

Summary of SC98043, *Jeanne H. Olofson v. Scott W. Olofson, in His Capacity as Personal Representative of the Estate of Tom. W. Olofson*

Appeal from the Jackson County circuit court, Judge Susan E. Long
Argued and submitted February 25, 2020; opinion issued July 22, 2021

Attorneys: Jeanne Olofson was represented by Jonathan Sternberg of Kansas City, (816) 292-7020. Scott Olofson was represented by William C. Odle, R. Pete Smith, and Tiffany A. McFarland of McDowell, Rice, Smith & Buchanan, P.C. in Kansas City, (816) 753-5400.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A wife appeals from a judgment finding her motion to set aside a dissolution judgment on the basis of fraud was mooted or abated upon the death of her husband. In a 4-3 decision by Judge Patricia Breckenridge, the Supreme Court of Missouri vacates the judgment and remands (sends back) the case. The wife's claims raised in her motion to set aside the judgment are not procedurally barred, and the husband's death did not abate her motion because an action that primarily concerns property or property interests and only incidentally implicates personal issues does not abate with the death of a party. Additionally, the plain language of Rule 74.06(b) allows for relief from a portion of a final judgment; therefore, the rule authorizes the circuit court to vacate only the property division portion of the dissolution judgment if the wife establishes fraud on remand.

Judge Zel M. Fischer dissents in a separate opinion joined by one judge. He would affirm the circuit court judgment, holding that, because the circuit court rendered a final judgment dividing the property and that judgment is not subject to appeal or a motion for new trial, any action attempting to modify the judgment abated upon the husband's death. He would further hold that Rule 74.06(b) does not permit relief from a portion of a judgment.

Judge W. Brent Powell dissents in a separate opinion. He concurs in the portion of Judge Fischer's separate opinion finding that the wife's motion abated upon Husband's death because the circuit court's judgment dividing and disposing of the marital property is not subject to appeal or a motion for new trial.

Facts: Tom Olofson (Husband) was chairman and chief executive officer of a publicly traded software company, Equip Systems, Inc., in which he and his wife, Jeanne Olofson (Wife), owned shares of stock that constituted their largest asset when they divorced. The circuit court accepted the spouses' joint property settlement agreement, which allocated their stock and valued it at \$13.50 per share. As part of the settlement, the spouses stipulated they had made a full disclosure about the nature and extent of their property, income, assets, liabilities and financial conditions. About six months after the dissolution was final, Husband sold the company at \$16.50 per share to a buyer who took it private, allegedly triggering Husband's receipt of \$16 million in benefits. Wife subsequently moved under Rule 74.06(b) to set aside the division of the marital estate on the basis of fraud, alleging Husband deliberately misrepresented and failed to disclose facts regarding the company, including that a buyer had made a compelling offer to purchase Epiq for

more per share than the stock's current trading price. Husband died shortly after responding to Wife's motion, and his estate was substituted in his place. Following extended litigation and discovery, the circuit court granted judgment on the pleadings (without a trial) in the estate's favor and dismissed Wife's Rule 74.06(b) motion with prejudice, holding Husband's death had mooted or abated it. Wife appeals.

VACATED and REMANDED.

Court en banc holds: (1) Wife preserved for appeal her claim for vacating the property division portion of the judgment. The record establishes that, in her motion, Wife asked the circuit court to alternatively set aside portions of the judgment so as to effectuate an equitable division of the marital estate to include the value of the Equip stock at \$16.50 per share and the value of Husband's golden parachute benefits. Her suggestions in opposition to the estate's motion for judgment on the pleadings reiterated this request.

(2) The doctrines of res judicata and collateral estoppel are not applicable. The doctrines apply only in a second, subsequent lawsuit. Because Wife filed her Rule 74.06(b) motion in the original dissolution action, it is not considered a separate, subsequent lawsuit for purposes of res judicata and collateral estoppel.

(3) The estate did not preserve its claim for appeal that Wife's motion to set aside the judgment was untimely. The estate did not include this argument in its motion for judgment on the pleadings. When reviewing the grant of a motion for judgment on the pleadings, this Court can consider only whether the grounds raised in the motion support dismissal. Accordingly, the Court cannot address this unpreserved claim.

(4) The doctrine of abatement is not applicable to the circumstances of this case. An action that primarily concerns property or property interests and only incidentally implicates personal issues does not abate with the death of a party because such an action can achieve its purpose after death. Actions for fraud and deceit are considered property torts and are more than merely personal when they involve matters diminishing the property of the person defrauded. Consequently, a proceeding involving a claim of fraud in the property division of a dissolution does not abate upon the death of a party, even if the death occurs after final judgment.

(5) Rule 74.06(b) allows for relief from a portion of a final judgment. The rule's plain and ordinary language gives courts the discretion to fashion relief as equity demands. If a court were limited to vacating a judgment in its entirety, the phrase "upon such terms as are just" would be meaningless. In the context of a proceeding under Rule 74.06(b), just as in the context of a direct appeal, it is unnecessary and inefficient to vacate and, consequently, cause a lower court to readjudicate, issues concluded by correct and untainted portions of the judgment. By providing relief from a judgment upon such terms as are just, the rule recognizes courts have discretion to relieve a party from a portion of a judgment tainted by fraud and leave untainted portions intact.

(6) Wife's motion to set aside the judgment is not moot because the marital estate no longer exists in the same form it did when the property was originally distributed. A party's death after a judgment or order of dissolution does not prevent a court from dividing the spouses' property,

and courts frequently account for changes in the property and parties' circumstances since the date of the initial trial and judgment. The sale of Epiq in this case does not preclude Wife from receiving effectual relief.

Dissenting opinion by Judge Zel M. Fischer: The author would hold that, because the circuit court rendered a final judgment dividing the property and that judgment is not subject to appeal or a motion for new trial, any action attempting to modify the judgment abated upon Husband's death. Furthermore, he would hold Rule 74.06(b)'s plain language does not contemplate relief from a portion or portions of a final judgment or order; only relief from that final judgment or order as a whole. Therefore, he would find that, even if Wife could prove her allegations of fraud, the circuit court could not merely provide relief from the property division. Accordingly, he would affirm the circuit court's judgment.

Dissenting opinion by Judge W. Brent Powell: The author concurs in Judge Fischer's separate opinion that Wife's action abated upon Husband's death. Because the circuit court's judgment dividing and disposing of the marital property is not subject to appeal or a motion for new trial, the author would hold any further action seeking to set aside the judgment and distribute the marital assets and debts abated upon Husband's death.