COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3249 **Cir. Ct. No. 89-FA-418**

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

IN RE THE MARRIAGE OF:

NORMAN L. ZIMDARS,

PETITIONER-RESPONDENT,

V.

MARGARET A. VANCLEAVE, F/K/A MARGARET A. ZIMDARS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: JACQUELINE R. ERWIN, Judge. *Reversed and cause remanded.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Margaret Van Cleave appeals from a domestic relations order which arranged for distribution of payments from her ex-husband Norman Zimdars' retirement plan pursuant to a stipulated divorce judgment.

Van Cleave contends that the judgment was ambiguous with respect to the treatment of interest on her portion of the retirement account and whether her payments would continue after her death or, in the alternative, that she is entitled to relief from the judgment. We are not persuaded that the judgment was ambiguous or improperly construed but conclude the trial court erred in failing to hold a hearing on whether Van Cleave was entitled to relief from the judgment. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 Zimdars and Van Cleave were divorced in 1989 following a twenty-six-year marriage. The divorce judgment incorporated a stipulation between the parties drafted by Van Cleave's attorney. Paragraph 9 of the stipulation provided:

> **PENSION**: The parties hereto stipulate that the petitioner's interest in his Wisconsin State Retirement Fund account (pension) would equal a monthly annuity of $1,169.02 for a period of twelve (12) years, if the petitioner were eligible to retire as of the date of this divorce. It is therefore the agreement of the parties that, at the time of his retirement, the petitioner shall direct the Wisconsin State Retirement System plan administrator to forward his checks to the Office of the Clerk of Courts of Waukesha County, whose offices are located at 515 West Moreland Blvd., Waukesha, WI 53188. The Clerk of Courts is then directed to distribute to the respondent MARGARET A. ZIMDARS (CLARK) the sum of $584.51 for a period of up to 144 months. The remaining balance of said checks shall be distributed to the petitioner NORMAN L. ZIMDARS. All payments made herein shall be construed as Section 71 Payments under the Internal Revenue Code and shall be tax deductible by the petitioner and tax includable to the respondent.
>
> In the event that the petitioner dies before all 144 payments are made to the respondent, this obligation shall terminate and respondent shall be entitled to one-half any lump sum payment due to the petitioner through this Plan. The

> balance of any lump sum payment shall be awarded to the petitioner.

¶3 In 2001, in anticipation of retirement, Zimdars asked the court to approve a domestic relations order directing that the Clerk of Courts distribute a monthly payment of $584.51 from Zimdars' check to Van Cleave for a period not to exceed 144 months. The proposed order further specified that the payments would cease upon Van Cleave's death; that the payments would continue after Zimdars' death if there was a continued annuity; and that if the annuity was discontinued after Zimdars' death, Van Cleave would receive a percentage of any lump sum death benefit awarded, calculated based on the amount of her fixed sum divided by the amount of the benefit received by Zimdars in the month preceding his death, but in no event greater than the amount Van Cleave would have received by multiplying her fixed monthly amount by the number of months remaining in the stream of 144 payments.

¶4 In response, Van Cleave asked the trial court to either construe the divorce judgment to allow entry of a Qualified Domestic Relations Order awarding her a 50% interest in Zimdars' pension plan as of the date of divorce, or to grant her relief from the judgment under WIS. STAT. § 806.07(1)(h) (2000-01) [1] by entering such an order. The trial court denied Van Cleave's motions and entered a domestic relations order in line with Zimdars' request, except that the amount of the lump sum payment to be made to Van Cleave in the event of Zimdars' death would be 50 percent.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

DISCUSSION

Terms of the Divorce Judgment

¶5 The provisions of a divorce judgment relating to the property division are not subject to revision or modification. WIS. STAT. § 767.32(1)(a). Ambiguities, however, may be clarified if necessary to put the judgment into effect. *See* ***Washington v. Washington***, 2000 WI 47, ¶19, 234 Wis. 2d 689, 611 N.W.2d 261. Whether a judgment is ambiguous is a question of law subject to *de novo* review. ***Id.*** at ¶26.

¶6 In ***Washington***, the court held that

> a circuit court may construe the final division of property in a divorce judgment and allocate appreciation and interest on a pension when the divorce judgment is silent about the allocation of appreciation and interest on a lump-sum share awarded to a spouse but not payable immediately. The silence about appreciation and interest makes the judgment ambiguous.

Id. at ¶4.

¶7 Van Cleave first argues that the divorce judgment in this case is ambiguous because, like that in ***Washington***, it is silent as to the allocation of appreciation and interest in the pension plan. Unlike the situation in ***Washington***, however, the judgment here did not merely divide the value of the pension plan as of the date of the divorce into two lump sum shares, without making any provision as to how to divide future appreciation and interest. Rather, it set a specific monthly amount to be distributed to Van Cleave, with the "remaining balance" to go to Zimdars. Regardless, whether Van Cleave realized at the time of the divorce that the remaining balance would include all the appreciation and interest on the account, that is the plain meaning of the language used in the judgment. Because

the judgment unambiguously set Van Cleave's monthly payment as a specific dollar amount, we conclude the trial court properly refused to "construe" the judgment as dividing the parties' interest in the account on a percentage basis.

¶8 Van Cleave also maintains that the judgment is ambiguous as to whether her payments would end upon her death. We agree that the silence of the stipulation on that issue creates an ambiguity. However, we are not persuaded that the trial court's construction of the judgment to mandate that the payments would cease upon Van Cleave's death was unreasonable, given that the judgment explicitly provided for "Sec. 71" payments, and § 71 of the federal tax code does not permit payments following the death of the payee. 26 U.S.C. § 71(b)(1)(D). We therefore conclude the domestic relations order entered by the court represented a proper interpretation of the language of the stipulated divorce judgment.

Relief from the Divorce Judgment

¶9 Our conclusion that the trial court properly construed the amount and duration of Van Cleave's monthly payment set forth in the judgment does not resolve this appeal, however, because Van Cleave also requested relief from the judgment. We review the trial court's decision whether to reopen a judgment under the discretionary review standard, considering whether the trial court reasonably considered the facts of record under the proper legal standard. ***Nelson v. Taff***, 175 Wis. 2d 178, 187, 499 N.W.2d 685 (Ct. App. 1993).

¶10 WISCONSIN STAT. § 806.07(1) (1999-2000) allows the trial court to reopen an order or 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;
>
> (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.

Subsection (h) should be applied even to allegations which would arguably be time barred under one of the other sections "when the petition … also alleges extraordinary circumstances that constitute equitable reasons for relief." ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 549-50, 363 N.W.2d 419 (1985). Factors relevant to a determination of whether extraordinary circumstances exist include

> whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id. at 552-53. If the allegations would be sufficient, if true, to constitute extraordinary circumstances warranting relief, the trial court must grant a hearing to determine the truth of the allegations before ruling. ***Id.*** at 553.

¶11 Here, Van Cleave asserted mistake as her grounds for relief.[2] Essentially, she claimed that the parties' intent was to divide the pension equally between them as of the date of the judgment of divorce. Because the Wisconsin Retirement System would not accept qualified domestic relations orders at the time of the divorce, they hired an accountant to assist in devising an equal division. However, Van Cleave contended that the stipulation eventually reached was allegedly premised on Van Cleave's mistaken understanding that Zimdars' benefits would be limited to a term of twelve years and that the portion of his monthly benefits at time of retirement attributable to his service during the divorce would be the same as they were at the time of divorce. Zimdars disputed that the stipulation had been based on any mistake.

¶12 Because Van Cleave asserted a ground for relief under WIS. STAT. § 806.07(1)(a) more than a year after the divorce, she also needed to demonstrate extraordinary circumstances in order to allow the court to consider her claim under the catchall provision of (h). ***M.L.B.***, 122 Wis. 2d at 549-50. Discussing the extraordinary circumstance factors set forth in ***M.L.B.***, Van Cleave further claimed that her stipulation was not the result of a conscientious, deliberate and well-informed choice due to her mistaken understanding; that she was denied the effective assistance of counsel because counsel never discussed the topic of post-divorce appreciation and interest with her; that the judgment was not the result of

[2] Zimdars complains that Van Cleave did not properly set forth all of her allegations in her initial motion and affidavit. However, because waiver is a doctrine of judicial administration, we retain the authority to address an issue on appeal even if it has not been properly preserved. ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980). Here, Margaret addressed the factors of ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 363 N.W.2d 419 (1985), in her trial brief, and the court cited ***M.L.B***. in its decision. We therefore chose to address the ***M.L.B.*** factors as well.

judicial consideration of the merits; and that the subsequent appreciation and interest of the retirement account resulting in an approximately 80/20 split of the marital estate following a long-term marriage constituted an intervening factor. Although the trial court cited ***M.L.B.*** for the proposition that Van Cleave needed to demonstrate extraordinary circumstances, its discussion reveals that it was operating under a mistaken view of the relevant factors under that case.

¶13 First, the trial court seemed to entirely disregard the parties' factual dispute over whether the stipulation had been the result of a mistake, under the notion that any motion under WIS. STAT. § 806.07(1)(a) was time barred. As we have explained above, under ***M.L.B.***, allegations that would otherwise be time-barred under (a) may be brought under (h) upon showing both the grounds and extraordinary circumstances. Thus, the question of mistake was relevant not only as the initial grounds but also as to the extraordinary circumstance factor of whether the stipulation was the result of a well-informed choice. The trial court could not properly rule on Van Cleave's motion for relief from the judgment without making a finding as to whether the stipulation was the result of a mistake on Van Cleave's part and, given the parties' disagreement on the issue, could not make such a finding without first holding an evidentiary hearing.

¶14 Second, the trial court emphasized that both parties had been represented by counsel. But the factor listed for consideration in ***M.L.B.*** is not merely whether the claimant was represented but whether she received *effective assistance* from counsel. Van Cleave claimed that counsel had never discussed with her the question of post-judgment appreciation and interest on the pension fund, which was the primary asset in the divorce and in which she would have had a presumptive entitlement of a half-interest following a long-term marriage. However, the trial court could not properly make a finding on the issue of

ineffective assistance without first holding a hearing to obtain testimony relating to counsel's representation.

¶15 Third, the trial court seemed to consider the fact that the judgment was the result of a voluntary stipulation as weighing against relief. However, under ***M.L.B.***, the opposite is true. A judgment which is the result of a stipulation has not been subjected to judicial consideration on the merits. It is therefore entitled to a lesser presumption of fairness.

¶16 Finally, the trial court acknowledged that the difference between the amount Van Cleave stipulated to receive and the amount she would have been entitled to receive had the value of the pension been divided equally could "be characterized as extraordinary." But it apparently believed that the size of the discrepancy could not be considered a factor in determining whether to grant relief. We disagree. The larger the size of the alleged inequity, the greater weight it would have against the consideration to be given generally to the finality of the judgment.

¶17 In sum, we conclude that the trial court erroneously exercised its discretion by applying a mistaken view of the extraordinary circumstance factors and failing to hold an evidentiary hearing to make the findings required to evaluate the relevant factors. We therefore reverse and remand with directions that the trial court hold an evidentiary hearing to specifically consider the factors discussed in this opinion.

By the Court.—Order reversed and cause remanded.

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