



# PRESERVING YOUR CLIENT'S RIGHT TO REOPEN A JUDGMENT FOR NON-DISCLOSURE OF ASSETS

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Sally Smith hired you to represent her in a divorce action. She and her husband have been married 20 years, their children are grown. Her husband owns an interest in several different businesses and holds other assets. Sally is unsure of the extent of the marital estate. She claims that her husband has kept her in the dark with regard to his business dealings and is convinced that he is concealing assets. You conduct extensive discovery – serving subpoenas and scads of interrogatories and document production requests. You hire an expert. You believe you've done your due diligence to uncover all of the assets in the marital estate. But at the back of your mind is a niggling worry that maybe something has slipped through the cracks. What can you do to protect your client from her husband's potential concealment of assets and yourself from a potential malpractice claim? Put a safeguard provision in the *Judgment of Divorce*.

## Remembering Contract Principles

A divorce judgment entered by consent is in the nature of a contract, and it must be construed and applied as such.<sup>1</sup> Absent fraud, coercion or duress, unambiguous contracts are not open to judicial construction and must be enforced as written.<sup>2</sup> When negotiating the terms of the divorce judgment, it is imperative that practitioners fight for appropriate language to protect their clients in the event of post-judgment discovery of undisclosed assets. This is especially true in high asset cases when discovery has failed to expose any overt concealment, but the potential for foul play exists.

Consider the following scenario:

The parties enter into a Judgment of Divorce that ostensibly divides all property between them. Two years later, wife discovers that one of husband's companies (of which he is sole owner) purchased property worth more than a million dollars during the marriage, and then sold that property to husband's close personal friend after the divorce complaint was filed. At the time husband answered interrogatories, the business no longer owned the asset, and

he answered that the business had no assets. Husband subsequently sells the property to a different company (which he also owns) shortly after the Judgment of Divorce is entered. The consideration for the transaction is one dollar.

This hypothetical transaction clearly fails to pass the "smell test," but without the proper language in a judgment of divorce, wife would be barred from bringing a motion for relief from judgment by the one year statute of limitations set forth in MCR 2.612. She would have no recourse against husband's fraud. If the judgment specifically reserved the right for either party to reopen the judgment to address a nondisclosure however, MCR 2.612, and its limitations, would not apply.

With the proper language, the right to reopen a judgment of divorce to address undisclosed assets can be preserved. Such provisions have been upheld by the Court of Appeals in the case of *Wiand v. Wiand*<sup>3</sup>

## *Wiand v. Wiand* Sets the Precedent

*Wiand* was a hotly contested, complicated divorce originating in Oakland County Circuit Court. In *Wiand I*, the parties had a trial. The trial court found that defendant-husband intentionally frustrated wife's attempts to engage in meaningful discovery of his assets and net worth. The court was apparently not comfortable with its valuation of husband's assets and thus inserted a post-judgment discovery section in the judgment of divorce titled "Post Judgment Discovery," which said:

IT IS FURTHER ORDERED AND ADJUDGED that either party, by post judgment motions, may petition the Court to conduct discovery, seek independent audit or offer further proofs relative to the value of the Defendant-husband's equitable interest in the following marital assets (and it enumerated) ...



Husband appealed. The Court of Appeals agreed with the husband that this provision was improper and vacated this portion of the judgment. Its reasoning for so finding was the general rule that courts prefer finality in judgments. In all other respects, the Court affirmed the divorce judgment.

Wife then filed a separate complaint (*Wiand II*) against husband, claiming damages based on fraud, misrepresentation, interference with advantageous relationships, conversion, and violation of court orders. In response to the complaint, husband filed a motion for summary disposition, which the trial court granted. Plaintiff then filed a motion to set aside the divorce judgment (*Wiand I*), and for relief based upon newly discovered evidence and fraud. When the trial court denied her request for relief, wife appealed.

The *Wiand II* panel treated wife's first complaint (which had been dismissed on summary disposition) as a motion to set aside, and tolled the statute of limitations because wife did not know that no further discovery or proofs would be allowed under the post-judgment discovery provision of the divorce judgment in *Wiand I* until the Court had issued its opinion. As a result, the Court found that wife had timely filed her "motion."<sup>5</sup>

Wife alleged that she had newly discovered evidence of husband's non-disclosure of an office building, five new patents, and additional businesses in which husband had an equitable interest.

For purposes of this article, what is significant in the *Wiand II* Court of Appeals opinion is that it upheld the following provision in the judgment of divorce, which stated:

The Property Settlement set forth herein is based upon a marital estate consisting of only those assets set forth above. Should it be determined that additional marital assets existed other than those set forth above, this Court retains jurisdiction over this matter for the purpose of rendering an equitable distribution of such assets.<sup>6</sup>

The *Wiand II* opinion specifically stated:

Notwithstanding the need for finality in litigation, we believe where there is evidence of concealment, it is not improper for a judgment of divorce to include a provision, as in the instant case, stating that undisclosed assets are not covered by the judgment and are subject to further proceedings (Cf. *Sands v Sands*, 442 Mich 30, 497 NW2d 493

(1993). If such provisions are to be enforced the trial court must entertain post-trial motions regarding undisclosed assets.<sup>7</sup>

The Court then remanded the case to the trial court with the instruction that the trial court consider wife's allegations regarding undisclosed assets, pursuant to the specific language of the divorce judgment. Such provisional language was again approved in the later unpublished case of *Turner v Turner* (Docket No. 276584, January 27, 2009) to wit:

The proper method for handling the division of marital property where the potential for undisclosed assets is a concern is the inclusion of a provision in the judgment that undisclosed assets are not covered by the judgment and are subject to further post-trial motions.<sup>8</sup>

Although *Wiand II* involved language in a judgment of divorce provided by a trial court in a contested divorce action, such provisions are being enforced in consent judgments, based upon contract principles.

### Drafting Your Judgment

In drafting a divorce judgment, it is important to specifically reserve the right of either party to reopen the judgment based upon a failure to disclose assets, whether intentional or not.<sup>9</sup> Because courts are obligated to enforce the parties' intent based upon the plain language of their agreement,<sup>10</sup> it is important to clearly express the parties' intent to guard against the potential for undisclosed assets.

Such a provision might include language to this effect:

Each Party affirms that he or she has fully and accurately disclosed all assets owned by him or her in which either Party has or has claimed any interest. Failure to disclose any asset, liability or income may provide the aggrieved Party a basis to set aside the property provisions of this Agreement.

Or

If either party has failed, either intentionally or unintentionally, to disclose any of his or her assets or has otherwise failed to fully and candidly respond to discovery requests, the issue of property division may be reopened on the motion of either party to determine and resolve the distribution of the previously undisclosed assets.<sup>11</sup>



Whatever language you elect to use, be sure that the terms are clear, concise and unambiguous, such that the court has no choice but to enforce the provision as written.

If a party is particularly resistant to adding this type of provision, it gives rise to a higher degree of suspicion, making the post-judgment protection even more necessary. This type of provision should be standard in any high asset case. The practitioner should also negotiate for a provision that awards costs and attorney fees to the prevailing party should post-judgment action become necessary.<sup>12</sup>

1. *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004).
2. *Lentz v Lentz*, 271 Mich App 465, 471-473; 721 NW2d 861 (2006).
3. 205 Mich App 360; 522 NW2d 132 (1994).
4. 178 Mich App 137; 443 NW2d 464 (1989).
5. Wife had filed her complaint in *Wiand II* within three weeks of the Court's decision in *Wiand I* (where it struck the post-judgment discovery provision from the divorce judgment). She also filed her motion to set aside the judgment in *Wiand I* on the same day as the entry of the order granting husband's motion for summary disposition in *Wiand II*. Therefore, the Court of Appeals treated Wife's complaint in *Wiand II* (claiming damages based on fraud, misrepresentation, etc.) as a timely filed motion for relief from judgment in *Wiand I*. See *Wiand*, *supra* 205 Mich App at 366-367.
6. *Id* at 364.
7. *Id* at 368 (emphasis added). The footnote in this case is also worth mentioning. It states: "Judge MacKenzie was a member of the panel that decided *Wiand I*. To the extent that *Wiand I* may be construed as requiring finality of the parties' divorce judgment, she is now of the opinion that such a result is inconsistent with the public policy established by the Supreme Court in *Sands*, *supra*, to combat the concealment of assets." *Id.* at 368 (fn 5).
8. Quoting *Wiand v Wiand*, 205 Mich App 360, 368; 522 NW2d 132 (1994).
9. Of course, if you're on the other side, it would be prudent to negotiate for the removal of the term "unintentional" to protect your client from unwarranted post-judgment litigation.
10. *Harbor Park Market, Inc. v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007).
11. The language is provided by way of example only, and not as a recommendation for the inclusion of the specific terms set forth above.
12. A court has discretion to award attorney fees without such a provision based upon a party's misconduct. See *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992), but many courts are reluctant to do so. A court is more likely to award fees if the terms of the divorce judgment provide for them.

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