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DISTRICT II

June 12, 2013

To:

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

2013AP289-FT

In re the marriage of: Barbara Ann Balke v. John Chester Balke
(L.C. # 2007FA460)

Before Brown, C.J., Reilly and Gundrum, JJ.

John Balke appeals an order denying his motion for WIS. STAT. § 806.07 (2011-12) relief from judgment.¹ He contends that the circuit court erroneously exercised its discretion in denying relief. Pursuant to a presubmission conference and this court's order of March 7, 2013, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1). Upon review of those memoranda and the record, we affirm the order of the circuit court.

John and Barbara Balke were divorced in August 13, 2007, by the Honorable Donald J. Hassin, Jr. Both parties appeared pro se and presented a proposed marital settlement agreement

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

and judgment of divorce. The documents stated that John “shall pay an amount equal to 15% of gross income but not less than the sum of \$750.00 per month as child support” and pay “an amount equal to 15% of gross income but not less than the sum of \$750.00 per month as [maintenance].” Judge Hassin signed the parties’ documents.

On January 7, 2011, Barbara brought a motion to find John in contempt for his failure to pay the proper amount of child support and maintenance. While John had paid the \$750.00 per month in both child support and maintenance, 15% of his gross income required a greater payment than this floor. John responded with a motion to modify his support obligations. The circuit court, with the Honorable Kathryn W. Foster presiding, denied John’s motion. In doing so, it agreed with Barbara that John had underpaid his support obligations. This court affirmed the circuit court’s decision on appeal. *See Balke v. Balke*, No. 2011AP1961-FT, unpublished op. and order (WI App Dec. 14, 2011).

On July 25, 2012, John filed a motion to reopen the parties’ judgment of divorce pursuant to WIS. STAT. § 806.07(1)(h).² John maintained that the judgment needed to be reopened to reflect the intentions of the parties and the ruling of the circuit court as reflected in the divorce hearing transcript. According to John, at the time of the final divorce, it was understood that he would pay child support and maintenance at \$750.00 a month, unless one or both parties came back to the court with another fixed amount. The circuit court, with the Honorable Lloyd V. Carter presiding, denied the motion. This appeal follows.

² WISCONSIN STAT. § 806.07(1)(h) is a catch-all provision that allows the circuit court to grant a party relief for “[a]ny other reasons justifying relief from the operation of the judgment.”

On appeal, John contends that the circuit court erroneously exercised its discretion when it denied his request to reopen the judgment of divorce. Whether to grant relief from judgment under WIS. STAT. § 806.07(1)(h) is a discretionary decision. *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. In exercising its discretion under this statute, the circuit court should consider a wide range of factors, keeping in mind the competing interests of finality and fairness. *Id.*, ¶36. While other factors may be relevant, the court must consider five “interest of justice” factors, which are:

[1] whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; [2] whether the claimant received the effective assistance of counsel; [3] whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; [4] whether there is a meritorious defense to the claim; and [5] whether there are intervening circumstances making it inequitable to grant relief.

Id. (citation omitted).

As noted, the circuit court denied John’s motion to reopen the parties’ judgment of divorce pursuant to WIS. STAT. § 806.07(1)(h). It did so because (1) it did not find an inconsistency between the judgment and divorce hearing transcript; and (2) the issue of what John owed in support obligations was litigated before Judge Foster.

Reviewing the circuit court’s decision, we acknowledge that it did not explicitly consider the five interest of justice factors outlined in *Miller*. Nonetheless, because the court’s decision is discretionary, we look for reasons to sustain it and will independently review the record to determine whether it properly exercised its discretion and whether the facts provide support for its decision. *Miller*, 326 Wis. 2d 640, ¶30.

Our independent review of the record persuades us that the facts asserted by John do not warrant relief under WIS. STAT. § 806.07(1)(h). First, it appears that the judgment of divorce was the result of a conscientious, deliberate and well-informed choice of the parties. Second, John has failed to demonstrate that, as a pro se litigant, he did not know what he was doing at the time he presented his proposed marital settlement agreement and judgment of divorce to the circuit court. Third, by signing the parties' documents, the circuit court implicitly considered the merits of the judgment. Fourth, John's defense (*i.e.*, that he should only have to pay child support and maintenance at \$750.00 a month) was previously rejected by Judge Foster in a decision affirmed on appeal. Fifth, the passage of time and John's failure to act sooner are intervening circumstances that make it inequitable to reopen the judgment now. For these reasons, along with the reasons cited by the circuit court, we conclude that the circuit court properly exercised its discretion by denying John's motion.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals