COURT OF APPEALS DECISION DATED AND FILED

June 26, 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. 2007AP1250

Cir. Ct. No. 2006FA15

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

IN RE THE MARRIAGE OF:
CORA L. JOHNSON V. SCOTT G. JOHNSON:

MARK JOHNSON,

APPELLANT,

V.

CORA L. JOHNSON,

RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mark Johnson appeals an order vacating a divorce judgment granted to Cora and Scott Johnson. Mark argues that the circuit court

lacked jurisdiction to vacate the judgment. Alternatively, Mark argues that there was insufficient evidence to establish that Cora was not a resident of Waupaca County for the thirty days preceding commencement of the divorce action. Mark also contends that judicial and equitable estoppel should have barred the circuit court from vacating the judgment. Finally, Mark argues that the circuit court's decision should be overturned on public policy grounds. We reject Mark's arguments and affirm the order.

BACKGROUND

¶2 Cora filed for divorce in Waupaca County on January 17, 2006. Between the filing of the divorce and the divorce judgment, Scott executed a Will directing that his estate be awarded to Nicole Stanles, Scott's step-daughter and Cora's natural born daughter. Scott also appointed Stanles as executor of the estate, with Cora named as an alternate executor. The couple were ultimately divorced on September 7, 2006, and Scott died on October 6, 2006. After Stanles declined to act as executor for the estate, Cora, as the named alternative, consented.

¶3 Cora moved to admit the Will into probate, and Mark Johnson, Scott's father, objected to admission of the Will as well as Cora's appointment as executor. The estate then moved to reopen and vacate the divorce judgment for lack of jurisdiction, on the ground that Cora was not a resident of Waupaca County for thirty days preceding the filing of the divorce petition. The circuit court granted the motion to vacate, and this appeal follows.

DISCUSSION

¶4 Mark argues that the circuit court lacked jurisdiction to vacate the judgment of divorce. Citing ***Pettygrove v. Pettygrove***, 132 Wis. 2d 456, 393 N.W.2d 116 (Ct. App. 1986), and ***Cox v. Williams***, 177 Wis. 2d 433, 502 N.W.2d 128 (1993), Mark contends that the court's jurisdiction over the divorce matter terminated upon Scott's death. ***Pettygrove*** and ***Cox***, however, are distinguishable on their facts.

¶5 In ***Pettygrove***, the husband in a divorce action died approximately one hour before the divorce judgment was rendered. ***Pettygrove***, 132 Wis. 2d at 458. The ***Pettygrove*** court concluded that "a nonadjudicated divorce action does not survive the death of one of the parties." ***Id.*** In ***Cox***, Debbie Williams was nominated to serve as her step-child's guardian under her deceased husband's will. ***Cox***, 177 Wis. 2d at 438. After her husband died, Williams filed a petition for visitation in the divorce action between her husband and his ex-wife. ***Id.*** at 437-38. Our supreme court ultimately affirmed the circuit court's denial of Williams' petition. Acknowledging that jurisdiction over divorce actions terminates upon the death of one of the parties, the ***Cox*** court concluded: "It follows … that the circuit court's postjudgment authority over visitation [of the child] expired upon Dan's death." ***Id.*** at 440.

¶6 The present case does not involve a situation where the court granted a divorce judgment or otherwise sought to modify issues arising from a divorce judgment after a party's death. Rather, the circuit court here addressed whether it had jurisdiction to issue the divorce in the first instance. We discern no error.

Pursuant to WIS. STAT. § 767.301 (2005-06),[1] "[n]o action for divorce or legal separation … may be brought unless at least one of the parties has been a bona fide resident of the county in which the action is brought for not less than 30 days next preceding the commencement of the action." Fulfillment of the residency requirement is a condition precedent to commencement of the divorce action. ***Siemering v. Siemering***, 95 Wis. 2d 111, 114-15, 288 N.W.2d 881 (Ct. App. 1980). If the condition was not met, the action was never commenced. ***Id.*** at 115.

¶7 Mark nevertheless argues that there was insufficient evidence to establish that Cora was not a resident of Waupaca County for the thirty days preceding commencement of the divorce action. We disagree. Cora testified at the motion hearing that she resided with Scott at their residence in Portage County until "probably" mid-January 2006. Cora then moved to a house in Waupaca County. The court heard evidence showing that Cora applied for a post office box in Waupaca County on January 11, 2006. Cora's cable television was scheduled for installation on January 13, 2006, and her gas service began on January 5, 2006. The tenant that preceded Cora in the Waupaca County house testified that he did not move out of the house until January 1, 2006. Three witnesses testified that they helped Cora move from the Portage County house to the Waupaca County house sometime between the beginning to the middle of January 2006. Based on the evidence and Cora's testimony, the court found that Cora was not a bona fide resident of Waupaca County for the requisite thirty days preceding the January 17, 2006 commencement of the divorce proceedings.

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

¶8 Mark argues that although there is evidence establishing that Cora resided in Waupaca County in early January 2006, there is no evidence that Cora did not live in Waupaca County prior to that time. To the contrary, as noted above, Cora testified that she resided with Scott in Portage County until approximately mid-January 2006. Further, witnesses testified that they helped Cora move from Portage County to Waupaca County sometime between the beginning to the middle of January 2006. This evidence supports Cora's claim. To the extent Mark challenges the witnesses' credibility, the circuit court is the ultimate arbiter of both the credibility of the witnesses and the weight to be given each witness's testimony. ***Pindel v. Czerniejewski***, 185 Wis. 2d 892, 898, 519 N.W.2d 702 (Ct. App. 1994).

¶9 Mark also contends that judicial and equitable estoppel should have barred the court from vacating the judgment. As Mark concedes, the doctrine of judicial estoppel is intended to protect against a litigant playing "fast and loose with the courts" by asserting inconsistent positions. *See* ***State v. Fleming***, 181 Wis. 2d 546, 557, 510 N.W.2d 837 (Ct. App. 1993). Here, Cora testified that she had an eleventh-grade education and later obtained her G.E.D. Cora further testified that she did not know what "commencement" meant and has "a hard time understanding lawyers." The court ultimately concluded:

> [W]hen I hear her say that she doesn't speak very good lawyer language, that she doesn't understand, that she just relies upon what her attorney tells her, she doesn't read documents before she signs them, she's one of those people that I believe that about.

The circuit court's findings demonstrate that Cora was not attempting to play fast and loose with the court. Turning to Mark's equitable estoppel claim, "[t]he elements for equitable estoppel include (1) an action or non-action that induces

(2) reliance by another, either in the form of action or non-action, (3) to his or her detriment." ***Russ v. Russ***, 2007 WI 83, ¶37, 302 Wis. 2d 264, 734 N.W.2d 874. Mark does not explain, however, how it is that Scott relied to his detriment on the divorce judgment. We therefore reject this argument.

¶10 Finally, Mark argues that the circuit court's decision should be overturned on public policy grounds. Mark intimates that an affirmance of the circuit court's order in this case will somehow place undue influence on what he describes as "the previously insignificant issue of residency." Mark lists a number of hypothetical scenarios he thinks will occur if we do not rule in his favor and further emphasizes the impact this case may have on the probate proceeding. As noted above, however, fulfillment of the residency requirement is a condition precedent to commencement of the divorce action. ***Siemering***, 95 Wis. 2d at 114-15. A court must be able to reopen and vacate a divorce judgment that was a nullity in the first instance. Mark's arguments for a blanket rule to the contrary are unfounded.

By the Court.—Order affirmed.

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