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DISTRICT II

June 19, 2024

To:

Hon. William J. Domina
Circuit Court Judge
Electronic Notice

Amy Hetzner
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Jennifer J. Van Kirk
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP669

Paul Donald Volkert v. Lisa Theresa Volkert (L.C. #2006FA223)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Paul Volkert appeals from an order of the circuit court modifying his maintenance payments to Lisa Volkert. The dispositive issue is whether the court properly reopened and revised its July 16, 2021 order based on a mistake. *See* WIS. STAT. § 806.07(1)(a) (2021-22).¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On July 16, 2021, the circuit court ordered Paul to pay \$9,636 in maintenance per month to Lisa, commencing on July 1, 2020. The court divided the parties' respective incomes on a sixty percent/forty percent basis, favoring Paul. The court set an explicit end date for maintenance payments, March 31, 2026, which is when Lisa will be eligible for her maximum social security benefits. The court concluded that an indeterminate award was not appropriate given the parties' ages at that time. At the end of its oral ruling, the court stated that the maintenance payments would be tax deductible for Paul and taxable to Lisa.

On January 27, 2022, Lisa moved to reopen what she argued was a mistake in the circuit court's prior ruling regarding the tax deductibility of the maintenance payments. Her motion was grounded in a claimed inconsistency with the court's intended sixty percent/forty percent income split between the parties. The court granted Lisa's motion, explaining that it made a mistake in the July 16, 2021 decision. The court changed the tax status of the payments, making them taxable to Paul and tax deductible for Lisa. The court explained that its decision was proper under WIS. STAT. § 806.07(1)(a), which allows an order to be reopened within a year if a mistake is identified. *See* § 806.07(2).

The issue before us is whether the circuit court erred in deciding that it made a mistake with regard to the taxability of the maintenance payments. A court may reopen an order or judgment for various reasons, including “[m]istake, inadvertence, surprise, or excusable neglect.” WIS. STAT. § 806.07(1)(a). We review the court's decision to reopen an order or judgment under § 806.07 for an erroneous exercise of discretion. *See Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. “We will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision.” *Id.* “A discretionary decision

contemplates a process of reasoning that depends on facts that are in the record, or reasonably derived by inference from facts of record, and a conclusion based on the application of the correct legal standard.” *Id.*

The circuit court flatly stated that it made a mistake with regard to the taxability of the maintenance payments. The court explained that in its prior oral ruling it had made detailed findings regarding the parties’ income and the appropriate division of that income relative to maintenance. The court noted that it had expressly stated that its decision was intended to provide Paul with sixty percent of the parties’ total income and to provide Lisa with forty percent of the parties’ total income. Characterizing its award of the tax deduction as a mistake made after a lengthy hearing, the court emphasized that its intent as clearly explained in the oral ruling was for the parties to share their income sixty percent/forty percent, while the mistaken tax-deduction award to Paul resulted in the parties having an income split that was closer to seventy percent/thirty percent. Because the court’s decision to reopen and modify its order was based on the facts of record, and in accord with the appropriate law, we conclude that the court properly exercised its discretion in so ruling.

Paul raises other issues with regard to the July 16, 2021 order that are unrelated to the question of the tax liability for the maintenance award. He argues that the circuit court: (1) erroneously exercised its discretion in denying his motion to foreclose maintenance; (2) erred in making its order retroactive to July 1, 2020; and (3) erroneously exercised its discretion when it decided to split the parties’ income on a sixty percent/forty percent basis. The deadline for Paul to raise those issues in this court has already passed because he did not timely file a notice of appeal from the July 16, 2021 order. *See* WIS. STAT. § 808.04. That order explicitly stated that it was the final order for purposes of appeal, but Paul did not appeal. Moreover, to the

extent that Paul objected to the impact that changing tax deductibility would have on the merits of the court's overarching decision regarding maintenance—the sixty percent/forty percent division—he was required to raise that challenge during the proceedings on the motion to reopen. *See State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999) (issues not raised in the circuit court will not be considered for the first time on appeal). He did not do so.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals