Appeal No. 2011AP1240 **Cir. Ct. No. 1988FA73**

WISCONSIN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

PATRICIA A. JOHNSON, P/K/A PATRICIA MASTERS,

PETITIONER-APPELLANT,

V.

MICHAEL R. MASTERS,

RESPONDENT-RESPONDENT.

FILED

APR 04, 2012

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., Reilly, J.

Pursuant to WIS. STAT. RULE 809.61 (2009-10),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

When a former wife seeks to obtain a pension award by submitting a qualified domestic relations order (QDRO) as required by the divorce judgment, and the submission is approximately one year after the former husband retires, but

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

more than twenty years after the divorce judgment, is this an "action" which is barred by the statute of repose, WIS. STAT. § 893.40?

BACKGROUND

The parties to this appeal signed a marital settlement agreement awarding Patricia A. Masters (n/k/a Johnson) one-half of the value of Michael R. Masters' pension accrued from the date of marriage to the date of divorce. A QDRO was to be submitted to secure these rights. The marital settlement agreement that was incorporated into the judgment of divorce said the following:

> **V. PROPERTY DIVISION-PENSION**
>
> The Petitioner shall be awarded ½ of the value of the Respondent's Wisconsin Retirement System benefits accrued from the date of the marriage [through] the date of divorce. A QDRO shall be submitted to secure these rights.

The judgment of divorce was entered on July 20, 1989. Michael retired in 2009.[2] Patricia submitted a QDRO to the circuit court on March 5, 2010, twenty years and seven months after the date of divorce.[3] Michael balked and Patricia moved for an order requiring release of pension information. Michael moved to dismiss on grounds that the twenty-year statute of repose set forth in WIS. STAT. § 893.40 barred Patricia's enforcement motion. Section 893.40 reads as follows:

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[2] There appears to have been a disagreement at the trial level as to whether Michael retired in 2007 or 2009. The trial court concluded that the issue was not relevant to its decision, and we conclude that it is also not relevant to the issue we raise. Both parties state that Michael retired in 2009 in their briefs, so that is the date we use.

[3] It is worth noting that, at the time the divorce judgment was entered on July 20, 1989, the Wisconsin Retirement System did not recognize QDROs. It was not until the passage in 1997 of 1997 Wis. Act. 125, effective May 2, 1998, that the WRS accepted QDROs.

> **Action on a judgment or decree; court of record.**
>
> Except as provided in ss. 846.04 (2) and (3) and 893.415, action upon a judgment or decree of a court of record of any state or of the United States shall be commenced within 20 years after the judgment or decree is entered or be barred.

The circuit court granted the motion to dismiss. It did so based on ***Hamilton v. Hamilton***, 2003 WI 50, 261 Wis. 2d 458, 661 N.W.2d 832. In ***Hamilton***, the State filed what the supreme court called an "independent" action to collect child support arrearages almost thirty years after the original judgment, more than twenty years after the amended judgment and more than fifteen years after the youngest child reached the age of majority. ***Id.***, ¶2. The court held that in an independent action to collect child support not paid after July 1, 1980, WIS. STAT. § 893.40 "governs the time within which a party may bring an independent action to collect child support arrearages that accumulated after the statute's effective date." ***Hamilton***, 261 Wis. 2d 458, ¶4. In addition, it concluded that an action brought to enforce a child support judgment must be commenced within twenty years of the date when the judgment is entered. ***Id.*** Of particular importance to this certification, the court wrote that "an independent action for child support arrearages *is* an action upon a judgment." ***Id.***, ¶18.

The circuit court rejected Patricia's attempt to distinguish ***Hamilton*** on the grounds that, since Michael did not retire until shortly before the supposed twenty-year limitation and the pension did not begin to operate until then, she had no right to share in the pension until after Michael retired. The circuit court focused on that part of ***Hamilton*** which distinguished statutes of limitation from statutes of repose and held that statutes of repose apply regardless of when the cause of action accrued. In the circuit court's view, Patricia's theory was that her pension claim had not "accrued" until after the twenty-year limitation on actions.

Based on this understanding, the circuit court quoted ***Hamilton***, to say that, since a statute of repose must be timely initiated from the date the judgment is entered, regardless of when the cause of action accrues, the action was untimely.

DISCUSSION

This certification addresses five concerns about whether ***Hamilton*** should truly govern this case. First, we note that WIS. STAT. § 893.40 refers to an "action" on a judgment. The ***Hamilton*** court answered the question of *when* the time period begins to run after a judgment or decree on an action has been entered. It also held that "[w]hen the State filed its May 22, 2000, motion to order Walter to pay child support arrearages and interest, it was commencing an action on a judgment." ***Hamilton***, 261 Wis. 2d 458, ¶15. But ***Hamilton*** did not explicitly address *what* constitutes an "action" on a judgment. And we note that neither party in ***Hamilton*** cited WIS. STAT. § 893.02, which states:

> **893.02 Action, when commenced.** Except as provided in s. 893.415 (3), an action is commenced, within the meaning of *any provision of law which limits the time for the commencement of an action*, as to each defendant, when *the summons naming the defendant and the complaint are filed with the court*, but no action shall be deemed commenced as to any defendant upon whom service of authenticated copies of the summons and complaint has not been made within 90 days after filing. (Emphasis added.)

An argument could be made that an "action" is a proceeding which is begun by a summons and complaint and that an action upon a judgment or decree of a court of record therefore means any judgment that was commenced by a summons and complaint. This is indeed part of the rationale used by another panel of this court in ***Lueck v. Lueck***, No. 2011AP1195, unpublished slip op. (WI App Oct. 12, 2011), *review denied* (WI Mar. 2, 2012). There, the divorce judgment provided that Stanley receive part of Janice's pension and that Janice

was to assign her interest in the pension to the clerk of court to assure payment to Stanley. ***Id.***, ¶2. Janice never assigned her interest and, some twelve years later, began receiving benefits. ***Id.***, ¶¶2-3. Eleven years after that, Stanley filed a contempt motion. ***Id.***, ¶¶3-4. The circuit court granted Janice's motion to dismiss based on WIS. STAT. § 893.40. ***Lueck***, slip op. ¶4. The court of appeals reversed on two grounds. First, it held that the statute of repose did not pertain to actions begun by motion and order to show cause. ***Id.***, ¶9. It read WIS. STAT. § 893.02 to mean that an action is defined as one which is begun by a summons and complaint. ***Lueck***, slip op. ¶9. Second, it pointed to that part of the ***Hamilton*** decision which exempted contempt proceedings from the reach of § 893.40. ***Lueck***, slip op. ¶11. We believe that the supreme court should consider how, if at all, § 893.02 impacts § 893.40, especially since neither party in ***Hamilton*** or the parties in the predecessor cases relied upon by the ***Hamilton*** court, addressed this statute or its prior provision.

Our second concern is this. We notice that the ***Hamilton*** court repeatedly referred to the State's action as an "independent" action. Patricia points out that ***Hamilton*** was not "a contest within the underlying divorce action between the original divorcing parties." She maintains that the ***Hamilton*** court recognized just this distinction when it saw fit to refer to the court of appeals opinion on this topic. At footnote four, the court wrote as follows:

> The court of appeals noted that both Walter and the State agree that the State's motion is an "independent action" upon the judgment. Apparently, neither party argues that the State could not bring a motion within the context of the original action. We do not address this issue because it has no bearing on our present decision.

Hamilton, 261 Wis. 2d 458, ¶9 n.4 (citation omitted).

Indeed, if the repeated reference to the State's action as an "independent" one was for the purpose of making the same distinction that the court of appeals did, then this is the case and this is the time to address the issue.

Third, we fully understand the following statement in ***Hamilton***:

> Statutes of repose operate differently from statutes of limitations. A statute of limitations usually establishes a time frame within which a claim must be initiated after a cause of action actually accrues. A statute of repose, by contrast, limits the time period within which an action may be brought based on the date of the act or omission. A statute of repose does not relate to the accrual of a cause of action. In fact, it may cut off litigation *before* a cause of action arises. In this case, the "act" that triggers the statute of repose is the entry of the judgment.

Hamilton, 261 Wis. 2d 458, ¶29 (citations omitted). In other words, as the circuit court noted in its decision, the date of accrual of a cause of action does not impact when the statute of repose begins to run, and it does not prevent the time from tolling. So any argument that Patricia should be allowed to proceed because her cause of action did not *accrue* until long after the divorce judgment would be in vain. But accrual as it is used in ***Hamilton*** presupposes that a vested right existed at the time of the divorce judgment.

According to BLACK'S LAW DICTIONARY 22 (8th ed. 2004), "accrue" means "[t]o come into existence as an enforceable claim or right." As far back as ***State v. Risjord***, 201 Wis. 26, 229 N.W. 61 (1930), a cause of action was succinctly defined as consisting of two parts: (1) the plaintiff's right and (2) the violation of that right by the defendant. People often refer to accrual and vesting in the same breath, but their meanings are distinct. BLACK'S LAW DICTIONARY 1594 defines "vest" as "[t]o confer ownership of (property) upon a person" *or* "[t]o give (a person) an immediate, fixed right of present or future enjoyment."

The disjunctive is important here because it gives the word "vest" two different meanings. The vesting of a "right" is different from vesting of "property." As to the vesting of a right, ***Hamilton*** tells us that WIS. STAT. § 893.40 applies regardless of when a right is *violated*, thereby causing an action to accrue—but it says nothing about how (or if) the timing of the plaintiff's right coming into existence in the first place affects the application of § 893.40.

In this case, as we already explained, Patricia did not have an immediate "right of present or future enjoyment" until many years after the divorce judgment, when QDROs were accepted by the Wisconsin Retirement System. So, our question is this: does the WIS. STAT. § 893.40 clock begin ticking before a right is even in place? In our view, an argument can be made that the statute of repose does not begin to run until there is a vested right—in this case, the point at which the Wisconsin Retirement System began accepting QDROs. Therefore, it may be too simplistic to say the clock always begins at the divorce judgment because in a case such as this one, rights are contemplated in the judgment that do not vest until a later date when the vesting of property occurs.

This brings us to our fourth point. If we look at this QDRO as nothing more than a document necessary to complete the enactment of Patricia and Michael's divorce judgment, then WIS. STAT. § 753.03,[4] entitled **Jurisdiction of circuit courts**, becomes relevant:

> The circuit courts have the general jurisdiction prescribed for them by article VII of the constitution and have power to issue all writs, process and commissions provided in article VII of the constitution or by the statutes, or which

[4] This statute also existed, with the same wording, in the 1989-90 volume of the Wisconsin Statutes.

> may be necessary to the due execution of the powers vested in them. The circuit courts have power to hear and determine, within their respective circuits, all civil and criminal actions and proceedings unless exclusive jurisdiction is given to some other court; and they have all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carry into effect their judgments, orders and other determinations, subject to review by the court of appeals or the supreme court as provided by law. The courts and the judges thereof have power to award all such writs, process and commissions, throughout the state, returnable in the proper county.

The foregoing statute illustrates that circuit courts have the power to do whatever is necessary to accomplish the full and complete administration of their determinations, even if it means reserving their power until all sequences of events necessary to the execution of their orders take place. It is axiomatic that divorce proceedings are special proceedings whereby courts must have jurisdiction long after the divorce is over to ensure its orders are abided by. The same reasoning applies to family support, child support, maintenance, and property division cases. When the legislature has stated, as it did in § 753.03, that courts have this broad power to see to the enactment of their judgments, how do we apply the statute of repose to cut off this power?

Our final question is closely related to the third, but analyzes the vesting of Patricia's interest in Michael's pension from a different angle. In ***Dewey v. Dewey***, 188 Wis. 2d 271, 275-76, 525 N.W.2d 85 (Ct. App. 1994), this court analyzed whether an employee-spouse was discharged of his "obligation" to execute a QDRO when a bankruptcy court discharged all of his prepetition debts. Relevant to this case, the ***Dewey*** court held that "a division of a pension plan pursuant to a divorce decree does not create an obligation in the employee-spouse

but creates two separate property interests that become vested at the moment the decree is entered." ***Id.*** The court continued:

> The effect of a divorce decree is to extinguish any prior interests that the parties might have had in an asset and creates new interests which become vested at the moment the divorce decree is entered.
>
> ….
>
> Although the asset is currently held by [the employer], this asset is [the nonemployee-spouse's] sole and separate property and any money owed to [the nonemployee-spouse] is owed to her by [the employer]. The judgment clearly provides that [the employee-spouse] was required to execute a QDRO to effectuate the division of his pension. [The employee-spouse's] responsibility is to do so.

Id. at 276-77.

If we accept the ***Dewey*** analysis, then this case is arguably not an "action" on a divorce judgment because the divorce judgment itself gave Patricia a vested property interest in the portion of Michael's pension that was awarded to her. As a result, Michael is not being divested of any property, so there is no action on the judgment and Michael has no standing to object to the execution of the QDRO. We acknowledge that this case is distinguishable from ***Dewey*** in that there is a strong argument that Patricia's interest in Michael's property did not vest until QDROs were accepted by his retirement plan.[5] But whether Patricia's property interest vested at the time of the divorce or at a later date, the result is the

[5] In the ***Dewey*** case, as in this one, no QDRO had been executed and the employee-spouse unsuccessfully argued that because of that, the nonemployee-spouse's interest was a contingent one. *See* ***Dewey v. Dewey***, 188 Wis. 2d 271, 278-79, 525 N.W.2d 85 (Ct. App. 1994). However, there was no discussion of whether a QDRO would have been accepted by the employee-spouse's retirement plan at the time of the divorce decree, so the precise situation we have here was not addressed.

same: it vested before this case was initiated, and Michael is not being divested of anything by executing a QDRO. So we question whether he is even a proper party to this case.

In summary, we have submitted to the supreme court five questions, all of which implicate ***Hamilton***. This court is not equipped to make a statement about any of these issues without running the risk of either extending ***Hamilton*** beyond what was intended or effectively overruling it without intending to do so. Because of this, we respectfully submit this case to the supreme court to answer these questions.