiguous. *See* ***id.***, ¶23. The divorce judgment in this case must be upheld to mean what it says, and the circuit court erred by using the mechanism of construction to restructure the unambiguous agreement to relieve Steven from what the court viewed as disadvantageous terms.

¶11 Steven argues his motion to modify the judgment could be construed as a motion for relief from judgment under WIS. STAT. § 806.07.[4] Steven contends relief was appropriate for "mistake, inadvertence, surprise, or excusable neglect" under WIS. STAT. § 806.07(1)(a). Steven also insists the tax liability could be described as "newly—discovered evidence" under § 806.07(1)(b), because the "depreciation problem existed at the time of the divorce but the parties were unaware of same until after the sale." Steven fails to adequately develop these arguments, and we will not abandon our neutrality by developing Steven's arguments for him. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

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[3] Although a circuit court is required to consider the tax consequences of a property division under WIS. STAT. § 767.255(3)(k) (2003-04), there were no capital gains tax consequences at the time of the judgment in this case. A court is not required to consider the tax consequences of a hypothetical or theoretical disposition of property. ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 480, 377 N.W.2d 190 (Ct. App. 1985).

[4] Steven's motion filed in the circuit court did not identify WIS. STAT. § 806.07 as a basis for relief.

¶12 Even on the merits, however, Steven's arguments fail. We note Steven stipulated to the marital settlement agreement, which was approved by the court, after full negotiation by the parties after two days of trial. Moreover, Steven signed the parties' joint tax returns and concedes in his briefs to this court that he knew at the time of the divorce the property had previously been depreciated.[5] Steven also testified on cross-examination that he took depreciation on a business he previously operated on the marital property, and that he understood what depreciation meant.

¶13 Although Steven now claims he was not aware of the capital gains tax liability until after the sale of the property, nothing prevented Steven from discussing with his accountant or attorney prior to the stipulation any issues involving tax implications of a sale of the property. Steven had all the information available to him when he was negotiating the marital settlement agreement, including the possibility of a sale. The fact that Steven did not ask does not subject his stipulation to revision on the basis of mistake, inadvertence, surprise, excusable neglect or newly discovered evidence.[6]

[5] In his brief to the circuit court, Steven represented that, "Subsequent to the sale of the property, Mr. Veith visited with the former family accountant and was alerted for the first time that Ms. Lee had depreciated part of the marital residence and some of the equipment, as business expenses associated with her Coventry Cove Farms business." However, the parties' accountant testified under cross-examination at the subsequent hearing that he believed both parties knew there was depreciation being taken.

[6] Karen also argues these provisions are inapplicable because the motion was filed more than a year after the judgment. It appears from the record that the motion was filed within a year of the written judgment of divorce, but more than a year after the oral judgment granting the divorce. In addition, Karen argues that if Steven had not indicated an intention to retain the realty, she could have taken steps to attempt to avoid capital gains tax liability by a like-kind exchange to another business venture. Because we conclude the judgment was not subject to revision, we need not address these issues.

¶14 Steven also insists the "comments of the court implicate Wis. Stat. § 806.07(1)(h)," which provides for reopening a judgment for any 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***, 256 Wis. 2d 255, ¶26. We will not find an erroneous exercise of discretion in granting a motion under § 806.07(1)(h) if the record shows the circuit court exercised its discretion and that there is a reasonable basis for the court's determination. ***Id.***, ¶27.

¶15 Here, the record does not reflect the circuit court analyzed WIS. STAT. § 806.07(1)(h), or even mentioned the statute in either its November 1, 2005 order or the May 25, 2006 order affirming the initial order. The November 1 order simply stated, without the benefit of any testimony or evidence, that it was "equitable and proper" that the tax consequences of the sale of the realty be shared by the parties.

¶16 The May 25, 2006 order affirming the initial order also did not state any basis in law for modifying the divorce judgment. However, it is clear from the court's oral statements at the May 3, 2006 decision hearing that the court believed it should have considered the capital gains tax consequences on its own initiative:

> I think it is an oversight. It certainly was—I can speak from my perspective. It was an oversight on the part of the Court, not demanding more information in terms of the joint tax returns that have been filed. I guess if I'd have gotten all of them and looked at the depreciation schedules, I could have figured out that, hey, wait a minute, this may have an effect and maybe a substantial effect on the division of these parties' assets.

¶17 The circuit court is not an advocate. ***Fowler v. Fowler***, 158 Wis. 2d 508, 519, 463 N.W.2d 370 (Ct. App. 1990). If the parties do not present the court with evidence as to the tax consequences of the parties' stipulation, it is not up to the court to demand the evidence. ***Id.*** Therefore, to the extent the court's order could be construed as having been decided under WIS. STAT. § 806.07(1)(h), we conclude the court erroneously exercised its discretion by improperly placing itself in the position of an advocate.[7]

By the Court.—Order reversed.

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

[7] We note both parties fail to conform to the requirements of WIS. STAT. RULE 809.19. The briefs lack citations to the record on appeal and cite generally to multi-page documents such as "R48," which is the court's "Findings of Fact, Conclusions of Law and Judgment." In addition, their citations do not always support the allegations of fact made in the briefs. The briefs also lack pinpoint cites for citations to legal authority. It should be clear to all lawyers that appellate briefs must give references to page and line of the record on appeal for each statement and proposition made in the appellate briefs, and that citations to caselaw must include the specific page or paragraph referenced. This has unnecessarily complicated our review in this case. We remind the attorneys that the rules of appellate practice are designed in part to facilitate the work of the court.