

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2012

A. John Voelker
Acting 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 No. 2011AP1910-FT

Cir. Ct. No. 2008FA480

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

DAVID JOHN CAREW,

PETITIONER-APPELLANT,

V.

CHRISTINE ELIZABETH CAREW,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Fond du Lac County:

DALE L. ENGLISH, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ This appeal arises from a postjudgment contempt hearing and subsequent order finding David Carew in contempt for nonpayment of an equalization sum he owed his former wife Christine Carew as part of their judgment of divorce. David contends the circuit court improperly exercised its discretion by ordering the parties to cooperate in signing and filing an amended 2007 joint federal income tax return and in awarding an equal division of the expected refund to each party. We disagree. The circuit court's postjudgment order requiring the parties to cooperate in filing the joint tax return and equally dividing the expected refund was a proper application of the final judgment of divorce. We therefore affirm.

Facts

¶2 David and Christine married on September 19, 1998. Before the marriage, they entered into a premarital agreement in which each party waived any rights they otherwise may have had in the individual property of the other party. The agreement further stated there would be no marital property of any kind except items specifically titled in joint names as husband and wife or joint tenancy or survivorship marital property and that, in the event of a divorce, each party was waiving any statutory rights in separate property as described in the agreement.

¶3 David filed for divorce in 2008. Prior to the grant of divorce, David and Christine entered into a final stipulation, which was approved in its entirety²

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Except that the final stipulation was orally amended at the time of trial on two nonrelevant points.

by the circuit court and was incorporated into the March 18, 2010 judgment of divorce.

¶4 In the stipulation, David and Christine agreed they each would be awarded their separate property as defined by the premarital agreement. With regard to their 2009 income taxes, the stipulation stated they would “file joint federal and state income tax returns and [would] equally divide any refund.” They further agreed in the stipulation that David would pay Christine an equalizing payment of \$385,000 within seventy-five days of the date of the final hearing. The stipulation emphasized that “[t]ime is of the essence with respect to the payment of the equalizing payment.” (Emphasis omitted.)

¶5 Nine months after the judgment was entered, David still had not paid Christine any portion of the \$385,000 he owed her. Based on David’s nonpayment, Christine filed a motion asking the circuit court to find David in contempt. On December 28, 2010, the circuit court issued an order to show cause³ why David should not be found in contempt and set a hearing date of May 4, 2011.

¶6 At the hearing, the Carews’ former accountant, Jeffrey Timler, testified that he filed the Carews’ 2009 joint tax return. Timler further informed the court that the Carews incurred a net operating loss of \$152,462 related to their 2009 taxes. The loss was generated from property owned solely by David. Timler explained that, because the Carews did not elect to forego the “carryback”⁴ period

³ An order to show cause is commonly issued by circuit courts to attain compliance with judgment provisions. *Morrisette v. Morrisette*, 99 Wis. 2d 467, 470, 299 N.W.2d 590 (Ct. App. 1980).

⁴ A carryback is “[a]n income-tax deduction (esp. for a net operating loss) that cannot be taken entirely in a given period but may be taken in an earlier period (usu. the previous three years).” BLACK’S LAW DICTIONARY 227 (8th ed. 2004).

on their 2009 taxes, the net operating loss could not be applied to years in the future. The Carews would have to carry the 2009 net operating loss back to a prior year in order to obtain a tax refund.

¶7 To gain the benefit of the refund, the Carews decided to carry the 2009 net operating loss back to tax year 2007.⁵ In an effort to accomplish this carryback, Timler's office prepared a Form 1045, Application for Tentative Refund, reflecting the 2009 net operating loss of \$152,462 and the resulting refund of \$71,732. The 1045 application was signed and mailed in March 2011; however, the application was returned by the Internal Revenue Service as untimely because it was submitted after December 31 of the year following the net operating loss, in this case 2010.

¶8 Given the return of the 1045 application, Timler explained to the circuit court that in order for the Carews to receive the \$71,732 tax refund, they instead would have to file an amended 2007 joint tax return, a 1040X, claiming the refund. Because the 1045 application had just been returned, at the time of the hearing Timler's firm was in the process of preparing the amended 2007 joint tax return but it had not been completed. Timler testified that he assumed David still intended on seeking the refund since David had originally submitted the 1045 application for that purpose. Timler confirmed that because the Carews' original 2007 tax return was a joint return, "any refund from that year would be a joint—a [refund] check made out in both [David's and Christine's] names."

⁵ It is undisputed that the parties originally filed joint federal and state income tax returns for the year 2007 and equally shared in the refund.

¶9 Despite substantial assets available to David, as of the time of the contempt hearing, more than one year after the final divorce judgment was entered, David still had not made any payments toward the \$385,000 equalizing sum he owed Christine. During its oral ruling on the contempt motion, the circuit court noted that it had been emphasized in the divorce judgment and at the final divorce hearing that “time was of the essence” with regard to the equalization payment. The circuit court found David in contempt and expressed its concern over David’s failure to pay, stating, “Something has got to happen and it’s got to happen soon.” Among other directives related to satisfying the equalization payment, the court ordered that David and Christine cooperate in signing and filing the amended 2007 joint tax return to procure the tax refund related to the 2009 operating loss, explaining:

Well, I don’t know why they wouldn’t do it anyway but—and it’s my understanding that they were going to based on the testimony of Mr. Carew....

....

But just to be clear so we don’t have to come back here in 150 days because it hasn’t been done, I’ll order that both parties cooperate in signing the document for the tax refund.

The court ordered that the expected refund be equally split between David and Christine and that David’s share be applied to the equalization payment. The court reasoned:

With respect to the net loss carryover and how that is to be allocated—and it’s undisputed that the loss resulted from Mr. Carew’s separate property.... It’s also undisputed however that the 2009 return, which is to be amended, was a joint return and that the net loss carryover is to be applied as against the 2007 tax return which was a joint return.

I agree with the family court commissioner’s analysis of it ... to my way of thinking where the [2009] joint return is

being amended to apply a net loss to a prior joint return for a refund, I'm going to find that the refund then is joint property and \$35,866.00 will be awarded to Ms. Carew and the same amount to Mr. Carew. And that as a condition of purge, the \$35,866.00 will also be applied to the equalization payment and then any interest.

Law and Discussion

¶10 On appeal, David contends that the circuit court erred by ordering the parties to cooperate in signing and filing an amended 2007 joint federal income tax return and awarding equal division of the resulting refund to each party because the refund was generated by a net operating loss from David's separate property.⁶ We disagree.

¶11 In his briefing before this court, David attempts to cast the circuit court's order as an improper amendment or modification of the judgment of divorce. He seems to contend that the only way the court could have acted as it did postjudgment was if Christine had filed a motion to reopen the judgment pursuant to WIS. STAT. § 806.07.⁷

⁶ On appeal, David claims that the "net loss carryover ... is conceded by all parties to be David's separate property as defined by the pre-nuptial agreement." Christine ardently disagrees, pointing out that she conceded it was his property that originally generated the loss, but not that the loss remains his separate property when claimed in a joint tax return.

⁷ WISCONSIN STAT. § 806.07 provides in pertinent part:

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

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

(b) Newly-discovered evidence which entitles a party to a new trial under [WIS. STAT. §] 805.15(3);

(continued)

¶12 A circuit court, however, has continuing authority to effectuate a final divorce judgment. While the division of property in a divorce judgment is final, the circuit court’s jurisdiction continues until the property is disposed of pursuant to the provisions of the property division contained in the judgment of divorce. *Washington v. Washington*, 2000 WI 47, ¶14, 234 Wis. 2d 689, 611 N.W.2d 261. As our supreme court has emphasized:

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, ... by virtue of [WIS. STAT. §] 767.01(1) the circuit court has the power to effectuate its orders and do justice.⁸

Washington, 234 Wis. 2d 689, ¶15; *see also* WIS. STAT. § 767.59(1c)(a)2. (“On the petition, motion, or order to show cause of either of the parties ... a court may ... [m]ake any judgment or order on any matter that the court might have made in the original action.”). Given this authority, how a circuit court chooses to

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

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

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

⁸ WISCONSIN STAT. § 767.01(1) provides in pertinent part: “The circuit courts have jurisdiction of all actions affecting the family and have authority to do all acts and things necessary and proper in those actions and to carry their orders and judgments into execution as prescribed in this chapter.”

effectuate its divorce judgment is reviewed for an erroneous exercise of discretion. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (we review a discretionary decision under the deferential erroneous exercise of discretion standard). We look to the record for reasons to sustain the circuit court's exercise of discretion. *See Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737; *see also State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶13 In addition, a circuit court has authority to resolve ambiguities in a judgment of divorce should ambiguities later become apparent. *See Washington*, 234 Wis. 2d 689, ¶¶16-18. In some circumstances, silence in a divorce judgment can create an ambiguity. *See id.*, ¶4 (where a divorce judgment ordered equal division of a federal pension, but its silence on the allocation of appreciation and interest of the pension created ambiguity). Whether a judgment of divorce is ambiguous is a question of law we review de novo. *See id.*, ¶18. Once we conclude a judgment is ambiguous, however, a deferential standard of review is appropriate. *See Cashin v. Cashin*, 2004 WI App 92, ¶12, 273 Wis. 2d 754, 681 N.W.2d 255. If the circuit court used a reasonable rationale in resolving an ambiguity, we will affirm the court's clarification. *Id.*, ¶12 (“Because the judge who drafted the ambiguous language has a superior practical knowledge of its meaning, when the judge resolves an ambiguity based on his or her experience of the trial and uses a reasonable rationale, an appellate court is to affirm the clarification by the trial judge.”).

¶14 This law explained, we begin by addressing David's argument that the circuit court erred in requiring the parties to cooperate in signing and filing the amended 2007 joint tax return. This claim is a nonstarter. First, ordering parties in a divorce action to file a joint income tax return and determining what the

parties must do with their tax refund by itself is not clearly erroneous. *See Forester v. Forester*, 174 Wis. 2d 78, 94, 496 N.W.2d 771 (Ct. App. 1993) (where we observed no error with the court commissioner's order directing the divorcing couple to file a joint income tax return and further directing the husband to deposit any refund from that return with the clerk of courts).

¶15 Second, despite David's protestations about being ordered to cooperate in filing the amended return, the record indicates that he almost certainly would have done precisely this even without an order. Prior to the circuit court's order to sign and file the amended 2007 joint tax return, the 1040X, David had already tried to procure the refund by submitting the 1045 application. David's accountant testified that, given the untimely filing of the 1045 application and the resulting inability to claim the refund through its filing, the way to claim the refund now would be to file an amended 2007 joint tax return. The accountant believed David would sign the amended 2007 joint tax return once it was completed, since David had originally sought the refund through the 1045 application.

¶16 Third, it is evident the circuit court viewed its order to cooperate in the signing and filing of an amended 2007 joint tax return as a formality. As noted, the Carews' accountant testified that he expected David to continue pursuing the refund. The court also observed that David himself testified that he was attempting to procure the refund. Nonetheless, the court said it would order David and Christine to cooperate in signing and filing an amended 2007 joint tax return "just to be clear."

¶17 Most significantly, as the Wisconsin Supreme Court has recognized, a final division of property in a divorce judgment does not always resolve all

matters between the parties and action by the circuit court may be needed “to effectuate the objectives of the final division without disrupting the finality of the judgment.” *Washington*, 234 Wis. 2d 689, ¶14. To that end, the circuit court retains jurisdiction “until the property [is] disposed of pursuant to the provisions of the division contained in the judgment of divorce.” *Id.* (quoting *Morrisette*, 99 Wis. 2d at 470). Further, WIS. STAT. § 767.01(1) “vests in the circuit courts the authority to do all things ‘necessary and proper’ in actions affecting the family and ‘to carry [the courts’] orders and judgments into execution.’” *Washington*, 234 Wis. 2d 689, ¶14 (quoting § 767.01(1)).

¶18 That is the case here. The circuit court clearly viewed the filing of the amended 2007 joint tax return, and the resulting refund, as a means of effectuating the divorce judgment. In the judgment, the circuit court ordered David to make an equalization payment to Christine of \$385,000 within seventy-five days of the judgment. Despite substantial assets available to him, more than one year later David still had not paid a dime toward that equalizing sum, and the circuit court found him in contempt for this. The circuit court’s concern with getting dollars flowing from David to Christine in a timely manner, as required by the divorce judgment, was clear: “Something has got to happen and it’s got to happen soon.”

¶19 Based upon the foregoing, the court did not erroneously exercise its discretion when it effectuated the final divorce judgment by ordering David and Christine to cooperate in signing and filing the amended 2007 joint tax return to secure the tax refund as a means of partially satisfying the equalization payment.

¶20 We next consider David’s contention that the circuit court erred in ordering an equal division of the joint tax refund expected to be realized from the

amended 2007 joint tax return. It is undisputed that the net operating loss at issue was generated from David's separate property. The tax refund related to that loss, however, is to be realized through the filing of an amended joint tax return, resulting in a joint tax refund check made out to both David and Christine. In ordering that the refund be used toward satisfying the equalization payment, the court necessarily had to decide whether the full \$71,732 refund should go toward satisfying the \$385,000 David owed Christine or whether Christine was entitled to some portion of that amount outside of and separate from satisfaction of the equalization payment. The court did not err in deciding that Christine was entitled to half of the refund outside of and separate from the equalization payment.

¶21 *Washington* again underpins our conclusion. Just as the circuit court had the authority to order the parties to cooperate in the signing and filing of the amended 2007 joint tax return, it also had the authority to order the equal division of the resulting refund.

¶22 As noted, the final division of property in David and Christine's divorce judgment did not resolve all matters between the parties. With regard to their 2009 taxes, the joint stipulation and final judgment specifically required the Carews to file a joint 2009 income tax return and equally split any resulting refund. The judgment, however, did not address the unanticipated situation that arose here, where a refund related to the marriage and those same 2009 taxes was discovered after the judgment was finalized. The silence in the final divorce judgment on this matter created an ambiguity. As a result, a decision by the circuit court was needed in order to clarify the ambiguity and "effectuate the objectives of the final division [of property]." See *Washington*, 234 Wis. 2d 689, ¶14.

¶23 The circuit court had before it its divorce judgment in which David and Christine stipulated to, and the court ordered, an equal division of any refund resulting from their 2009 joint tax return. The uncontroverted testimony of the Carews' accountant was that the net operating loss at issue in this case and the joint tax refund to be realized through the filing of the amended 2007 joint tax return related to the Carews' 2009 joint taxes. The amendment to the 2007 joint tax return was merely the accounting mechanism being utilized to procure this refund. The court also heard the accountant's uncontroverted testimony that the Carews' 2007 tax return was also a joint return and that any refund from the amended 2007 joint tax return would be a joint refund issued as a check made out in both David's and Christine's names. From this evidence, it was hardly surprising that the court viewed the expected tax refund in this case as "joint property" and it was hardly a stretch for the court to decide that the refund check should be equally divided. The court's decision to split the refund evenly was a reasonable and appropriate exercise of its discretion which did not disrupt the finality of the divorce judgment. *See id.*; *see also Cashin*, 273 Wis. 2d 754, ¶12.

Conclusion

¶24 Because David failed to pay Christine any portion of the \$385,000 equalization sum ordered by the circuit court in the final divorce judgment, substantial issues regarding the final division of property were still unresolved at the time of the contempt hearing. To effectuate the divorce judgment, the court properly ordered David and Christine to sign and file the amended 2007 joint tax return so the related refund could be utilized toward satisfaction of the equalization payment David owed Christine.

¶25 Utilizing the amended 2007 joint tax return and related refund to effectuate the divorce judgment, the court necessarily had to decide whether the full \$71,732 refund from that amended tax return should go toward satisfying the equalization payment or whether Christine was entitled to a portion of that amount outside of and separate from the equalization payment. Considering the joint nature of the Carews' 2007 and 2009 tax returns, the final divorce stipulation and judgment ordering an equal division of any refund related to their 2009 tax return, the fact that the amended 2007 joint tax return was simply the accounting mechanism being utilized to effectuate the refund related to this tax year 2009 operating loss, and the fact that the refund check from the amended 2007 joint tax return would be issued in both David's and Christine's names, the court did not err in deciding Christine was entitled to half the refund outside of and separate from satisfaction of the equalization payment.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

