

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 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. 2007AP1165

Cir. Ct. No. 1992FA289

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

KAREN A. WOODS P/K/A KAREN A. GUNN,

PETITIONER-RESPONDENT,

v.

LOWELL A. GUNN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Lowell Gunn appeals a post-divorce order dividing his military pension. He sets forth several reasons why he believes his ex-wife,

Karen Woods, should have been procedurally barred from raising the issue. We conclude that the trial court properly reached the issue, and affirm.

BACKGROUND

¶2 Gunn and Woods were divorced in 1993 following a twenty-three year marriage. The divorce judgment incorporated a marital settlement agreement by the parties. The agreement provided in relevant part:

The parties agree that [Gunn] has approximately 12 years of credible military service and that all of ... this service has taken place during the parties' marriage. Under present law, a minimum of 20 years of credible military service is required before the respondent will be entitled to a pension and there is absolutely no guarantee that the respondent will ever actually be entitled to a military pension since for many reasons he may not actually serve at least 20 years. The parties cannot agree on what amount, if any, of each potential pension payment [Woods] should be entitled to and this issue will be decided by the court.

The divorce judgment did not further address the issue, however.

¶3 Gunn did eventually complete his twenty years of service and began receiving military pension benefits in 2001. On July 14, 2005, Woods moved for an order dividing the pension. Gunn objected on the grounds that: (1) the court lacked jurisdiction to reopen the property division; and (2) the motion was barred by laches. The trial court rejected Gunn's objections and entered an order dividing the pension. Gunn does not challenge the court's calculation of the division, but appeals whether the trial court properly reached the issue.

STANDARD OF REVIEW

¶4 Whether a court has continuing jurisdiction over the property division in a divorce judgment presents a legal question subject to *de novo* review. *See, e.g., Washington v. Washington*, 2007 WI 47, ¶3, 234 Wis. 2d 689, 611 N.W.2d 261.

¶5 Our review of a laches determination presents a mixed standard of review. The reasonableness of the delay and prejudice questions are treated as questions of law based upon factual findings. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶17, 290 Wis. 2d 352, 714 N.W.2d 900. However, once the elements of laches have been established, a court still has discretion whether or not to apply the doctrine. *Id.*

DISCUSSION

Trial Court's Authority to Act

¶6 Gunn first argues that the trial court lacked the authority to divide his pension since Woods presented no grounds to reopen the divorce judgment under WIS. STAT. § 806.07 (2005-06).¹ This argument is entirely misplaced, however, since the trial court did not act under WIS. STAT. § 806.07, but rather under WIS. STAT. § 767.01(1). As the Wisconsin Supreme Court once explained, it is not necessary to consider whether there would be grounds to open a divorce judgment under WIS. STAT. § 806.07 if the court already has continuing jurisdiction under another provision. *See Washington*, 234 Wis. 2d 689, ¶4 n.2.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Contrary to Gunn’s assertions, this case does not present a statute of limitations situation; it involves the enforcement of a judgment.

¶7 WISCONSIN STAT. § 767.01(1) provides a court with continuing jurisdiction to enter postdivorce orders regarding property division when necessary to effectuate a divorce judgment, notwithstanding the general rule that divorce judgments are not “subject to revision or modification.” See *Washington*, 234 Wis. 2d 689, ¶¶14-15. Thus, silence in a final divorce judgment with respect to an issue which was before the court may create an ambiguity which allows the court to issue an additional order clarifying the original judgment. *Id.*, 234 Wis. 2d 689, ¶¶17-25.

¶8 Here, the marital settlement agreement incorporated into the divorce judgment explicitly stated that the court would determine “what amount, if any, of each potential pension payment [Woods] should be entitled to.” The agreement did not specify whether that determination was to be made at the time of the divorce, the time the pension was actually vested, if it did vest, or when payments began. The judgment of divorce did not further address the issue. Thus, the divorce judgment was ambiguous with respect to the disposition of Gunn’s pension, and the trial court had continuing authority to address the issue.

Laches

¶9 The equitable defense of laches “operates as a bar upon the right to maintain an action by those who unduly slumber upon their rights.” *Flejter v. Estate of Carl Flejter*, 2000 WI App 26, ¶41, 240 Wis. 2d 401, 623 N.W.2d 552. The elements of laches are: (1) an unreasonable delay by the party now seeking relief; (2) lack of knowledge or acquiescence by the party asserting laches that a

claim for relief was forthcoming; and (3) prejudice to the party asserting laches caused by the delay. *Coleman*, 290 Wis. 2d 352, ¶¶27-29.

¶10 First, with regard to the reasonableness of the delay, it was clear at the time of the divorce that it would be at least eight more years before the parties would even know if the pension had vested. Woods averred in the affidavit supporting her motion to divide the pension that she had learned Gunn was receiving benefits but did not know when he had begun to do so. Gunn was obviously in a better position than Woods to know when he began receiving benefits, and did not inform her of that fact. We are not persuaded it was unreasonable for Woods to wait until learning that Gunn was actually receiving benefits before moving to have the pension divided.

¶11 Nor has Gunn satisfied the second or third elements of the laches test. Gunn should have been fully aware that a pension division claim was forthcoming since he signed the marital settlement agreement stating that the court was to decide the issue. In any event, it was as much Gunn's responsibility to bring the matter to the court's attention as it was Woods', and he could have done so at any time if he wished clarity on the issue. He has not presented any facts that would show his ability to litigate the issue of how the pension should be divided was adversely affected by waiting until he was actually receiving benefits. The relevant evidence was all documentary in nature, and not subject to diminished witness memories or otherwise unavailable.

¶12 Gunn also argues on appeal that Woods "waived" the pension issue or "abandoned" it under WIS. STAT. § 177.02(1). Neither doctrine applies to the facts of this case. Waiver does not apply because Woods fully preserved the issue of Gunn's military pension in the final divorce judgment by including it in the

marital property settlement. WISCONSIN STAT. § 177.02(1) deals with the State's ability to claim certain intangible property "that has remained unclaimed by the owner for more than 5 years after it became payable or distributable" Gunn's pension has not remained "unclaimed"; benefits have been paid out on a continuing basis for the past several years. Even if the statute did somehow apply, Woods filed her motion for division of the pension within five years after the benefits first became payable.

¶13 In sum, we conclude the trial court properly declined to apply laches or any other procedural bar to Woods' motion to have the court calculate the division of Gunn's military pension, as has been specified in the divorce judgment.

By the Court.—Order affirmed.

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

