

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 23, 1996

NOTICE

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.

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

No. 95-1212

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

In re the Marriage of:

**SHARON L. PRETSCH,
n/k/a SHARON L. PHILLIPS,**

Petitioner-Appellant,

v.

KENNETH A. PRETSCH,

Respondent-Respondent.

APPEAL from an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Sharon L. Pretsch, n/k/a Sharon L. Phillips, has appealed from an order denying her motion for relief from a stipulation, order and judgment entered in the trial court on February 13, 1989. We affirm the trial court's order denying relief.

Phillips and Kenneth A. Pretsch were divorced by judgment entered on February 16, 1988.¹ On March 16, 1988, Phillips filed a petition for bankruptcy with the United States Bankruptcy Court for the Eastern District of Wisconsin. Based on debts owed by her pursuant to the property division in the divorce judgment, she listed Pretsch among her creditors.

After receiving notice of the bankruptcy petition, Pretsch immediately began an adversary proceeding in the bankruptcy court to challenge the dischargeability of the debt arising under the divorce judgment. The bankruptcy court then granted Phillips a discharge of other debts, but provided that the dischargeability of the divorce judgment debt would remain pending in the adversary proceeding in bankruptcy court.

While the adversary proceeding remained pending, Pretsch filed a motion to reopen the divorce judgment in the circuit court pursuant to § 806.07, STATS., alleging fraud, mistake, surprise and misrepresentation. On June 16, 1988, the circuit court requested briefs from the parties on the issue of whether the filing of the bankruptcy petition precluded it from vacating the judgment.

Before the circuit court resolved this issue, a pretrial conference was held in bankruptcy court. At that August 16, 1988 hearing, the bankruptcy court was informed that Pretsch had filed a motion in the state circuit court to set aside the divorce judgment and allow maintenance to be awarded to him. According to the minutes of the pretrial conference, the bankruptcy court indicated that since maintenance would not come from the property of the estate, the hearing of the motion by the state circuit court would not violate the automatic stay. The record indicates that the minutes of the bankruptcy court pretrial hearing were transmitted to the circuit court by letter by counsel for Pretsch. According to the letter, the bankruptcy court judge indicated that the circuit court judge should give her a call if he had any questions.

At a subsequent hearing on September 27, 1988, the circuit court stated that it would proceed to hear the motion to reopen because the

¹ In this decision, Sharon Pretsch will be referred to by her current surname of Phillips. Kenneth Pretsch will be referred to as Pretsch.

bankruptcy court had relinquished jurisdiction and indicated that it could "go ahead in this matter." On October 5, 1988, the bankruptcy court provided that it would hold over the bankruptcy proceedings pending a circuit court determination as to whether to award maintenance to Pretsch. On January 26, 1989, the bankruptcy court was informed by counsel that the parties had reached a settlement which would make the adversary proceeding in bankruptcy court unnecessary and that Pretsch's counsel would transmit a stipulation and order for dismissal.

Phillips and Pretsch subsequently entered into a stipulation to resolve both the circuit court action and the bankruptcy court proceeding. The stipulation was approved and adopted by the circuit court in an order entered on February 13, 1989. Pursuant to the stipulation and order, Pretsch was granted a civil judgment against Phillips in the amount of \$11,039, representing Phillips' share of the marital debt divided in the divorce judgment. The stipulation further provided that the civil judgment would be nondischargeable in the bankruptcy proceeding and that maintenance was denied to both parties. Pretsch then stipulated to the dismissal of the adversary proceeding in the bankruptcy court with prejudice and without costs. The bankruptcy court subsequently dismissed and closed the adversary proceeding.

Phillips never appealed the 1989 circuit court order or the bankruptcy court order. However, in late 1994 she moved for relief from the February 13, 1989 stipulation, order and judgment. She claims that the circuit court lacked jurisdiction to enter the order and judgment because the automatic stay provided for bankruptcy proceedings by 11 U.S.C. § 362(a) was never lifted by the bankruptcy court. She contends that the 1989 judgment and order approving the stipulation therefore were void. She also contends that the circuit court had no authority in 1989 to reopen the divorce judgment to consider maintenance because maintenance had been specifically waived by both parties at the time of divorce. In addition, she contends that the stipulation did not satisfy the requirements of 11 U.S.C. § 524(c) and (d) and therefore was unenforceable as a "reaffirmation agreement." She also contends that the stipulation is invalid because it was not supported by consideration.

We conclude that the bankruptcy court's actions in permitting the motion to reopen to go forward in the state circuit court constituted the functional equivalent of lifting the automatic stay provided by 11 U.S.C. §

362(a). This conclusion is corroborated by the bankruptcy court's subsequent dismissal of the adversary proceeding based on the stipulation and order entered in circuit court, indicating that it viewed the circuit court settlement and disposition as falling within the scope of the proceedings contemplated by it in circuit court. While a formal written order lifting the stay was never entered by the bankruptcy court, it is clear from the bankruptcy court's actions that it was willing to permit the circuit court to hear and decide Pretsch's motion for relief from the divorce judgment, going so far as to invite the circuit court judge to call if he had any questions and holding the adversary proceeding in abeyance in the bankruptcy court pending proceedings in the circuit court.

Phillips argues that the bankruptcy court's "divestment" of jurisdiction can only be explained as a result of a mistaken impression that the circuit court had retained jurisdiction over maintenance." She argues that the circuit court had no authority to award maintenance after entry of the divorce judgment because the parties waived their right to maintenance in the divorce judgment. She contends that if the bankruptcy court had realized that maintenance was waived and been afforded a chance to grant relief from the automatic stay, it may have reserved the issue of dischargeability to itself.

The problem with Phillips' argument is that when the bankruptcy court held bankruptcy proceedings in abeyance and indicated that circuit court proceedings could be held on Pretsch's motion to reopen, it did not indicate that some, but not all, of the issues raised by the motion to reopen could be dealt with in the circuit court. If Phillips believed the circuit court was going beyond what was contemplated by the bankruptcy court, she could have obtained a clarification from the bankruptcy court at that time. Instead, she proceeded to enter into a stipulation in the circuit court, including a provision for a nondischargeable judgment in favor of Pretsch which was accepted by the bankruptcy court when it dismissed the adversary proceeding. Based on the totality of these facts, the only conclusion that reasonably can be drawn is that the bankruptcy court consented to the circuit court's addressing of the motion to reopen and thus lifted the automatic stay. No basis therefore exists for this court to conclude that the automatic stay provisions of 11 U.S.C. § 362(a) deprived the circuit court of jurisdiction to enter the February 13, 1989 order and judgment.

Phillips also argues that the stipulation did not satisfy the requirements of 11 U.S.C. § 524(c) and (d) and therefore was unenforceable as a "reaffirmation agreement." However, this argument does not affect the issue of whether the circuit court had jurisdiction to enter the February 13, 1989 order and judgment. Moreover, while the issue of whether the stipulation satisfied 11 U.S.C. § 524 might have been a proper issue for appeal in 1989 in either the circuit court or bankruptcy court actions, those appeals were never taken. Similarly, we are not concerned with the issue of whether the circuit court had authority to award maintenance after it was waived in the original divorce judgment because ultimately it did not award maintenance.

We also reject Phillips' argument that the 1989 stipulation was void for lack of consideration. Assuming *arguendo* that this issue could properly be raised in Phillips' 1994 motion for relief, it lacks merit on its face. Among other things, by entering the stipulation Pretsch relinquished his right to challenge the dischargeability of the debt in bankruptcy court, which saved Phillips the travail and cost of participating further in that proceeding.

By the Court. – Order affirmed.

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