



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 15, 2020

To:

Hon. Maureen M. Martinez
Circuit Court Judge
730 Wisconsin Ave.
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Jacqueline M. Hallac
Renee E. Mura Attorneys At Law SC
6123 Green Bay Rd., Ste. 220
Kenosha, WI 53142-2927

Peter J. Ludwig
Wanasek, Scholze, Ludwig & Ekes, S.C.
P.O. Box 717
Burlington, WI 53105-0717

Renee E. Mura
Renee E. Mura, S.C.
6123 Green Bay Rd., Ste. 220
Kenosha, WI 53142

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

2019AP462-FT

Ed Cruz v. Mary H. Cruz (L. C. # 1997FA6)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Ed Cruz appeals from an order of the circuit court denying his self-styled motion to “enforce the original divorce decree” as it relates to the division and distribution to Mary H. Cruz of one of Ed’s retirement plans. Pursuant to a presubmission conference and this court’s order of March 29, 2019, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1)

(2017-18).¹ Upon review of those memoranda and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Ed and Mary divorced in 1998. Both were represented by counsel. Ed was ordered to pay maintenance to Mary for an indefinite term, and the parties reached a stipulation regarding property division. Relevant to this appeal, the judgment assigned to Mary “the actuarial equivalent of Fifty Percent (50%)” of Ed’s accrued benefit under the Federal Employee Retirement System (FERS), to be accomplished by a Qualified Domestic Relations Order (QDRO).²

In 2013, Ed filed a motion seeking to modify or terminate maintenance on the ground that his approaching mandatory retirement date would alter his income and trigger the FERS annuity payment to both parties. The circuit court denied the motion, and we reversed and remanded “to give the court the opportunity to re-examine the maintenance issue” once the FERS distribution amounts were determined.

The FERS account entered pay status in June 2014, with a gross monthly payout amount of \$3133. Of this, Mary received \$1,215.29 per month.

In January 2015, Ed filed a motion “for correction of the Qualified Domestic Relations Orders prepared in this matter,” alleging, in pertinent part, that the FERS QDRO did not divide the FERS account “consistent with the divorce decree.”

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² More precisely, the FERS account was divided and distributed by a Court Order Acceptable for Processing (COAP). Like the parties and the circuit court, we will refer to the COAP as a QDRO. Ed’s two other federal retirement plans were also divided in the divorce, but are not relevant to this appeal.

The circuit court conducted a trial in April 2016 to determine the appropriate distribution of Ed's FERS benefit. Ed presented Grant Zielinski as his expert witness, while Jesse Mueller testified as an expert on Mary's behalf. Both experts agreed that the language in the marital settlement agreement (MSA) and the resulting QDRO provided insufficient direction as to how the FERS account should be divided. In a June 30, 2016 decision and order, the court adopted Mueller's analysis and ordered that Mary should continue to receive a monthly distribution by QDRO from the FERS account in the amount of \$1215.29.

In 2017, a new circuit court judge heard and decided the parties' opposing maintenance modification motions. The court found that Ed's retirement justified a modification. It declined to increase Mary's maintenance award and ordered that her payments would terminate in December 2019. In reaching its decision, the court was aware of the other circuit court's June 2016 FERS determination.

In October 2018, Ed filed the self-styled motion underlying this appeal. As in his January 2015 motion, Ed disputed the propriety of Mary's FERS award and asked the circuit court to change the QDRO to better reflect the language in and intent of "the original divorce decree property division." According to Ed, the United States Office of Personnel Management (OPM) had been improperly calculating Mary's share of the FERS distribution all along. Ed complained that the OPM's formula improperly determined Mary's share based on the length of the parties' marriage (270 months), rather than the shorter length of his federal service during the length of the marriage (161 months). Ed asserted that the OPM informed him of the alleged error in a November 2016 letter, and that Mary's award was a "windfall" that contradicted the terms of the original MSA. The circuit court denied the motion, stating that this very issue was

decided by the court in June 2016 after extensive litigation and with the benefit of two highly qualified experts.

On appeal, Mary points out that Ed never appealed or even moved to reconsider the circuit court's June 2016 order, and argues that Ed is essentially seeking to reopen that order based on allegedly new information reflected in the November 2016 letter.³ According to Mary, Ed has not shown his entitlement to relief under any cognizable theory. We agree.

We reject Ed's characterization of his claim as a mere attempt to enforce the original 1998 MSA. To do so would require this court to ignore the 2016 litigation that interpreted and clarified the MSA and resulted in a QDRO effectuating its intent. Ed does not offer and we are not otherwise aware of any authority that would allow this court to disregard the superseding June 2016 order for a QDRO distributing \$1,215.29 to Mary each month.

Nor has Ed set forth a colorable claim under WIS. STAT. § 806.07 for vacating or reopening the June 2016 order. In fact, Ed's brief expressly disclaims any reliance on § 806.07. To that end, he does not argue or establish the existence of newly discovered evidence under § 806.07(1)(b) or any of the factors justifying relief from the operation of the June 2016 order pursuant to § 806.07(1)(h) and *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493.

³ Mary also correctly points out that Mueller's April 2016 expert testimony explicitly stated that the OPM had calculated Mary's share using "270 months" which was "the whole length of the marriage." Mueller was immediately asked to explain why OPM might have used this number and whether it was "wrong." Thus, the propriety of OPM's coverture fraction was the subject of litigation at the April 2016 trial, and the court set a fixed sum after considering a multitude of variables. The OPM's pretrial coverture fraction was hardly new information discovered for the first time in November 2016.

Upon the foregoing reasons,

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

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

Sheila T. Reiff
Clerk of Court of Appeals