COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

No. 95-3034

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

In re the Marriage of:

ELIZABETH H. TAYLOR,

Petitioner-Respondent,

v.

JAMES A. TAYLOR, IV,

Respondent-Appellant.

APPEAL from an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed and cause remanded with directions*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. James A. Taylor, IV appeals from an order denying his motion to reduce payments he makes to Elizabeth H. Taylor under a 1987 divorce judgment. He argues that the circuit court ignored the parties' agreement that the payments include child support and therefore are subject to modification. We conclude, as did the circuit court, that the payments are not subject to modification, that no grounds under § 806.07, STATS., exist to relieve James of the terms of the stipulated payments and that James' motion to modify

was frivolous. We affirm the order and remand to the circuit court for a determination of appellate attorney's fees and costs for a frivolous appeal.

The divorce judgment incorporated the agreement of the parties that James make monthly payments which periodically increased based on the Consumer Price Index. The payments were $6650 starting in 1987 and had increased to $8958 in 1995 when James filed a motion to modify them. The judgment designated the payments as IRC § 71 payments[1] and stated that they were in lieu of maintenance and to be treated as a final division of property. The payments continue until Elizabeth's death or December 31, 1999, whichever occurs first. Maintenance was waived. Child support for the parties' two children was "held open in that other provisions are contained herein in lieu of said support."

James sought to modify the payments on the ground that they constituted modifiable child support. He challenges the circuit court's finding that the payments do not include child support as contrary to the undisputed evidence that the parties intended the payments to include child support. He points to the fact that the payments cease six months after the youngest child will have graduated from high school. He contends that the circuit court is required to "pierce through the Judgment's `§ 71' verbiage" to ascertain the true nature of the payments.

Whether the facts as determined fulfill a legal conclusion presents a question of law which we review de novo. *See* ***Popp v. Popp***, 146 Wis.2d 778, 787, 432 N.W.2d 600, 603 (Ct. App. 1988) (identity is a question of law). Here, the payments were designated as § 71 payments. But there is more than the designation which demonstrates that the payments were not merely modifiable child support.

The IRS code provides that if a portion of a payment is fixed and designated as child support, that amount is not deductible by the payor or included in the income of the payee. 26 U.S.C. § 71(c)(1). Yet for every year

[1] This refers to 26 U.S.C. § 71 (Internal Revenue Code) which permits a payor of alimony or maintenance to deduct the payments and includes such payments in the recipient's gross income.

since the divorce, James has deducted the full amount of the payments. The termination date of the payments was six months beyond the usual termination date for support for a child and thus ensured the deductibility of the payments for James. *See* 26 U.S.C. § 71(c)(2) (a payment is treated as child support if it is reduced at a time clearly associated with a contingency relating to a child, such as leaving school). Further, the payments terminate upon Elizabeth's death. That is a contingency which fits the definition of maintenance under 26 U.S.C. § 71(b)(1)(D).

Even accepting Elizabeth's concession that the payments include a child support component, it does not transform the entire payment to child support. No portion of the payment was fixed as child support. Indeed, the circuit court retained jurisdiction to make an order for child support.[2] The driving force behind § 71 payments is the deductibility of the payments for the payor. James utilized this feature of the payments he made.

We conclude that the payments are not child support. To the extent that the payments are property division, they are not subject to modification. Section 767.32(1)(a), STATS. Further, the payments could not have been ordered by the circuit court in the judgment of divorce but for the parties' agreement to settle their financial affairs in such a manner. *See* ***Ross v. Ross***, 149 Wis.2d 713, 719-21, 439 N.W.2d 639, 642-43 (Ct. App. 1989). James cannot seek modification of the terms of the stipulation because both parties entered into the stipulation freely and knowingly and the overall settlement is fair, equitable and not illegal or against public policy.[3] *See* ***id.***

James argues that a reduction in the child support payments was justified under § 806.07, STATS. We need not address this argument because of the conclusion that the payments were not child support. James' argument

---

[2] For this reason, we summarily reject James' claim that the judgment is contrary to public policy because it removes the circuit court's jurisdiction over child support.

[3] James does not challenge the circuit court's findings that the stipulation was freely and knowingly entered into and that it is a fair settlement not contrary to public policy. Even if the payments included an amount for child support, a stipulation that support be maintained at a certain level despite a reduction in income is not contrary to public policy. ***Honore v. Honore***, 149 Wis.2d 512, 518, 439 N.W.2d 827, 829 (Ct. App. 1989).

ignores that the parties' stipulation for § 71 payments was, in essence, a contract between the parties. *See* ***Kastelic v. Kastelic***, 119 Wis.2d 280, 287, 350 N.W.2d 714, 718 (Ct. App. 1984). Although the business devastation he suffered may not have been foreseeable and may justify a modification of child support based on a change of circumstances, it does not affect contractual obligations. The fact that a settlement appears in hindsight to have been a bad bargain is not sufficient by itself to set aside a judgment. ***Spankowski v. Spankowski***, 172 Wis.2d 285, 292, 493 N.W.2d 737, 741 (Ct. App. 1992).

The circuit court imposed a $2500 sanction against James for bringing a frivolous motion. James contends that the court's finding is not supported by the record. He further claims that the court focused on his subjective motivation for bringing the motion to modify rather than applying the objective standard.

We first note that it is not clear whether the circuit court's finding of frivolousness was made under § 802.05, STATS., or § 814.025, STATS. Elizabeth argues that under § 802.05 our standard of review is deferential, whereas under § 814.025 our inquiry involves a mixed question of law and fact. ***Gardner v. Gardner***, 190 Wis.2d 216, 247, 250, 527 N.W.2d 701, 712, 713 (Ct. App. 1994). In this instance, we need not distinguish between the two provisions because the result is the same under either provision.

If the record is sufficient, we can decide as a matter of law whether a reasonable attorney should have known that the action was without a proper basis in law. ***Elfelt v. Cooper***, 163 Wis.2d 484, 501, 471 N.W.2d 303, 310 (Ct. App. 1991), *rev'd on other grounds*, 168 Wis.2d 1008, 485 N.W.2d 56 (1992), *cert. denied*, 113 S. Ct. 1251 (1993). The standard is an objective one: whether the attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 241, 517 N.W.2d 658, 666 (1994).

A body of case law explains that stipulations in divorce actions for provisions which are otherwise beyond the authority of the circuit court to order are enforceable and subject to "estoppel." There is no reasonable argument that the periodic payments James stipulated to were subject to

modification. His claim that the provision for the periodic payments was contrary to public policy because it divested the circuit court of jurisdiction over child support is patently frivolous in light of the express reservation of child support jurisdiction. Thus, there was no good faith argument for an extension, modification or reversal of existing law.

Additionally, James' attempt to avoid the hard consequences of the stipulated payments while taking advantage of the deductibility of such payments over many years is something other than "creative lawyering." It demonstrates the absence of plausible facts to support his claim. "[A] claim cannot be made reasonably or in good faith, even though possible in law, if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed." ***Stern***, 185 Wis.2d at 244, 517 N.W.2d at 667.

The final issue is the assessment of costs on appeal. We must make a determination of whether an appeal is frivolous under RULE 809.25(3)(c), STATS. We may make this determination as a matter of law. ***Stern***, 185 Wis.2d at 252, 517 N.W.2d at 670. It follows that upon affirming the trial court's determination that the motion was frivolous, the appeal is frivolous as a matter of law. *See* ***id.*** at 253, 517 N.W.2d at 671; ***Riley v. Isaacson***, 156 Wis.2d 249, 262, 456 N.W.2d 619, 624 (Ct. App. 1990) (if the claim is correctly adjudged to be frivolous in the trial court under § 802.05, STATS., it is frivolous per se on appeal). Thus, we remand to the circuit court with directions to determine the reasonable appellate attorney's fees and costs incurred by Elizabeth and to be assessed against James.

By the Court.—Order affirmed and cause remanded with directions.

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