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DISTRICT IV

August 25, 2022

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Electronic Notice

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

2021AP798

In re the marriage of: Tatiana S. Laiter v. Michael Lyubchenko
(L.C. # 2016FA752)

Before Kloppenburg, Fitzpatrick, and Graham, 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).

Michael Lyubchenko appeals an order entered by the circuit court following a de novo hearing on his motion to clarify terms in 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 (2019-20).¹ For reasons explained below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. Separately, we deny Tatiana Laiter's motion for sanctions under WIS. STAT. RULE 809.25(3).

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Laiter and Lyubchenko were divorced in 2017. Laiter was awarded primary placement of their minor child, and Lyubchenko was ordered to pay child support consistent with the guidelines. The court determined that Lyubchenko was not entitled to maintenance payments, and the issue of Laiter’s entitlement to maintenance was held open.

At the time the divorce judgment was entered, WIS. STAT. § 767.54 provided in pertinent part: “In any action in which the court has ordered a party to pay child or family support under this chapter, ... the court shall require the parties annually to exchange *financial information*.”² (Emphasis added.) A corresponding provision in the parties’ divorce judgment provides: “Pursuant to ... § 767.54 the parties shall exchange copies of their *taxes* each year to determine if child support should be adjusted.” (Emphasis added.)

Since the entry of the divorce judgment, the parties have disputed a number of issues, and these disputes have resulted in the filing of multiple contested motions. Many but not all of these motions have been filed by Lyubchenko, and a common subject of his motions has been the parties’ annual exchange of financial information. In response to one of Lyubchenko’s motions, the circuit court ordered that he is required to seek its prior approval before filing any additional motions.

In November 2020, without explicit preapproval by the circuit court, Lyubchenko filed the motion that is the subject of this appeal. In his motion, Lyubchenko asked for clarification

² As discussed in greater detail below, WIS. STAT. § 767.54 was amended in April 2022, during the pendency of this appeal. *See* 2021 Wis. Act 259. Here and at other places throughout the discussion, we cite to the 2019-20 version, which was in effect at the time of the de novo hearing and is identical to the version that was in effect at the time of the parties’ divorce. At other times, as noted, we cite to the current version of the statute, which reflects the amendments made by 2021 Wis. Act 259 (effective April 17, 2022).

about whether the annual exchange of “taxes” meant “full tax returns with all schedules,” or whether “providing only Form 1040 is sufficient.”

The motion was originally considered by a court commissioner, who addressed Lyubchenko’s motion to clarify as well as other disputes that had arisen between the parties. As for the motion to clarify, the court commissioner determined that Laiter was “not required to furnish [Lyubchenko] with any additional tax return documents for any [tax] year prior to 2020.” However, going forward, the commissioner ordered as follows:

Commencing October 15, 2021, and for each and every year thereafter so long as the parties’ child remains unemancipated or maintenance to [Laiter] remains open, the parties shall provide full financial disclosure of all taxable and not taxable income to each other, and exchange their federal, state, individual and business tax returns, including Schedule K-1 and all attachments thereto, from the previous tax year.

The court commissioner denied Laiter’s motion for sanctions against Lyubchenko for overtrial and for filing what Laiter had characterized as a frivolous motion.

Lyubchenko sought “partial de novo review” of the court commissioner’s decision by the circuit court. As pertinent to this appeal, he specifically sought review of the determination that Laiter was not required to provide additional information from tax years 2018 and 2019.

The parties submitted briefing and exhibits prior to the de novo hearing. Specifically, Laiter filed a motion to dismiss Lyubchenko’s request for de novo review or, in the alternative, she requested that the circuit court review the court commissioner’s denial of her sanctions motion. Lyubchenko’s responsive brief set forth his argument that additional information beyond the Form 1040s was needed to determine Laiter’s income. His argument was built on assertions about the tax implications of the corporate structure of Laiter’s business and how

profits from that business may be distributed. However, Lyubchenko did not support these assertions with legal authority, nor did he indicate that he intended to present supporting testimony at the de novo hearing to support his argument.

During the de novo hearing, the circuit court took up the portion of the court commissioner's order that had clarified which financial documents the parties were required to exchange. Lyubchenko did not object to the court's decision to address this issue, nor did he request to present any evidence. The court ordered that the parties' annual financial exchanges be limited to "personal tax returns." Regarding Laiter's motion for sanctions, the court declined to order Lyubchenko to pay additional fees as a sanction for overtrial or frivolous filings.³

The circuit court then entered a written order. Like the court commissioner, the circuit court ordered that Laiter was not required to supplement any tax information for any tax year prior to 2020. However, in contrast to the court commissioner's decision, the circuit court ordered that, going forward, annual exchanges would be limited to Form 1040s:

Commencing with tax year 2020 and for each and every year thereafter so long as the parties' child remains unemancipated or maintenance to [Laiter] remains open, the parties shall each provide to the other party their Form 1040 personal tax return. The parties are not required to provide their business tax returns or other supporting financial documentation.⁴

³ The circuit court nevertheless ordered that all future motions by either party would be reviewed directly by the court before they could be referred to a court commissioner. The circuit court explained that Lyubchenko would be able to challenge its instant ruling on appeal but that, going forward, it did not intend to spend any more time on tax issues "that have been litigated and litigated and litigated."

⁴ In his appellate briefing, Lyubchenko states that the circuit court "[has] not yet issued a ruling on whether Laiter [has] to provide her full 2018 and 2019 tax returns to Lyubchenko." We disagree. The clear implication of the court's order is that the only document Laiter was required to provide for those tax years was her Form 1040.

Lyubchenko appealed. On appeal, the parties agree that the circuit court’s order should be reviewed for erroneous exercise of discretion.⁵ Lyubchenko argues that the circuit court erroneously exercised its discretion in limiting the annual exchanges to Form 1040s and, further, that the court should have set a deadline for the exchanges. Laiter argues that the court appropriately exercised its discretion, and she has filed a motion for sanctions pursuant to WIS. STAT. RULE 809.25(3). After briefing was complete, this case was submitted to this court for a decision.

Then, in April 2022, while the appeal was pending in this court, the legislature amended WIS. STAT. § 767.54. *See* 2021 Wis. Act. 259. Pertinent to this dispute, the legislature has now specified the types of documents that parties are required to exchange annually, and it added a deadline for the exchanges.

WISCONSIN STAT. § 767.54(1) (current, as amended by 2021 Wis. Act. 259) now reads in pertinent part as follows:

In an action in which the court has ordered a party to pay
 ... child support or maintenance under this chapter, ... the court
 shall require the parties annually to exchange financial

⁵ In Laiter’s briefing on this point, her counsel cites an unpublished per curiam opinion from an appeal involving different parties, asserting that the citation is “for persuasive value only.” Counsel’s citation of this opinion is contrary to our appellate rules. Specifically, WIS. STAT. RULE 809.23(3)(a) and (b) do not allow unpublished cases to be cited as “precedent or authority,” and allow such cases to be cited for “persuasive value” only if they were issued on or after July 1, 2009, and were “authored by a member of a three-judge panel or a single judge under [WIS. STAT. §] 752.31(2).” We caution counsel against such citations in the future.

Separately, we note that counsel also cites unpublished per curiam opinions from Lyubchenko’s prior appeals in this divorce proceeding. Unlike counsel’s citation of the per curiam opinions discussed in the above paragraph, counsel’s citation of prior per curiam opinions from this proceeding is consistent with our rules, which allow such opinions to be cited as “law of the case.” WIS. STAT. RULE 809.23(3)(a).

information. Information required under this section shall be exchanged no later than May 1 of each calendar year, unless otherwise agreed upon in writing by the parties. The information required to be exchanged shall include all of the following:

(a) A complete copy of the party's federal and state income tax return for the prior calendar year, including all W-2 forms and 1099 forms.

(b) A year-end paycheck stub from all sources of employment for the prior calendar year.

(c) The party's most recent paycheck stub from all sources of employment showing year-to-date gross and net income.

(d) Any other documentation of the party's income from all sources for the 12-month period preceding the exchange of information.

The effective date of the amended statute is April 17, 2022.⁶

We ordered the parties to file supplemental letter briefs to address the effect, if any, of the amendment on the issues in this case. Having considered the parties' submissions, we conclude as follows.

For all tax years prior to 2021, it was within the circuit court's discretion to limit the parties' annual exchanges to Form 1040s, and not to impose a specific deadline for the exchanges. As shown above, the version of WIS. STAT. § 767.54 that was in effect at the time of the divorce and the de novo hearing did not specify the documents to be exchanged, nor did it impose any specific deadline for the exchanges. The statute instead appeared to give a circuit court broad discretion to determine what "financial information" had to be exchanged and when based on the circumstances of any given case. Here, although the circuit court did not explain its

⁶ See WIS. STAT. § 991.11 (providing that, if an act does not expressly prescribe an effective date, an act shall take effect on the date after its publication).

reasoning in any detail, it appears that the court determined that, based on the court’s extensive knowledge of the history of litigation between the parties, it was appropriate to limit the annual exchanges of information.

Lyubchenko argues against this conclusion in his original briefing and in his supplemental brief. Throughout this appeal, he has argued that he could not determine Laiter’s total income from her Form 1040 alone. However, Lyubchenko does not cite any statute or case law that precluded the circuit court from exercising its discretion in the manner it did under the prior version of WIS. STAT. § 767.54 based on the court’s assessment of the circumstances of the case.⁷ Based on the language of the then-current version of the statute, we conclude that the court did not erroneously exercise its discretion with respect to tax years prior to 2021.

In his supplemental brief, Lyubchenko appears to acknowledge that the amendments to WIS. STAT. § 767.54 do not apply to the exchanges for tax years that predate the amendment—at least to the extent that financial information from those years had already been exchanged prior to the effective date of the amendment. And Lyubchenko does not develop any legal argument to explain why the amendment should apply to financial information that was due before the effective date of the statute but has not yet been exchanged.

⁷ In his original briefing, Lyubchenko also argued that the circuit court failed to conduct a proper de novo hearing and prevented him from introducing the testimony of a witness who “was on hand and ready to testify if necessary.” However, Lyubchenko did not object to the manner in which the hearing was conducted during the circuit court proceedings, nor did he ever inform the court that he had testimony he wished to present. Under the circumstances, we conclude that Lyubchenko has forfeited any arguments about the manner in which the hearing was conducted. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (providing that, as a general rule, a party forfeits an argument by not advancing it with clarity during the circuit court proceedings).

For all of these reasons, Lyubchenko has not persuaded us that the circuit court’s order with respect to tax years prior to 2021 was erroneous.

We reach a different conclusion for annual exchanges that post-date the effective date of the amendment (including the exchange of information from tax year 2021, which, based on the amendment, would have been due on May 1, 2022). For all such exchanges, the statute no longer allows the circuit court to limit the ongoing exchanges of “financial information” according to its own discretion, as it had done prior to the amendment.

Laiter argues against this conclusion in her supplemental brief. She contends that the amendments are “immaterial” to this appeal because they are not “retroactive.” To the extent Laiter means to argue that the amendments do not apply to any exchanges that were due prior to the effective date of the amendments, we agree, as we have discussed above. However, we do not agree with Laiter’s argument that the amendment has no application to the ongoing future obligations of parties to a divorce judgment that was entered before the effective date of the amendment.

“As a general rule, legislation is presumed to apply prospectively unless the statutory language reveals, by express language or necessary implication, an intent that it apply retroactively.” *Schulz v. Ystad*, 155 Wis. 2d 574, 597, 456 N.W.2d 312 (1990). Had the legislature intended to exempt the ongoing future obligations of divorced parties from the reach of the amendment, the legislature could have added language to that effect, as it has done when

amending other statutes that pertain to court proceedings.⁸ No such language appears in the statute, and the language that the legislature did use necessarily implies that the legislature intends the amendment to govern divorced parties' ongoing obligations. Indeed, the legislative history cited by Laiter suggests that the purpose of the amendment was to clarify the ambiguity in the prior version of the statute, which "breeds litigation." We see no reason that the legislature would want to accomplish this purpose only with regard to parties to future divorces, and not with regard to parties who have ongoing obligations under existing divorce judgments.

Laiter also argues that the apparent purpose of the amendment—to reduce litigation by clarifying what documents must be exchanged—has already been accomplished by the order on appeal in this case. Perhaps so, but, as we have explained, the statutory language no longer allows the circuit court to exercise its discretion in the manner that it did under the prior version of WIS. STAT. § 767.54.

For all of these reasons, we conclude that, for tax years 2021 and onward, the circuit court no longer has discretion to limit the parties' exchanges to Form 1040s.⁹

⁸ See, e.g., 2011 Wis. Act 2. In that act, the legislature amended various statutes pertaining to rules of civil litigation, including WIS. STAT. § 907.02(1), which addresses the standards for admissibility of expert testimony. 2011 Wis. Act 2 § 34m. The act contains a section on "initial applicability" which provides that "[t]he treatment of ... [§ 907.02 of the statutes first apply to actions or special proceedings that are commenced on the effective date of this subsection]" 2011 Wis. Act 2 § 45(5).

⁹ In their supplemental briefs, the parties appear to dispute whether WIS. STAT. § 767.54, as amended, requires Laiter to provide business tax returns. We observe that the language of the amended statute is unambiguous—under § 767.54(1)(d) (as amended by 2021 Wis. Act 259), a party must provide "[a]ny other documentation of the party's income from all sources for the 12-month period preceding the exchange of information." Therefore, to the extent that Laiter has income from her business, she must provide documentation of that income going forward. However, to the extent that there are remaining disputes between the parties about what documents are required to document business income, such disputes are appropriately resolved by the circuit court.

Finally, as for Laiter’s motion for sanctions, we conclude that Lyubchenko’s appeal was not frivolous, as is required to order sanctions under WIS. STAT. RULE 809.25(3). *See Howell v. Denomie*, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621 (“To award costs, and attorney fees, an appellate court must conclude that the entire appeal is frivolous.”).

IT IS ORDERED that the order of the circuit court is affirmed with respect to tax years prior to 2021, and reversed with respect to tax years starting with 2021.

IT IS FURTHER ORDERED that this case is remanded for the circuit court to conduct any necessary proceedings and enter an order that is consistent with this opinion and order and WIS. STAT. § 767.54 (as amended by 2021 Wis. Act 259).

IT IS FURTHER ORDERED that Laiter’s motion for sanctions is denied.

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

Sheila T. Reiff
Clerk of Court of Appeals