

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2008

David R. Schanker
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. 2007AP909

Cir. Ct. No. 1993FA66

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE (DISSOLVED) MARRIAGE OF:

TIMOTHY J. WINTERS,

PETITIONER-RESPONDENT,

v.

LINDA WINTERS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Linda Winters has appealed from a postdivorce order addressing child support. We affirm the order.

¶2 The parties were divorced in 1993. Pursuant to a marital settlement agreement approved and incorporated in the judgment of divorce, the respondent, Timothy J. Winters, was awarded his interest in Precision Color Graphics, Inc. (Precision).¹ Timothy had become a shareholder in Precision in 1992 when he invested \$100,000 received by him as an inheritance.

¶3 Section 5. D. of the parties' marital settlement agreement provided:

The petitioner's interest in Precision Color Graphics, Inc. (presently 200 shares) is awarded to him subject to the following:

Any and all dividends, distributions or proceeds of sale or redemption of said stock shall be divided 90% to the petitioner, Timothy J. Winters; 5% to the parties' son, Brandon; and 5% to the parties' son, Timothy. Said funds awarded to the minor children may be deposited in trust on their behalf, for distribution to them outright at age 24, or for application to payment of tuition and room and board expenses for post-high school education.

¶4 Timothy sold his stock in Precision in 2004 for \$300,000. Subsequently, Linda brought an order to show cause in the trial court, seeking a determination that the sale had resulted in additional income to Timothy for child support purposes under WIS. ADMIN. CODE § DWD 40.02(13) (Dec. 2003).

¶5 After an evidentiary hearing, the trial court determined that the \$300,000 constituted the proceeds of the sale of Timothy's Precision stock, entitling each of the children to \$15,000 under the terms of the marital settlement

¹ The portion of the agreement dealing with Timothy's shares of stock in Precision Color Graphics, Inc., was the subject of a previous appeal by Linda in *Winters v. Winters*, 2005 WI App 94, 281 Wis. 2d 798, 699 N.W.2d 229.

agreement. It rejected Linda's argument that the sale of the stock also resulted in income to Timothy for purposes of child support.²

¶6 On appeal, Linda argues that the trial court erred in concluding that the sale of the Precision stock did not produce income for purposes of calculating child support. She notes that WIS. ADMIN. CODE § DWD 40.02(13)(a)2 defines "gross income" as including interest and investment income. While acknowledging that Timothy had no taxable income in 2004 from the sale of the Precision stock, she contends that the child support rules do not distinguish between taxable and nontaxable income. See WIS. ADMIN. CODE § DWD 40.02(13)(a)10. She contends that the sale produced income for child support purposes because, between 1993 and 2003, Timothy was not required to pay child support on undistributed income from the stock or on cash distributed by Precision to him for payment of taxes on the undistributed income. See *Winters v. Winters*, 2005 WI App 94, ¶¶12-13, 281 Wis.2d 798, 699 N.W.2d 229. She argues that Timothy is therefore required to place \$30,000 of the proceeds of the sale (i.e., 10% of \$300,000) in trust for the parties' two children, leaving \$270,000, from which he is entitled to deduct 90% of his original \$100,000 investment, leaving \$180,000 of gross income subject to child support.³

² Although the trial court determined that the proceeds of the sale of the stock did not constitute income for purposes of child support, it set child support at 25% of Timothy's gross income and held that this would include any interest or other income earned from his reinvestment of the proceeds of the sale of the Precision stock. It also determined that a substantial change in circumstances had occurred and ordered Timothy to pay \$200 per month as additional child support toward the variable and extraordinary expenses of the minor children.

³ In her reply brief, Linda seems to alter her claim, contending that Timothy had an additional \$170,000 after the sale of the stock and the award to the children and that this \$170,000 constitutes income for child support purposes.

¶7 Based upon section 5. D. of the marital settlement agreement, the trial court properly rejected Linda’s argument. Because a marital settlement agreement is a contract, the interpretation of its language is subject to de novo review. *Id.*, ¶15. In addition, whether sales proceeds are income subject to child support presents a question of law which we review independently of the trial court. *State v. Maley*, 186 Wis. 2d 125, 127, 519 N.W.2d 717 (1994). However, whether the gain from the sale of an asset counted as property in a divorce can be counted as income for child support purposes is a fact-sensitive question to be resolved on a case-by-case basis. *Id.* at 128.

¶8 At the October 23, 2006 hearing, an expert witness presented by Timothy testified that the \$300,000 received by Timothy at the time of the 2004 sale was the proceeds of the sale, a fact admitted by Linda’s expert. Because the trial court was entitled to find this testimony to be credible, its finding that \$300,000 constituted the proceeds of the sale of the Precision stock is not clearly erroneous and will not be disturbed on appeal. *See* WIS. STAT. § 805.17(2) (2005-06).⁴

¶9 Under the express terms of the marital settlement agreement, the “proceeds of sale” of Timothy’s stock was to be divided upon sale of the stock, with 90% of the proceeds to Timothy and 5% to each of the parties’ sons. This is precisely what occurred here. As determined by the trial court, Timothy received the proceeds of the sale when the Precision stock was sold, not income from the corporation. The \$300,000 “proceeds of sale” were then divided in accordance with the terms of the agreement, resulting in \$270,000 to Timothy and \$15,000

⁴ All references to the Wisconsin Statutes are to the 2005-06 version.

being placed in trust for each child.⁵ Linda cannot now reasonably contend that the parties contemplated something different in their treatment of the Precision stock.

¶10 Linda argues that the trial court's construction of the marital settlement agreement violates *Ondrasek v. Tenneson*, 158 Wis. 2d 690, 692, 462 N.W.2d 915 (Ct. App. 1990), which held that a divorce stipulation that waives or sets a ceiling on child support without regard to whether a change of circumstances has occurred violates public policy. This argument is without merit. Unlike the situation in *Ondrasek*, nothing in the marital settlement agreement approved in this case set a ceiling on child support or prevented modification of child support. Linda can and has sought a modification of child support based on changed circumstances. Moreover, the provision for the division of the Precision stock was not merely a division of property between Timothy and Linda; it also created a mechanism for giving a portion of the proceeds of the sale of that stock to the parties' children to use for post-high school education or at age twenty-four. The public interest in the support of the children therefore was not ignored.

By the Court.—Order affirmed.

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

⁵ As noted by the trial court at the October 23, 2006 hearing on Linda's motion, the 1993 findings of fact, conclusions of law and judgment of divorce stated that both parties assumed joint responsibility for the form and composition of the marital settlement agreement and agreed that it should be interpreted as though each of them participated equally in the composition of each part of it. No basis therefore exists to construe the portion of the agreement dealing with the Precision stock against Timothy. It was equally Linda's bargain.

