20100053

IN THE SUPREME COURT OF NORTH DAKOTA

Russell E. Blomdahl,	)	**Supreme Court File No. 20100053**
	)	Walsh Co. Civil No. 93-C-13982
Appellee,	)	
	)	
v.	)	**APPELLEE'S BRIEF**
	)	
	)	
Mary Ellen Blomdahl,	)	
	)	
Appellant.	)	

APPEAL FROM MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S CONTEMPT MOTION DATED DECEMBER 17, 2009, AND ENTERED IN DISTRICT COURT, WALSH COUNTY, NORTHEAST JUDICIAL DISTRICT GRAFTON, NORTH DAKOTA.

CASE NO. 50-93-C-13982

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QUESTIONS PRESENTED

I. Whether the district court erred in denying the defendant's motion to show cause because it was filed after the statute of limitations had run.

II. Whether equitable principles of laches applies where the court may find the legal remedial defense of the statute of limitations not to apply.

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JURISDICTION

The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.R.App. P. Rule 3.

SUMMARY OF THE ARGUMENTS

I. Whether the application for an order to show cause, for purposes of enforcing a divorce judgment under N.D.C.C. 28-01-15, constitutes and "action" subject to the statute of limitations or if there are any other statutory provisions rendering the contempt motion untimely.

II. Whether, if statute of limitations bars adequate remedial measure at law, the action should be enjoined by the doctrine of laches.

OPINION BELOW

Walsh County District Court Judge M. Richard Geiger entered a Memoranda Decision and Order Denying the Defendant's Contempt Motion on the 17th day of December, 2009 because it was determined that the defendant failed to bring the claim within the ten-year statute of limitations. (Appellant Appx. 33-35).

STATEMENT OF CASE

I. PROCEDURAL DISPOSITION

The Appellant's Statement of the case is stipulated.

II. STATEMENT OF FACTS

Procedural facts included in the Mary Blomdahl's brief are not contested. However, there are additional facts pertaining to the original contempt motion brought before Judge Geiger below and references supporting those facts will be included in an addendum to the Mary's brief.

The original motion dated April 8th, 2009 was entitled "Motion for Order to Show Cause" and filed in Walsh County District Court pursuant to Civil Case No. 13982. (Appellee Appx. A-1). The Order to Show Cause motion was brought pursuant to N.D.C.C. § 14-05-24. Id.

STANDARD OF REVIEW

While Mary correctly asserts that questions of law are reviewed de novo, there are considerations given to factual determinations regarding when the state of limitations accrue. "Determining when a plaintiff's cause of action has accrued is generally a question of fact," Huber (v. Oliver County), 529 N.W.2d 179, at 182 (N.D. 1995). A district court's determination "will not be overturned on appeal unless clearly erroneous," Jones v. Barnett, 2000 ND 170, ¶ 6, 619 N.W.2d 490." Abel v. Allen, 2002 ND 147, ¶ 11, 651 N.W.2d 635 (adding original citation for short form citation version in the quotation).

LAW AND ARGUMENT

I. The District Court's Denial Of The Defendant's Motion Should Be Affirmed Because The Request Made By The Defendant Was An "Action" Subject To And Made Beyond The Statute Of Limitations.

As both Mary and Judge Gieger indicate, the parties' judgment and decree on the divorce action was entered in February 2, 1993. (Appellant Appx. A-1). Looking at the court docket, (Appellant Appx. 1) and Judge Geiger's Memoranda Decision and Order (Appellant Appx. A-31), the next occurrence in this case was the defendant's application for an "order to show cause" for purposes of enforcing a divorce judgment entered on April 29, 2009. Id.

At issue in this case is whether the *occurrence*, the order to show cause, should be deemed an "action" under state law. The term "*occurrence*" is used here briefly so as to lend

neutral tone to the term in order to help identify the nature of the action. The definition is important because the applicable statute of limitations may be triggered depending on the nature of the action. Although the term "statute of limitations" is at times casually injected into argument, there are two ways that this *occurrence* could violate statutory limitations. Although both provisions specify a ten-year limitations, if the "occurrence" is an *enforcement* of the divorce decree it may be barred by N.D.C.C. § 28-21-01, "[e]xecution at any time within ten years" or at least is required to be brought within this time and if the "occurrence" is deemed an *action* it will be barred by N.D.C.C. § 28-01-15, "[a]ctions having ten-year limitations."

A. The District Court Properly Denied the Defendant's Motion Because the Nature of the Action Sought to Execute a Judgment After the Ten-year Limitation ended.

Specifically related to divorce cases, "[a]s it relates to the specific award of 90% interest in certain retirement accounts to the defendant, it is no different that a judgment providing similar relief but outside of a divorce scenario." *See* Liefert v. Wolfer, 24 N.W.2d 690 (N.D. 1946) (quoted by Judge Gieger, Appellant Appx. A-34).

> A trial court has continuing jurisdiction to modify a divorce judgment with respect to spousal support and child support, provided that a change in circumstances occurred. § 14-05-24 of the North Dakota Century Code; Nygord v. Diets, 332 N.W.2d 708, 709 (N.D. 1983) [modification of child support]; Bingert v. Bingert, 247 N.W.2d 464, 467 (N.D. 1976) [modification of spousal support]. A trial court does not retain jurisdiction to modify a final distribution of property. Boschee v. Boschee, 340 N.W.2d 685, 688-689 (N.D. 1983); Sabot v. Sabot, 187 N.W.2d 59, 62 (N.D. 1971); Sinkler v. Sinkler, 49 N.D. 1144, 194 N.W. 817, 820 (1923). A property division may be attacked, however, in the same manner and on the same grounds as other judgments. Nastrom v. Nastrom, 262 N.W.2d 487, 492 (N.D. 1978); Dietz v. Dietz, 65 N.W.2d 470, 474 (N.D. 1954).

Wilkstrom v. Wilkstrom, 359 N.W.2d 821, 824 (N.D. 1984).

The above case helps illustrate, there are two awards that can arise out of a divorce decree, spousal support and property division. *See generally* id. "In determining whether an award constitutes spousal support or property division, we look to the rationale behind each of the two concepts. Wilkstrom at 824 (*quoting* Williams v. Williams, 302 N.W.2d 754 (N.D. 1981)).

> The equitable division of property has for its basis the husband's and the wife's respective rights to an equitable portion of the property which has been accumulated by the parties through their joint efforts and for their mutual benefit during the marriage. The function of alimony, on the other hand, has been identified by this court to be the method for rehabilitating the party disadvantaged by the divorce. Bingert v. Bingert, 247 N.W.2d 464 (N.D. 1976)

Wilkstrom at 824.

Here, the award in paragraph 9 of the divorce decree was not spousal support and there was no intent to rehabilitate Mary Blomdahl, rather this award was a property division. "[t]herefore, because we consider the provision of the...divorce judgment pertaining to retirement benefits as a property settlement and not as spousal support, it is not subject to modification. Id at 824 (*referencing* Boschee, Sabot, and Sinkler supra in the opinion). Therefore, paragraph 9 renders the award a property settlement subject only to an execution of judgment by Mary Blomdahl, restricted by applicable limitations at law.

There are two kinds of execution for judgments regarding personal property, "one against the property of the judgment debtor and another for the delivery of the possession of property and any damage for withholding the property." N.D.C.C. § 28-21-03 (2010). Either of these two execution options may be enforced within ten years after the entry of the judgment. N.D.C.C. § 28-21-01 (2010).

If the nature of the original motion was designed to have the district court order Russell Blomdahl put Mary in possession of the retirement accounts, then it is an execution on the divorce judgment not a contempt proceeding, and therefore was filed beyond the ten-year limitation.

B. Alternatively, if the Motion is not Considered an Enforcement of the Original Judgment, it Remains Untimely as an "Action" Brought Beyond the Statute of Limitations.

In looking at statutory prohibitions on "actions" state law reads, "[t]he following actions must be commenced within ten years after the claim for relief has accrued: 1. An action upon a judgment or decree of any court on the United States or of any state or territory within the United States" N.D.C.C. § 28-01-15. This statute is without definition of "action", however, another way to analyze this issue is to look at the nature of the occurrence (i.e. the Defendant's Motion) to see if is the type of occurrence that the statue of limitations is intended to bar. Generally:

> Statutes of limitation are designed to prevent plaintiffs from sleeping on their legal rights and bringing stale claims to the detriment of defendants. Burr v. Trinity Med. Ctr., 492 N.W.2d 904, 910-11 (N.D. 1992). Statutes of limitations are a legal bar to a cause of action and begin to run when the underlying cause of action accrues. Abel v. Allen, 2002 ND 147, 651 N.W.2d 635, P 10. The determination of when a plaintiff's cause of action has accrued is generally a question of fact, but if there is no dispute about the relevant facts, the determination is for the court. Id at P 11. A cause of action accrues when the right to commence the action comes into existence and can be brought in a court of law without being dismissed for failure to state a claim. Id at P 12. We have recognized statutes of limitation ordinarily began to run from the commission of the wrongful act giving rise to the cause of action, see BASF Corp. v. Symington, 512 N.W.2d 692, 695 (N.D. 1994), and '[a]n injury usually arises contemporaneously with the wrongful act causing the injury.' Huber v. Oliver, 529 N.W.2d 179, 182 (N.D. 1995) quoting Erickson v. Scotsman Inc., 456 N.W.2d 535, 537 (N.D. 1990)).

Dunford v. Tryhus, 2009 ND 212, 776 N.W.2d 539 (*quoting* Tarnasky v. McKenzie County Grazing Ass'n, 2003 ND 117, 665 N.W.2d 18, P 9). A claim's statute of limitations begins to run when the underlying cause of action accrues. Id (*citing* Tarnasky at P 9).

An action in relation to divorce cases can be better defined by the nature of what the motion is seeking. In some cases rights to receive payments, such as alimony, is considered a continuing order. *See generally* Richter v. Richter, 126 N.W.2d 634 at 637-8 (N.D. 1964)(explaining when the right to execution subject to an "action" accrues). Richter holds that where divorce decrees provide for payments in installments the right to enforce accrues upon each installment as it matures. Id.

In this case the divorce decree does not provide such a continuing accrual of rights based upon an installment of payments or distribution of property. Paragraph 9, under which Mary originally brought the motion and subsequently made this appeal specifically reads that, "...the Defendant will have a 90% interest in the Plaintiff's retirement accounts with Piper, Jaffray, and Aid Association Lutherans." (Appellant Appx. A-7).

This language does not specify any installment schedule, reoccurring payment, or continuous obligation to distribute property. Because there is no periodic accrual of rights in the interest of this property, the vesting of any property rights set forth in paragraph 9 came into existence not upon a subsequent date or time, but at the moment the judgment was docketed, in February, 1993. There is a fixed identifiable point in which the interest vested. All subsequent attempts to execute that judgment must necessarily have been made subject to the ten-year statute of limitations, N.D.C.C. § 28-21-01, related to the execution of judgments. This period would have ended February 2003. Any and all executions on judgments were, by law, required

within this time. Additionally, all actions would have similarly been barred at this time. The docket schedule provided by the Defendant is void of any such appropriate action within this time period as the first action taken in the case was done so nearly sixteen years after entry of the divorce judgment.

The Defendant's original motion requests that the Plaintiff appear to show why he, "should not be held in contempt for failure to comply with the Court's Judgment and Decree, dated February 1, 1993." (Appellee Appx. A-1). By the plain language of this motion the Defendant is not seeking that the court award an interest in property but rather asserting that the Plaintiff has failed to comply with a court order. However, paragraph 9 of the divorce decree does not command the Plaintiff to deliver possession of any personal property. Rather, the language of paragraph 9 only enters a judgment against the personal property as a vestment of the Defendant's 90% interest in the retirement accounts. This language is not a compulsory injunctive award rather, it is a declaratory judgment, defining the defendant's rights in personal property subject to the divorce decree. In other words, the court of original jurisdiction did not require the Plaintiff to proactively take any steps or order him to put the Defendant in possession of the property.

Based on this, even if the action commenced prior to February, 2003, a district court would not have been able to compel the Plaintiff to execute on the decree because he was never ordered to do so. Essentially, a motion for contempt would not have been an appropriate legal cause of action even within the ten-year statute of limitations. The correct action would have been an execution on the judgment pursuant to N.D.C.C. § 28-21-01. This perhaps, would have resulted in a court order directing the Plaintiff to place the awarded property in possession of the

defendant for which failure would then trigger a contempt proceeding. This process, regardless of the likelihood of success, needed to have been commenced within ten years of the 1993 decree.

In analyzing the nature of the motion, it appears the Defendant attempted to move to have the district court amend the original decree and order compulsory injunctive relief awarding not only interest in personal property to vest but also order delivery of possession of the property to be rendered against the Plaintiff some sixteen years after the original divorce judgment.

Mary's brief asserts that this *occurrence* is not an "action." (Appellant brief at 8). Relying on an inferential reference to "actions" requiring summons and complaint, the Defendant argues, "Russell has not been served a Summons and Complaint to enforce the 1993 divorce action. It is a motion brought to ***enforce the judgment of divorce.***" (Appellant brief at 9, ¶ 1) (emphasis added). Here, Defendant indicates that the nature of the motion was not a contempt proceeding as originally made rather it was an enforcement of the judgment, an action specifically required to be commenced within then years pursuant to N.D.C.C. § 28-21-01.

The Defendant relies on Atwood v. Atwood, 253 Minn. 185, 91 N.W.2d 728 (M.N. 1958) to assert that supplementary proceedings to divorce actions regarding custody of minor children as a supplementary proceeding incidental to the original suit and not an independent proceeding. (*See generally* Appellant Brief at 9, ¶ 2). Here, Mary flatly contradicts herself in asserting the nature of the action by analogizing, "[s]imilarly, in this case, a contempt motion brought pursuant to N.D.C.C. § 14-05-25.1 is a supplementary proceeding." Id at ¶ 3. As a matter of public policy it is understandable the issue related to child custody may require supplementary proceedings as material changes may render original decrees inadequate.

Additionally installment payments for support are understandably allowed to be addressed afterwards because of the continuing accrual of rights upon a payment schedule. However, this is not a supplementary proceeding and here is why:

N.D.C.C. § 14-05-25.1 merely authorizes contempt motions for failure to comply with distribution provisions relating to property. It does not define the action as "supplementary" as the Defendant alleges. The Defendant relies upon there being no mention of a specific time limitations for contempt motions contained within N.D.C.C. 14-05-25.1 and further suggests that if the legislature intended to do so they would have. (Appellant brief at 10). This leaves the illogical conclusion that any action subsequent to an original decree or judgment could escape the statutory time limitations, of any length, by merely being entitled a "contempt" motion. This is erroneous legal reasoning and exemplifies the importance of addressing the nature of the action and the purpose for which it is being brought.

The Defendant's reliance on Giese v. Giese falters as well. Giese v. Giese, 2004 ND 58, 676 N.W.2d 794. Giese dealt with a QDRO and a retirement account award where the Plaintiff there did not timely file the QDRO. Id. "A QDRO is a judgment, decree, or order, relating to child support, spousal support, or marital property which creates or recognizes the existence of an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under the plan." Giese at ¶ 9. The Giese case's similarity to this one ends at it being a divorce case. In Giese, the property at issue was a right to a retirement account and a distribution spilt was ordered by the district judgment. Id. This was not merely a vested right in property but also compelled the obligor to draft an order accomplishing the split. Id. In this case paragraph 9

of the divorce decree gave only a declaratory judgment in property rights and lacked any compulsory action on the part of the Plaintiff.

C. If the Motion is Considered an "Action", that Action Accrued Upon Entry of the Judgment and Began to Toll When Docketed.

Mary urges the court to accept that, in the "plain language" of paragraph 9, was prohibited from having any control or possession of the retirement accounts. (Appellant brief at 12, ¶ 2). However paragraph 9 indicates that, "[t]he Plaintiff shall have sole and exclusive use, possession, and control of the retirement, savings, checking, and insurance accounts solely in his name ***with the exception*** that the defendant will have a 90 percent interest in the Plaintiff's retirement accounts with Piper, Jaffray, and Aid Association Lutherans." (Appellant Appx. A-7)(emphasis added). In fact, the "plain" language of this paragraph specifically precludes Russell from having sole and exclusive use of the retirement account at issue.

While lacking any affirmative obligation for Russell to transfer this interest, there is nothing ambiguous in the language of the property distribution. It is a declaratory judgment merely allocating the Mary's property interest. There exists no ambiguity in the order's failure to direct Russell to delivery possession of that property. Mary's contention that the she was awarded a 90% interest but had no right to control, use, or possess them (Appellant brief at 13, ¶ 2), is erroneous because a 90% award turns on the "exception" language specifically dislodging Russell's "sole and exclusive use, possession, and control." The exception language is specifically aimed at declaring her 90% interest would *not* be subject to Russell's use and control.

D. The Time That the Interest Began to Toll Occurred Upon Entry of the Judgment not Upon a Subsequent Condition of the Retirement Account.

In the Mary's brief 15-17, she contends that the time that cause of action began to toll was not until recent years. Id at 15. There is no disagreement in the assessment of case law offered by her. However, it is an improper application to infer that maturation and accrual of a right in property in this case is dependant upon the a condition of the retirement account. Mary suggests that the "award and obligation did not accrue, mature, or ripen until Mary either entered retirement age or discovered Russell had taken a full distribution of the three retirement accounts thereby depriving her of her 90% interest." Id at 16.

There are two reasons this is incorrect. First, as outlined above, there was no obligatory order binding Mr. Blomdahl and therefore no "obligation" subject to either a fixed or continuing maturity or accrual. Second, her 90% interest was not dependant upon her reaching the age of retirement. Here Mary seems to infer that the status of the retirement account itself determines when she has a possessory interest in it (i.e. when it is subject to be drawn upon). In other words Mary suggests that the retirement account maturing triggers, or causes to accrue, her interest in the account. It is irrelevant for purposes of her 90% interest that the account has "matured" in relation to her ability to access funds within that account. This is because that the terms "matured" and "accrued" in relation to her interest were vested upon the divorce judgment and not when the account becomes active or when the account may be drawn upon or even upon her subsequent knowledge of its status. Here, Mary's interest came into existence when she received the declaratory judgment (i.e. the 90% award) and is not based on some unascertainable date of when the account would be subject to redemption or when she became aware of her legal failure to execute on the judgment.

It stands to reason that the lower court awarding the 90% interest would not have contemplated that she would only have rights in that property upon some ancillary action by

Piper Jaffray occurring thereby giving her ability to draw upon the account. It is important to recognize that the award was not a distribution of funds, it was the ability to *control* and *use* her 90% share of the retirement account. Had Mary timely asserted her right in a proper execution of judgment she would not have been bound to accept a cash discharge of that account. Rather, she would merely have had vested access and control over that account. It would have been her prerogative to do with the account what she wished however, that prerogative was dependant upon her establishing possession of her interest, which she failed to do in time.

II. Because The District Court Accurately Determined The Motion Was An "Action" There Remains No Adequate Remedy At Law For The Defendant And Any Remaining Claims Must Be Barred By The Doctrine Of Laches.

> Laches is applicable where a party who has knowledge of his rights and an opportunity to enforce them delays in doing so, thereby leading the adverse party to believe that the rights would not be asserted, and where, because of changes conditions during the delay, it would be unjust to permit them to now be asserted. 27 Am. Jur.2d Equity § 162, at 702 (1966). This doctrine has been applied to a delay of less than the statute of limitations period in enforcing a property division section of a divorce judgment. See Schafer v. Wegner, 78 Wis.2d 127, 132-33, 254 N.W.2d 193, 196 (1997). Here the delay was unreasonable. Appellant disregarded the divorce judgment for ten years.

Shultz v. Schultz, 104 Wis. 2d 739, 313 N.W.2d 279 (1981).

Here the District Court was not in any position to provide a remedy at law for the defendant because any legal cause of action to either enforce the judgment, amend the order, or renewal of judgment was extinguished by statute in or about February of 2003. There now exists no applicable remedy at law and because of this lack of an adequate remedy at law the defendant's only remaining remedy lies at best in equity. However for much of the same reasons there are statutory limitations to causes of actions, so too should equity bar actions as a result of the defendant failing to assert rights in property. Here there has been no action on behalf of the defendant for sixteen years since the original decree was entered. While it may be unfortunate

that the defendant lacked counsel in previous proceedings the entry of judgment in the divorce action adequately provided for valid property interests and there was no order binding the plaintiff to place the defendant in possession of such interest.

CONCLUSION

This case can ultimately be summarized as follows. Mary and Russell Blomdahl received a legal dissolution of their marriage in February of 1993. This was a civil property judgment. That decree awarded Mary a declaratory interest in the division of the marital property, not an interest in a continuing spousal support obligation. Russell was not ordered to take any action by the court. The next legal proceeding that took place was sixteen years later when Mary moved the court, via an order to show cause, to find Russell in contempt. Because there was no order of continuing obligation, a contempt motion, regardless of its timeliness, was an improper cause of action. Mary's property judgment could only have legally been brought before the court of original jurisdiction within the ten-year statute of limitations or within 20 years had she extended judgment within ten-years of the decree. Within the ten-year limitation neither of these actions took place. While it is unfortunate that Mary lacked counsel at the time, the applicability of the limitation does not turn upon her having been represented. It depends upon a party's timely action in asserting their rights.

The court should affirm the district court's denial of the motion based upon a lack of an adequate remedy at law and should deny the appeal on any remaining equitable grounds.

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