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DISTRICT IV

April 30, 2014

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

2013AP770 Tina M. Prust v. Kenneth L. Prust (L.C. # 2011FA444)

Before Blanchard P.J., Lundsten and Kloppenburg, JJ.

Kenneth Prust appeals an order denying his motion to reopen a divorce judgment. 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(1) (2011-12).[1] We affirm. However, we deny respondent Tina Prust's motion for a finding of frivolousness.

Kenneth first argues that the judgment should be reopened on the ground of mistake under WIS. STAT. § 806.07(1)(a). He argues that he entered the marital settlement agreement based on a misunderstanding that certain real property he inherited was divisible property that

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

would be among the assets divided at the time of the divorce and, therefore, to retain possession of that property, he would have to compensate Tina in some manner, such as by making regular payments to her out of his income. Kenneth asserts that since the divorce he has learned that inherited property is *not* divisible property, which means that he mistakenly agreed to make excessive payments to Tina. He argues that the circuit court decision denying his motion does not address this issue.

Kenneth's misunderstanding about the legal status of the real property, if it genuinely occurred, was a "mistake" in the common meaning of that term. Kenneth does not cite any authority for the proposition that such a misunderstanding can be considered a mistake in the *legal* sense of the term. However, neither does Tina cite any authority holding that it cannot be.

The circuit court did not make a finding about whether Kenneth genuinely held that belief at the time of the divorce. Although the court made a finding that Tina's attorney, at that time assisting both parties, properly indicated the status of the real property as inherited or gifted on the financial disclosure forms, that finding does not resolve whether Kenneth properly understood the legal implications of that status. Nor did the court state a legal conclusion about whether such a misunderstanding on his part might qualify as a mistake for purposes of WIS. STAT. § 806.07(1)(a).

Although the court did not directly address Kenneth's "mistake" claim in the above ways, we read the court's decision as implicitly addressing that issue in a different way. In its discussion and findings, the court noted that Kenneth represented himself during the divorce, despite suggestions that he retain counsel; that he was an educated man holding a master's degree and an executive position; and that he had wanted to conclude the divorce as soon as

possible. Although the court did not state the following conclusion, we understand the court to have implicitly concluded that even if Kenneth was genuinely mistaken about the divisibility of inherited or gifted property at the time of divorce, it was essentially his own fault because he could have prevented that mistake by hiring counsel.

Under the applicable legal test for WIS. STAT. § 806.07(1)(a), not every mistake that occurs is necessarily a basis for opening a judgment. ***State v. Schultz***, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999). The question remains a discretionary one in which the court must consider whether the movant's conduct was excusable under the circumstances, meaning that the mistake might have been made by a reasonably prudent person. ***Id.*** We will not reverse a discretionary decision if it is based on facts of record, applies a correct legal standard, and has a reasonable basis. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶¶29-30, 326 Wis. 2d 640, 785 N.W.2d 493.

Here, the circuit court could reasonably conclude that it was not prudent for Kenneth to represent himself and, therefore, any mistake he made regarding the legal effect of the property's status was not a basis for reopening the judgment. Therefore, we must affirm this portion of the court's decision.

Kenneth's second argument is that the judgment should be reopened to make a change regarding the VA mortgage on the family residence, which was awarded to Tina. Kenneth asserts that the VA mortgage on the house remains in his name, which is now preventing him from obtaining a mortgage of his own, or is otherwise impairing his ability to obtain credit. He argues that the circuit court's decision "overlooked" this issue.

The circuit court's decision does not directly address this argument. Although the decision briefly notes the existence of the argument, it does not appear to make relevant findings or expressly make a substantive decision on this point. However, when the circuit court sets forth no reasons or inadequate reasons for its decision, we will independently review the record to determine whether it properly exercised its discretion and whether the facts provide support for the court's decision. ***Miller***, 326 Wis. 2d 640, ¶30.

On this point, Tina refers us to testimony at the hearing on Kenneth's motion to reopen the judgment. There, both Kenneth and Tina testified that before the divorce they looked into whether Tina could assume the mortgage, and were told that she would have to be working for a longer time for that to occur.

Based on that testimony, the court could reasonably conclude that Kenneth was aware of this potential problem at the time of the divorce, but proceeded with the agreement anyway, and therefore this should not be a basis for reopening the judgment. In addition, while this situation may have left Kenneth with certain negative consequences, he is vague on appeal about what better alternative should have been established at the time of divorce, or should be established now. He asserts that "this situation may have been alleviated by adding language to structure the outcome," but he does not propose any specific alternative that would have been possible, given the constraints that apply to mortgages, assumptions, and refinancings. Accordingly, we conclude that there was a reasonable basis to deny his motion to reopen as to this point.

Tina asks that we find this appeal frivolous under WIS. STAT. RULE 809.25(3) on the ground that Kenneth knew or should have known that it lacked a reasonable basis in fact or law. We deny the motion. Although we have rejected his arguments, we cannot say that both

arguments were ones that an unrepresented person should have known lacked a basis in law, given this record and the content of the circuit court decision.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals