

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 24, 2009**

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. 2007AP1609**

**Cir. Ct. No. 2002FA97**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**REBECCA M. HANKE, N/K/A REBECCA M. OWEN,**

**PETITIONER-APPELLANT,**

**V.**

**LARRY O. HANKE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from orders of the circuit court for Vilas County:  
NEAL A. NIELSEN III, Judge. *Dismissed in part; affirmed in part.*

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

¶1 PER CURIAM. Rebecca Owen, formerly Hanke, appeals from two postdivorce orders. Owen argues the circuit court erred by denying a motion for reconsideration challenging the termination of maintenance, denying double

damages for the misappropriation of vehicles from a marital business, and denying sanctions for evidence spoliation. Owen also appeals an order denying relief from judgment. We conclude this court lacks appellate jurisdiction over the order denying the motion for reconsideration and we therefore dismiss that portion of the appeal. We affirm the order denying relief from judgment.

### Factual Background

¶2 Owen and Larry Hanke were divorced on September 2, 2003. The findings of fact, conclusions of law and judgment of divorce required Hanke to pay \$3,000 monthly limited term maintenance to Owen for sixty months. Hanke was awarded 65% and Owen 35% of the marital estate. The property division also entitled Owen to 35% of distributions from an account called the “Caribbean Fund,” and from the anticipated sale of an automobile dealership known as “Ave’s Sports Center, Inc.”

¶3 Hanke sold the dealership on March 9, 2004. One week prior to the sale, Hanke filed a motion to terminate maintenance. Owen subsequently filed a petition for an accounting, alleging Hanke had failed to provide the dealership’s financial statements as required by the divorce judgment, necessitating a complete audit of the dealership. Owen also filed a motion for remedial contempt, seeking sanctions for evidence spoliation. She alleged Hanke “has engaged in a clear pattern of deception, concealment, and false statements.” She subsequently claimed Hanke improperly took money from the corporation and sought damages for the dealership’s sudden loss of approximately \$440,000 over a ten-month period from May 2003 through March 2004. On May 19, 2006, the court held a post-trial evidentiary hearing and the parties submitted various posthearing written arguments.

¶4 On August 17, 2006, the circuit court issued an oral ruling, concluding a change of circumstances warranted the termination of maintenance. The court rejected sanctions for spoliation of evidence, but required Hanke to contribute \$35,000 toward Owen's postdivorce attorney fees of \$48,000. The court also confirmed Owen's 35% interest in Caribbean Fund disbursements.

¶5 The court's oral ruling also determined the dealership sale was an arm's length transaction conducted in good faith. The court concluded,

There wasn't really any mystery here that this business was not going the right direction. So I don't have any basis from the evidence before me to suggest that that was a result particularly of mismanagement or intentional fraud of Mr. Hanke on ... vis-à-vis Ms. Owen. That's simply where the business was going.

¶6 The court ordered Hanke to pay Owen 35% of the value of two automobiles and two snowmobiles taken from the dealership. However, the court rejected a "floor plan debt" argument whereby Owen claimed entitlement to double the value of the vehicles. Owen contended the vehicles were removed from the corporation without payment, and the dealership's value was thereby diminished because other dealership assets were required to pay the financing debt on the vehicles. Upon sale of the dealership, the corporation had to pay for this "floor plan debt" which, in effect, generated a double loss.

¶7 On August 29, 2006, prior to the court's entry of a written order, Owen filed a motion for reconsideration, challenging the termination of maintenance, the denial of double damages regarding the floor plan debt, and the denial of spoliation sanctions. The court entered a written order on September 14, 2006, pertaining to the issues decided orally at the August 17 hearing.

¶8 Several hearings were held on the motion for reconsideration. On September 15, 2006, the circuit court orally declined to reconsider its decision regarding maintenance and damages for spoliation of evidence. On March 20, 2007, the court orally reaffirmed its prior conclusion that Owen's floor plan debt argument amounted to "double counting." A written order was entered on April 13, 2007.

¶9 On May 1, 2007, Owen filed an amended motion for contempt, claiming Hanke failed to comply with the terms of the divorce judgment, after obtaining information from the Caribbean Fund that Hanke had received \$70,546 in payments in October 2004, May 2005, and April 2006, which he failed to disclose to Owen. Owen also filed a "Motion for Relief and Reopening," pursuant to WIS. STAT. § 806.07.<sup>1</sup> The motion sought to "vacate that part of an order of April 1[3], 2007 which denied the petitioner's motion to reconsider the court's prior limitation of sanctions for spoliation of evidence...." The motion also sought to reopen the May 19, 2006 hearing to incorporate the newly discovered evidence regarding the Caribbean Fund payments, and "impose as sanctions on the respondent twice the petitioner's 35% of the assets of Ave's which the respondent wasted in 2003 and 2004, plus the attorney's fees which the petitioner incurred in connection with the above motions."

¶10 The circuit court orally denied the motion for relief on the record during a hearing on June 22, 2007, but ordered Hanke to pay 35% of the funds received from the Caribbean Fund, together with interest, within thirty days or the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

court would issue an order of commitment to the Vilas County Jail for a period of 120 days as a remedial sanction, which Hanke could purge by making the payments as indicated. The court also found Hanke in contempt and awarded Owen \$10,000 as a remedial sanction. The court also awarded \$5,000 toward Owen's attorney fees for Hanke's misconduct. Further, the court referred Hanke to the Vilas County District Attorney for initiation of punitive contempt proceedings.<sup>2</sup> A written order was entered on July 9, 2007. On July 11, 2007, Owen filed a notice of appeal from the April 13, 2007 and July 9, 2007 orders.

### Discussion

¶11 Owen's appeal is not from the divorce judgment. Rather, it is from the court's postdivorce orders denying reconsideration and relief from judgment. This requires that we first determine whether we have appellate jurisdiction to consider the appeal.

¶12 WISCONSIN STAT. § 805.17(3) extends the time permitted an aggrieved party for appealing a final order if a timely motion for reconsideration is filed. See *Schessler v. Schessler*, 179 Wis. 2d 781, 783, 508 N.W.2d 65 (Ct. App. 1993). Section 805.17(3) is applicable to motions seeking reconsideration of decisions following postdivorce evidentiary hearings. *Id.* If the circuit court does not sign an order denying reconsideration within ninety days of the entry of the final postdivorce order or judgment, the motion for reconsideration is deemed

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<sup>2</sup> Vilas County court records indicate Hanke was found guilty of punitive contempt, contrary to WIS. STAT. § 785.03(1)(b), on August 27, 2008. *State v. Hanke*, Vilas County case No. 2007CM354.

denied and the time for appeal commences ninety days after entry of the final postdivorce order or judgment. *See* WIS. STAT. § 805.17(3).

¶13 Owen insists WIS. STAT. § 805.17(3) is inapplicable. She contends the September 14, 2006 order was not final “as it did not dispose of all issues.” Owen argues the April 13, 2007 order denying the motion for reconsideration was the final order. Owen contends the court had inherent authority to reconsider an oral ruling or a nonfinal ruling any time prior to the entry of the final order.

¶14 However, Owen does not identify any issues the September 14, 2006 written order did not dispose of. Here, the parties fully identified the issues in briefs and correspondence submitted to the court prior to the May 19, 2006 evidentiary hearing, as well as in posthearing written arguments. During the August 17, 2006 oral ruling on the issues presented at the May 19 hearing, the court specifically stated it was “ruling on a number of issues that have been raised in post-trial motions, and hopefully, with the assistance of counsel, to find resolution of several other procedural matters, such that this phase of the Hanke litigation may draw to a close.” The court also stated, “I’m going to attempt both from making some observations and from requesting the assistance of counsel today to get through the issues that are before us.” The oral ruling disposed of the issues and clearly contemplated a written order. We conclude the September 14, 2006 written order was the final order for appeal purposes.<sup>3</sup>

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<sup>3</sup> In her reply brief, Owen asserts, “There was a live motion pending when that order was entered.” Owen does not identify this pending motion. We assume she refers to her August 29, 2006 motion for reconsideration. Owen does not explain how a motion for reconsideration, raising the same issues disposed of in the oral ruling, affects our finality analysis. Regardless, under Owen’s position, a party could avoid the statutory time period for appeal under WIS. STAT. § 805.17(3), simply by filing a motion for reconsideration prior to the entry of the written order disposing of the issues in litigation.

¶15 The motion for reconsideration was not decided within ninety days after entry of the September 14 order, and therefore was deemed denied on December 13, 2006. *See Wainwright v. Wainwright*, 176 Wis. 2d 246, 250, 500 N.W.2d 343 (Ct. App. 1993). Owen failed to file the notice of appeal until July 11, 2007, and we thus lack appellate jurisdiction over an appeal of the court's order denying the motion for reconsideration. *See* WIS. STAT. §§ 808.04 and 805.17(3); *see also Wainwright*, 176 Wis. 2d at 250.

¶16 Owen insists the circuit court reached the merits of her reconsideration motion at the March 20, 2007 hearing and Hanke “failed to object and contend that the motion was already [deemed] denied.” However, jurisdiction can neither be conferred by the parties' consent, nor waived by the parties, and may be challenged at any stage of the proceedings. *See H.N.T. v. State*, 125 Wis. 2d 242, 245, 371 N.W.2d 395 (Ct. App. 1985).

¶17 Furthermore, even if we considered the circuit court's common law authority to reconsider its prior rulings, we would lack appellate jurisdiction over this aspect of the appeal because the motion for reconsideration contained no new issues. Motions for reconsideration have become part of the common law, and are encouraged as a method of correcting errors. However, “it has frequently been held that an order entered on a motion to modify or vacate a judgment or order is not appealable where, as here, the only issues raised by the motion were disposed of by the original judgment or order.” *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972). This rule was liberalized to allow the appeal of issues raised in a reconsideration motion if new arguments are made. *See Harris v. Reivitz*, 142 Wis. 2d 82, 87, 417 N.W.2d 50 (Ct. App. 1987). The rule embodies the concern that a motion for reconsideration must not be used as a ploy to extend the time to appeal or open WIS. STAT. § 805.17(3) to manipulation. *See*

*Ver Hagen*, 55 Wis. 2d at 25-26; *Marsh v. Milwaukee*, 104 Wis. 2d 44, 47-48, 310 N.W.2d 615 (1981).

¶18 To determine whether new issues exist, we must compare the issues raised in the motion for reconsideration with those the court disposed of in its September 14, 2006 order. See *Reivitz*, 142 Wis. 2d at 87. Owen raised three issues in her motion for reconsideration, with the September 14 order disposing of each. The issues presented in the motion for reconsideration could have been reviewed on an appeal from the September 14 order. Accordingly, we dismiss that portion of the appeal seeking to appeal from the April 13, 2007 order denying reconsideration.

¶19 That does not end the jurisdictional inquiry, however, because Owen also appealed from the denial of her WIS. STAT. § 806.07 “Motion for Relief and Reopening.” This motion raised new issues based upon newly discovered evidence pertaining to the Caribbean Fund payments Hanke received and his failure to disclose those payments. Motions made under § 806.07 must be made “within a reasonable time” and, if for fraud, mistake or excusable neglect, within one year of judgment. WIS. STAT. § 806.07(2). Owen’s § 806.07 motion was grounded upon “fraud, misrepresentation, or misconduct of an adverse party.” Owen’s motion was filed within one year of the September 14, 2006 order, and the notice of appeal was filed within the time period set by WIS. STAT. § 808.04 following the motion’s denial. Accordingly, we conclude this court has jurisdiction over the appeal from the July 9, 2007 order denying the motion for relief.

¶20 A circuit court’s order denying a motion for relief under WIS. STAT. § 806.07 will not be reversed absent an erroneous exercise of discretion. *State*

*ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). An erroneous exercise of discretion will not be found if the record shows the circuit court examined the relevant facts, applied the correct law, and set forth a process of logical reasoning. *Button v. Button*, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986). We may search for reasons to sustain a discretionary decision. *Steinbach v. Gustafson*, 177 Wis. 2d 178, 185, 502 N.W.2d 156 (Ct. App. 1993). Even if a court finds grounds to reopen an order or judgment under § 806.07, the court in the exercise of its discretion may determine there are factors militating against reopening it. *Johnson v. Johnson*, 157 Wis. 2d 490, 497-98, 460 N.W.2d 166 (Ct. App. 1990). Whether to impose sanctions for spoliation of evidence and what sanctions to impose are also matters committed to the sound discretion of the circuit court. See *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999).

¶21 On appeal, Owen insists “Hanke’s gross misconduct in this case—particularly as it relates to the Caribbean Fund—warrants reopening the divorce judgment with respect to the spoliation remedy previously requested by Ms. Owen.” Owen also insists the court “should have reopened its judgment with respect to the denial of Ms. Owen’s prior request for an award of 35% of \$442,125.39.”

¶22 However, Owen presented no newly discovered evidence of spoliation and the court previously rejected her claim for the dealership’s loss of value, finding the dealership was in financial trouble long before the sale in March 2004. Although Owen insists “aspects of the trial court’s previous rulings that relied on the credibility of Mr. Hanke’s testimony should have been revisited[,]” the court was not obligated to do so. The circuit court considered Owen’s arguments, but declined to reopen the matter. The court concluded:

I have already examined all of the numbers relating to the business at Ave's to the best of my ability, and the Caribbean Fund was not among those. I have already weighed in my conclusions regarding the division of property, Mr. Hanke's lack of forthrightness, and his credibility in these proceedings and considered that as part of fashioning my prior rulings. Motion to reopen is therefore denied.

¶23 Contrary to Owen's perception, the circuit court did not "[allow] this case to be 'tainted by fraud.'" The court required Hanke to pay 35% of the funds received from the Caribbean Fund, together with interest, within thirty days or he would be jailed for a period of 120 days as a remedial sanction, which Hanke could purge by making the payments as indicated.<sup>4</sup> The court also granted Owen's contempt motion and awarded \$10,000 in remedial contempt sanctions for Hanke's Caribbean Fund misconduct. Further, the court referred Hanke to the Vilas County District Attorney for punitive sanctions. The court also ordered Hanke to pay \$5,000 toward Owen's attorney fees for the motion. Hanke's misconduct was not disregarded.

¶24 The circuit court gave lengthy explanations concerning why it fashioned its remedy in the manner in which it did. In reviewing discretionary decisions, our task is to determine whether a court could reasonably come to the conclusion it reached. Our review of the record in this case demonstrates the court reasoned its way to a result that a reasonable judge could reach. In the exercise of its discretion, a circuit judge may reach a conclusion that another judge may not reach. We conclude the circuit court did not erroneously exercise its discretion in determining that relief from judgment under WIS. STAT. § 806.07 was unnecessary.

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<sup>4</sup> We note Owen is not challenging the percentage distribution from the Caribbean Fund.

*By the Court.*—Orders dismissed in part; affirmed in part.

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

