COURT OF APPEALS DECISION DATED AND RELEASED

March 6, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1129

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

IN RE THE MARRIAGE OF:

DOLORES J. RINDAHL,

Plaintiff-Appellant,

v.

RALPH G. RINDAHL,

Defendant-Respondent.

APPEAL from an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

DYKMAN, P.J. Dolores and Ralph Rindahl were married for forty-six years before their divorce in Illinois on July 1, 1992. At the time of divorce, Dolores was sixty-five years old and Ralph sixty-six. The judgment of divorce, which was prepared by Dolores's attorney, provided that Ralph pay Dolores $364 per month from social security and pension funds. The judgment

also provided that both parties waived maintenance. Ralph moved to Osseo, Wisconsin, in June 1993 and filed a Chapter 7 bankruptcy petition on December 22, 1993.

On January 9, 1996, Dolores brought an order to show cause to enforce a foreign judgment in Jackson County because Ralph failed to pay her the $364 per month. After hearing testimony from both Dolores and Ralph, the court found that the payment was not maintenance and as such was discharged in bankruptcy. The court reasoned:

> What [Dolores] in this case is doing is asking this court to interpret the Illinois judgment which was obviously prepared by [her] attorney. The judgment itself indicates that Denis J. McKeown is the attorney for [Dolores]; also indicates that [Ralph] appeared pro se.
>
> That judgment of divorce clearly in paragraph six provides that the parties have entered into an oral property settlement agreement settling and disposing of all matters of the division of marital and non-marital property, maintenance for either spouse and all other matters, that the oral agreement as hereinafter set forth is made a part of this judgment.
>
> It goes on in paragraph J of the judgment of the court to provide that the wife waives any claim of maintenance from the husband. Maintenance is very specific as to its meaning, and it is maintenance that is non-dischargeable in bankruptcy. If [Dolores] had wished that the debt not be dischargeable in bankruptcy, she should not have agreed and should not have asked the court to permit her to waive maintenance.

Dolores appeals from the circuit court's decision.

Section 523(a)(5) of the United States Bankruptcy Code exempts from discharge any debt owed to a former spouse for maintenance. The determination of whether a debt is dischargeable under this provision is a matter of federal bankruptcy law, not state law. ***Lyman v. Lyman***, 184 Wis.2d 124, 138, 516 N.W.2d 767, 773 (Ct. App. 1994). The party seeking to establish an exception to discharge bears the burden of proving, by a preponderance of the evidence, that the debt is nondischargeable. ***Id.***

The parties differ on the standard we are to use in reviewing the circuit court's decision. Ralph argues that we should review the court's decision under the clearly erroneous standard, while Dolores argues that our review is *de novo*.

The critical inquiry in determining whether an obligation is maintenance is the shared intent of the parties at the time the obligation arose. ***In re Sampson***, 997 F.2d 717, 723 (10th Cir. 1993). Federal courts have concluded that the determination of whether parties to a divorce action intended an obligation to be in the nature of maintenance is a factual question reviewed under the clearly erroneous standard. *See, e.g.*, ***id.*** at 721. Also, in Wisconsin a circuit court's determination of the parties' intent from an ambiguous judgment of divorce is treated as a question of fact reviewed under the clearly erroneous standard. *See* ***Weston v. Holt***, 157 Wis.2d 595, 601, 460 N.W.2d 776, 779 (Ct. App. 1990). Therefore, we will review the circuit court's decision to determine whether it is clearly erroneous.

Dolores argues that we should not use the federal standard of review because this case arose in state court, not federal court. She argues that we should instead review the circuit court's decision *de novo* under ***Nottelson v. DILHR***, 94 Wis.2d 106, 115-16, 287 N.W.2d 763, 768 (1980), because we are determining whether facts fulfill a particular legal standard.

Dolores's argument fails to recognize, however, that ***Nottelson*** discusses the standard of review for applying "a statutory concept *to a concrete fact situation*." ***Id.*** at 115, 287 N.W.2d at 768 (emphasis added). What we have here is hardly a concrete fact situation. The judgment of divorce provides that both parties have waived any right to maintenance, yet Dolores claims that the $364 payment was intended to be in the nature of maintenance. The sole issue in this case is whether the parties intended the payment as maintenance or as

part of their property settlement. As provided by ***Sampson*** and ***Weston***, the question of the parties' intent is a question of fact.

Courts look to a variety of factors in determining the mutual intent of the parties. These factors include:

1. Whether a maintenance award is also made for a spouse.

2. Whether there was a need for support at the time of the divorce and whether support would be inadequate absent the obligation in question.

3. Whether the court intended to provide for support by the obligation in question.

4. Whether the debtor's obligation terminated at the death or remarriage of the recipient spouse.

5. Whether the amount or duration of payments can be altered upon a change of circumstances.

6. The age, health, educational level, work skills, earning capacity and other financial resources of the parties independent of the obligation in question.

7. Whether payments are extended over time or are in lump sum.

8. Whether the debt is characterized as property division or support under state law.

9. Whether the obligation balances disparate incomes of the parties.

10. Tax treatment of payments.

11. Whether one party relinquished a right to support under state law in exchange for the obligation in question.

Lyman, 184 Wis.2d at 138-39, 516 N.W.2d at 773-74. This list is not exhaustive. *See, e.g.*, ***In re Daulton***, 139 B.R. 708, 710 (Bankr. C.D. Ill. 1992).

In this case, the court looked to the judgment of divorce in concluding that the parties did not intend the payment to be in the nature of maintenance. Although a written agreement between the parties is not dispositive of the issue of intent, it is persuasive evidence. ***Sampson***, 997 F.2d at 722-23. In ***Tilley v. Jessee***, 789 F.2d 1074, 1078 (4th Cir. 1986), the court concluded that while a written agreement could not be determinative on the intent issue, it could erect a "substantial obstacle" to the party challenging its terms.

In the present case, the judgment of divorce provided: "The wife waives any claim of maintenance from the husband. The husband waives any claim of maintenance from the wife." This provision provides a substantial obstacle for Dolores to overcome in attempting to establish the $364 payment as maintenance.

Other evidence points in favor of construing the $364 payment as part of the parties' property settlement, not maintenance. For example, the judgment of divorce provides that Dolores will receive 159 monthly installments of $5,324.92 from the sale of Ralph's business, thus lessening Dolores's need for maintenance. The judgment was also drafted by Dolores's attorney, and thus could have been drafted to include maintenance if Dolores thought that maintenance was necessary. Although the court did not discuss these factors in reaching its decision, we are to search the record for facts to support the trial court's finding, not for facts to support a finding the trial court could have made, but did not. ***In re Becker***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

Dolores attempted to overcome the substantial obstacle of the judgment's language by offering evidence that the payment was in fact intended as maintenance. She testified that the parties intended her to live on her social security and the $364 a month after the divorce. She testified that she dropped out of high school in eleventh grade and argued that her limited work experience made her prospects for employment slim. She also testified that she was concerned that the business purchaser would default on its payments and, in the absence of a default, she argued that her health and family's history of

longevity made it likely that she would outlive the income stream from the sale of the business. Finally, she argues that the payments would be taxable as maintenance under the Internal Revenue Code.

After reviewing the record, we cannot conclude that the circuit court's decision is clearly erroneous. The judgment provides that Dolores waived maintenance. The judgment also provides that Dolores is to receive 159 monthly installments of $5,324.92 from the sale of Ralph's business, much of this already paid. Dolores also received social security at the time of the divorce. The circuit court would not be clearly erroneous in concluding that the judgment was indicative of the parties' mutual intent and that Dolores could support herself at the end of twelve years with the money she would save from the sale of the business plus her social security.

We acknowledge that Dolores testified that the parties intended the $364 payment for her maintenance. But even the uncontradicted testimony of one of the spouses is not decisive on the issue of the parties' intent. ***In re Benich***, 811 F.2d 943, 945 (5th Cir. 1987).[1] And the circuit court is not required to consider every factor in making its determination. ***Lyman***, 184 Wis.2d at 139, 516 N.W.2d at 774. Because the circuit court did not discuss the factors argued by Dolores in its decision, we assume that the court concluded either that Dolores's testimony was not credible or that these factors did not overcome the substantial obstacle of the language of the divorce judgment.

Finally, Dolores argues that under ***In re Wisniewski***, 109 B.R. 926 (Bankr. E.D. Wis. 1990), we should attempt to determine the constructive intent of the parties because the parties' conscious shared intent cannot be determined from the judgment and the testimony. In ***Wisniewski***, Wayne agreed to pay

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[1] We recognize that a court cannot disregard uncontradicted testimony as to the existence of some fact or the happening of some event in the absence of something in the case that discredits the testimony or renders it against reasonable probabilities. ***Ashraf v. Ashraf***, 134 Wis.2d 336, 345, 397 N.W.2d 128, 132 (Ct. App. 1986). But intent, though a finding of fact, must be inferred from a person's acts and statements, in view of the surrounding circumstances. ***Pfeifer v. World Service Life Ins. Co.***, 121 Wis.2d 567, 569, 360 N.W.2d 65, 66 (Ct. App. 1984). Although Dolores testified that the $364 payment was to be considered maintenance, the trial court was not required to believe that testimony because of the existence of the written stipulation that "[t]he wife waives any claim of maintenance from the husband."

$2,000 of Linda's attorney's fees stemming from their 1988 divorce, and Linda agreed to waive maintenance. Prior to the entry of the divorce judgment, Wayne filed a Chapter 7 bankruptcy petition and sought to discharge the fees owed to Linda's attorney. ***Id.*** at 928.

The bankruptcy court decided that it needed to determine the parties' constructive intent in determining whether the obligation was dischargeable. The court reasoned:

> This court cannot say that when Linda and Wayne negotiated the attorney fee provision in their divorce judgment that they consciously intended for it to be either property division or support; to form such intent they would have to have known the legal consequences of a bankruptcy that might follow. They were wrapping up a bitter fight, and this provision was just part of the package. They did not intend to classify the obligation; they only intended that it be paid. This court must, therefore, determine their constructive intent. To do so, the court must measure the effect or function of this provision as revealed by the acts and circumstances of the spouses at the time of the divorce.

Id. at 929.

We decline Dolores's invitation to review the parties' circumstances to determine the constructive intent of their agreement. ***Wisniewski*** is a bankruptcy court decision, not an appellate court decision. The ***Wisniewski*** court was determining the parties' intent as a matter of first impression and independently concluded that the agreement was not indicative of the conscious intent of the parties. We, on the other hand, are not the first court to determine Ralph and Dolores's intent. The circuit court had the opportunity to hear Dolores and Ralph testify and determine their credibility and concluded that they did not intend the $364 payment as maintenance. We do not search the record to see if we would have reached a different conclusion than the circuit court; rather, we only review its decision to determine whether it is clearly erroneous. Based on the evidence, we conclude that it is not.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.