COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP622 **Cir. Ct. No. 2008FA314**

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

IN RE THE MARRIAGE OF:

ERIC L. PETERSON,

PETITIONER-APPELLANT,

V.

KIM A. BAUER P/K/A KIM A. PETERSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Eric Peterson appeals an order denying his motion to terminate a provision of a marital settlement agreement (MSA) requiring him to pay half of his military disability benefits to his former wife, Kim Bauer. Peterson

contends the MSA unambiguously characterized the disability payments as maintenance, and, as a result, the circuit court was required to terminate them upon Bauer's remarriage. The circuit court disagreed, ruling that the payments were part of the property division and were not subject to termination when Bauer remarried. We agree with the circuit court's reasoning and affirm.

BACKGROUND

¶2 Peterson petitioned for divorce from Bauer on September 26, 2008. At the time of filing, the parties had two minor children. Shortly after the divorce petition was filed, the parties began preparing an MSA, using preprinted form FA-4150V, "Marital Settlement Agreement With Minor Children." Peterson filled in the majority of the blanks on the form, but he testified Bauer "was present when it was drafted."

¶3 Neither Peterson nor Bauer retained counsel to represent them in the divorce proceedings. However, Bauer hired attorney Janet McDonough to review the MSA on her behalf. Both parties ultimately met with McDonough. McDonough informed Peterson that she had been hired by Bauer and was not acting as Peterson's attorney. She advised Peterson he could consult with his own attorney.

¶4 During the meeting, McDonough filled out the section of the preprinted MSA form entitled, "MAINTENANCE (Spousal Support)." She crossed out the word "MAINTENANCE" in that heading and wrote in "Family Support." Below the heading, McDonough completed the blanks in the preprinted form so that it read:

> The husband shall pay maintenance to the wife in the amount of $*3100* per month beginning on the first day of

> the month of *Dec 1*, 20*08*. Maintenance shall end on the last day of the month of *Nov 30 2018* or until the wife remarries, dies, or by court order, whichever comes first.[1]

Immediately below this language, McDonough wrote, "From Dec 1 2018 HE shall pay ½ of his Government compensation until the wife dies or by court order, whichever comes first." On appeal, the parties agree that the term "government compensation" refers to Peterson's military disability benefits.

¶5 Peterson and Bauer signed the completed MSA on November 5, 2008. On January 26, 2009, both parties appeared pro se at a final divorce hearing before a family court commissioner. The commissioner questioned both Peterson and Bauer about the MSA's terms. Peterson testified he was not satisfied with the MSA's family support provision because he believed his monthly family support obligation should be $3,011 instead of $3,100. Bauer agreed to that change, and the commissioner revised the MSA accordingly. Peterson then testified that he understood and agreed with the MSA's terms, as revised. He did not raise any objection to the provision requiring him to pay Bauer half of his military disability benefits beginning on December 1, 2018. The commissioner specifically stated that the disability payments would continue until Bauer died or a court ordered otherwise, and Peterson did not dispute that assertion. The commissioner accepted the MSA and incorporated its terms into the divorce judgment.

¶6 Bauer remarried on October 1, 2011. Peterson subsequently filed a "Motion to Terminate Maintenance," arguing the MSA "clearly and unambiguously" stated that maintenance would terminate when Bauer remarried. He also asserted, "An agreement for a subsequent maintenance order is intended to

[1] The italicized terms were written by hand in blanks in the preprinted form.

commence on December 1, 2018, but that agreement is vague, undefined, self-contradictory, and contrary to public policy and should be terminated." In response, Bauer contended the MSA provision requiring Peterson to pay Bauer half of his military disability benefits beginning on December 1, 2018, was part of the property division and was not an additional maintenance award. Bauer therefore argued her remarriage did not affect her right to receive half of Peterson's disability benefits.

¶7 The circuit court held two hearings on Peterson's motion, at which Peterson, Bauer, and McDonough testified. The court ultimately denied Peterson's motion in a thorough, well-reasoned decision. The court agreed with Bauer that the disability payments were part of the property division and were not an additional maintenance award. The court acknowledged that the disability benefits provision was located in the family support section of the MSA, but it credited Bauer's testimony that McDonough placed the provision in that section of the preprinted form because she did not know where else to put it. The court also credited McDonough's testimony that she believed the disability benefits provision was intended to equalize the property division. The court further observed, "If the parties had agreed that maintenance would continue past November 30, 2018, this logically would have been accomplished in the original maintenance clause." The court also reasoned that, had the parties intended the disability payments to terminate on Bauer's remarriage, they would have included language to that effect in the MSA.

¶8 The court next rejected Peterson's argument that he had insufficient time to review the MSA before signing it. The court noted that Peterson did not testify at the final divorce hearing that he had insufficient time to review the MSA. Further, McDonough informed Peterson he could consult his own attorney before

signing the MSA, but Peterson failed to do so. The court also observed that the MSA was signed on November 5, 2008, but the final divorce hearing was not held until January 26, 2009, which gave Peterson "sufficient time to consult his own attorney if he had second thoughts about this agreement."

¶9 Finally, the court rejected Peterson's argument that the disability benefits provision was invalid if interpreted as part of the property division because a court "may not make a military disability pension part of the property division[.]" The court reasoned that parties to a divorce may agree to terms a court could not otherwise order. Thus, Peterson and Bauer could agree to make Peterson's disability benefits part of the property division, even though the court could not have done so without their agreement.

DISCUSSION

¶10 On appeal, Peterson argues the MSA unambiguously provides that the disability payments he must make to Bauer are maintenance. He therefore argues the circuit court should have granted his motion to terminate the payments after Bauer remarried. *See* WIS. STAT. § 767.59(3) ("After a final judgment requiring maintenance payments has been rendered and the payee has remarried, the court shall, on application of the payer with notice to the payee and upon proof of remarriage, vacate the order requiring the payments.").[2]

¶11 The interpretation of an MSA, including whether it is ambiguous, is a question of law that we review independently. *See* ***Topolski v. Topolski***, 2011

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

WI 59, ¶28, 335 Wis. 2d 327, 802 N.W.2d 482; ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987). A document is ambiguous when it is reasonably susceptible to more than one interpretation. ***Spencer***, 140 Wis. 2d at 450. After a document has been found to be ambiguous, a court may look beyond the face of the document and consider extrinsic evidence. ***Id.*** "In construing an ambiguous contract, the object is to ascertain and effectuate the parties' intent." ***Id.***

¶12 When a contract is ambiguous, determining the parties' intent is a question of fact. ***Weston v. Holt***, 157 Wis. 2d 595, 601, 460 N.W.2d 776 (Ct. App. 1990). We uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** "[A] finding of fact is clearly erroneous when 'it is against the great weight and clear preponderance of the evidence.'" ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (quoted source omitted).

¶13 We conclude the disability benefits provision of the MSA is ambiguous. It is unclear from the face of the document whether the parties intended the disability payments to be treated as maintenance, and therefore subject to termination on Bauer's remarriage. As Peterson points out, the disability benefits provision is located in the family support section of the MSA. This indicates the parties may have intended to treat the disability payments as maintenance.

¶14 However, as Bauer observes, the disability benefits provision does not use the term maintenance. In addition, the preceding provision unequivocally states that maintenance will terminate on Bauer's remarriage. Conversely, the disability benefits provision does not state that the payments will terminate when

Bauer remarries. We agree with the circuit court that, if the parties had intended the disability payments to terminate on Bauer's remarriage, they would likely have included language to that effect in the disability benefits provision, as they did in the maintenance provision. Thus, when read in conjunction, the disability benefits provision and the maintenance provision create an ambiguity as to whether the parties intended the disability payments to be treated as maintenance.

¶15 Because the MSA is ambiguous, the circuit court properly looked to extrinsic evidence to determine the parties' intent. The court found that the parties intended the disability payments to be part of the property division, and they did not intend the payments to terminate on Bauer's remarriage. These factual findings are not clearly erroneous. Bauer testified McDonough placed the disability benefits provision in the family support section of the MSA because she did not know where else to put it on the preprinted form. McDonough testified she did not believe the disability payments were maintenance. Instead, based on Bauer's representations, she believed Peterson was agreeing to give up half of his disability benefits in exchange for Bauer giving up her share of his 401(k). McDonough testified Peterson was "very, very adamant" that he did not want to pay any maintenance, and he did not want any payments to Bauer to be called maintenance. McDonough further testified that she told Peterson the disability payments would continue until Bauer died and would not terminate if Bauer remarried.

¶16 In addition, during the final divorce hearing, the family court commissioner read the disability benefits provision aloud, including the portion stating that the payments would continue "until the wife dies or by court order, whichever comes first." Peterson did not indicate that he disagreed with this language or had any questions about it.

¶17 This evidence amply supports the circuit court's finding that the parties intended the disability payments to be part of the property division and did not intend them to terminate on Bauer's remarriage. Peterson cites some evidence supporting a contrary conclusion. Specifically, he cites his own testimony that he did not think the disability payments were part of the property division and he believed the payments would terminate if Bauer remarried. He also asserts he was never told the MSA would create a "lifetime obligation" to share his disability benefits with Bauer. However, the circuit court was not obligated to accept Peterson's testimony as true in the face of contradictory evidence. Where there is conflicting testimony, the circuit court is the ultimate arbiter of the witnesses' credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). Here, the circuit court implicitly found Bauer and McDonough more credible than Peterson.

¶18 Peterson argues the parties would have placed the disability benefits provision under the heading "Pension, Retirement Accounts" if they had intended the disability payments to be part of the property division. He asserts the parties' decision to place the provision under the "Family Support" heading conclusively establishes they intended the disability payments to be treated as maintenance. We disagree.

¶19 Both parties acknowledge that the payments at issue are disability payments, not retirement or pension payments. Peterson specifically testified he waived his future entitlement to military retirement benefits in order to receive disability benefits. Because Peterson's disability benefits are not retirement benefits, it would not have made sense to place the disability benefits provision in the section of the MSA dealing with pensions and retirement accounts. Further, the MSA was drafted using a preprinted form. The form does not include a place

for the parties to address disability benefits. Bauer testified McDonough placed the disability benefits provision under the "Family Support" heading because she did not know where else to put it. On these facts, the location of the disability benefits provision in the MSA is not dispositive.

¶20 Peterson next argues that, if the MSA is ambiguous, we must construe the ambiguity against Bauer because her attorney drafted the agreement. Peterson is correct that, generally, ambiguous contract terms are construed against the drafter. *See, e.g.*, ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶24, 233 Wis. 2d 314, 607 N.W.2d 276. This is a "default rule" of contract construction, though, and default rules apply "only in the event of an unresolvable ambiguity—a tie—and only at the end of the process after extrinsic evidence has failed to clear up the question." ***Roth v. City of Glendale***, 2000 WI 100, ¶¶50-51, 237 Wis. 2d 173, 614 N.W.2d 467 (Sykes, J., concurring); *see also* ***Bidlack v. Wheelabrator Corp.***, 993 F.2d 603, 609 (7th Cir. 1993). Here, the circuit court could determine the parties' intent by examining extrinsic evidence, so it did not need to resort to the default rule that ambiguities are construed against the drafter.

¶21 Regardless, this case does not call for application of the default rule. This is not a situation in which one party drafted an agreement with no input from the other. Instead, Peterson and Bauer jointly drafted the MSA by filling out a preprinted form. Peterson completed most of the blanks on the form, but Bauer was "present" during the drafting process. The disability benefits provision was inserted by McDonough during a conference with both parties. McDonough testified she understood that the parties "had basically worked out [an MSA]" by the time they met with her, but they "needed to wrap it up and finalize things." The language of the MSA was negotiated by the parties. Under these

circumstances, it makes little sense to construe the disability benefits provision against Bauer.

¶22 Peterson also argues the parties could not have intended the disability payments to be part of the property division because a property division "does not expire upon the death of the recipient." He asserts, "The clause 'until the wife dies' must be given meaning consistent with Wisconsin law." However, Peterson does not cite any authority for these propositions or explain why the circuit court's interpretation is inconsistent with Wisconsin law. We need not consider arguments that are undeveloped or unsupported by legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). In addition, Bauer contends that some aspects of a property division—for instance, survivorship pension benefits—do expire on the recipient's death. She therefore argues the disability benefits provision is consistent with Wisconsin law. Peterson fails to respond to this argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

¶23 Lastly, Peterson argues the parties could not have intended the disability payments to be part of the property division because: (1) the MSA allows the payments to be terminated "by court order," but WIS. STAT. § 767.59(1c)(b) prohibits a court from modifying a final property division; and (2) under ***Topolski***, 335 Wis. 2d 327, ¶46, disability benefits are income for the purpose of determining maintenance and cannot be included in a property division. These arguments would be persuasive if the issue in this case were whether the circuit court had authority to include Peterson's disability benefits in the property division. The actual issue, though, is whether Peterson and Bauer intended the disability benefits to be part of the property division when they signed the MSA.

It is well established that parties to a divorce can agree to terms a court could not otherwise order. *See, e.g.*, ***Rintelman v. Rintelman***, 118 Wis. 2d 587, 348 N.W.2d 498 (1984).

¶24 In ***Rintelman***, the parties stipulated that the husband would pay the wife maintenance for the rest of her life. ***Id.*** at 590. The wife subsequently remarried. ***Id.*** at 591. The husband then moved to terminate maintenance, arguing that WIS. STAT. § 767.32(3) (1979-80), required termination of a maintenance award when the recipient remarried. ***Rintelman***, 118 Wis. 2d at 591.

¶25 On appeal, the supreme court concluded the circuit court properly denied the husband's motion because, despite the statutory requirement that a court terminate maintenance upon the recipient's remarriage, the parties had agreed maintenance would continue for the rest of the wife's life. ***Id.*** at 596-97. The court held that, in some situations, "when a party to a divorce agrees to a certain disposition of the parties' financial obligations and the agreement is made a part of the judgment of the court, the party is thereafter estopped from seeking release from the terms of the agreement." ***Id.*** at 594. For this rule to apply, three elements must be established: (1) both parties entered into the stipulation freely and knowingly; (2) the overall settlement is fair and equitable and is not illegal or against public policy; and (3) one party subsequently seeks to be released from the terms of the court order on the grounds that the court could not have entered the order it did without the parties' agreement. ***Id.*** at 596.

¶26 Whether ***Rintelman*** estoppel applies to a given set of facts is a question of law that we review independently. ***Jacobson v. Jacobson***, 177 Wis. 2d 539, 544, 502 N.W.2d 869 (Ct. App. 1993). We conclude all three elements of ***Rintelman*** estoppel are satisfied in this case.

¶27 With respect to the first element, Peterson argues he did not knowingly enter into the agreement because he believed the disability payments were maintenance and would therefore terminate on Bauer's remarriage. However, McDonough testified she told Peterson the payments would continue until Bauer died and would not terminate when Bauer remarried. McDonough also testified Peterson was adamant that he did not want to pay maintenance and did not want any payments to Bauer called maintenance. Further, Peterson did not express any confusion about the disability benefits provision at the final divorce hearing. He asked the family court commissioner to change the amount of his family support obligation, but he did not request any other changes to the MSA. Based on this evidence, the circuit court determined Peterson intended the disability payments to be part of the property division. That finding is not clearly erroneous.

¶28 Peterson nevertheless contends he did not enter into the agreement knowingly because he "thought, and the language of the agreement states, that the payments of his disability pay could be discontinued." He asserts, "The trial court has now held that the payments cannot be stopped by further court order." Peterson misconstrues the circuit court's decision. The court did not hold that the disability payments could never be terminated by court order. It merely determined that the arguments Peterson advanced were insufficient to warrant termination.

¶29 Peterson also argues he did not enter into the agreement knowingly because he asked McDonough to change the language of the disability benefits provision, but she refused to do so. He asserts he told McDonough the language was "too vague," but she responded that his proposed explanation was "too specific, too drawn out and it couldn't be addressed in that section." Peterson does

not explain how he wanted McDonough to change the disability benefits provision. However, our review of the record shows that Peterson testified he felt the term "government compensation" was too vague and he wanted the MSA to specifically reference his military retirement benefits. Peterson does not explain why McDonough's failure to change the term "government compensation" to "military retirement benefits" shows that he did not knowingly enter into the agreement. Moreover, it is undisputed that Peterson was not entitled to any military retirement benefits because he waived them in order to obtain his disability benefits. Thus, a provision referring to Peterson's military retirement benefits would have been meaningless.

¶30 The second element of ***Rintelman*** estoppel asks whether the overall settlement is fair, equitable, and not illegal or against public policy. Peterson does not advance any argument that the overall settlement is unfair or inequitable. He also fails to develop an argument that the settlement is against public policy. *See* ***Pettit***, 171 Wis. 2d at 646-47. Instead, he argues the MSA violates federal law, which prohibits a state court from treating veteran's disability benefits as divisible property in a divorce. *See* ***Mansell v. Mansell***, 490 U.S. 581, 594-95 (1989). However, as discussed above, the *circuit court* did not treat Peterson's disability benefits as divisible property. Rather, the court found that *Peterson* intended to treat the benefits as divisible property. Peterson signed the MSA despite the rule articulated in ***Mansell***. We therefore agree with Bauer that ***Mansell***'s holding and Peterson's federal preemption arguments are irrelevant.

¶31 The third element of ***Rintelman*** estoppel is that one party seeks to be released from the terms of a court order on the grounds that the court could not have entered the order without the parties' agreement. In his brief-in-chief, Peterson asserts that he "seeks to be released from the terms of the court order (if

the order is interpreted in the manner the trial court has interpreted it) on the grounds that the court could not have entered the order it did without the parties' agreement." He therefore concedes that the third element of ***Rintelman*** estoppel has been met. Consequently, all three elements are satisfied, and Peterson is estopped from challenging the disability benefits provision on the ground that a court could not have ordered that provision absent the parties' agreement.

¶32 In summary, we conclude the MSA is ambiguous with respect to whether the parties intended the disability payments to be part of the property division, or to be treated as maintenance and therefore terminable on Bauer's remarriage. After examining extrinsic evidence, the circuit court found that the parties intended the payments to be part of the property division. That finding is not clearly erroneous. Peterson's additional arguments have not convinced us that the parties intended the payments to be treated as maintenance. We therefore affirm the circuit court's order denying Peterson's motion to terminate the disability payments.

By the Court.—Order affirmed.

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