COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP612 **Cir. Ct. No. 2001FA619**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

SUELLEN THOMPSON-LINK,

PETITIONER-RESPONDENT,

V.

THOMAS P. LINK,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed*.

Before Dykman, Vergeront and Bridge, JJ.

¶1 VERGERONT, J. This appeal concerns the proper construction of a provision in a divorce judgment that was based on a stipulation between the parties regarding their children's education. The provision stated that the children

would continue to be home schooled for two years following the divorce and "[h]ome schooling will be subject to review after this two-year period." Thomas Link appeals the circuit court's order dismissing his motion for a review by the court under this provision. The court determined that the phrase "subject to review" did not mean, as Link contended, a review by the court. We affirm.

BACKGROUND

¶2 Link and Suellen Thompson-Link were divorced in February 2002. They had three minor children. They entered into a partial marital settlement agreement concerning custody and placement under which the parents had joint legal custody of the three children and Thompson-Link had primary placement. The agreement provided that the parties would participate in co-parenting counseling, with the counselor[1] to have the authority to resolve physical placement disputes subject to certain conditions. With respect to education, the agreement provided: "The children will continue to be home schooled, with [Thompson-Link] taking primary responsibility for the development and implementation of their curriculum for the next two years." With respect to modification of the agreement and the judgment of divorce, the agreement provided that, in the absence of a written stipulation to modify the judgment, the parties were bound by WIS. STAT. § 767.32 (2003-04)[2] and WIS. STAT. § 767.35 [sic] and the applicable

[1] The counselor agreed upon by the parties was in private practice, not a counselor with Family Court Counseling Services.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. WISCONSIN STAT. §§ 767.24 and 767.32 (2003-04) have been renumbered to WIS. STAT. § 767.41 and WIS. STAT. § 767.451 respectively in the 2005-06 statutes. Changes made to these sections do not affect our analysis.

case law. The circuit court incorporated this settlement agreement into the judgment.

¶3 In February 2005, the parties entered into a stipulation to amend the judgment on various placement and education issues. This stipulation provided that the children would continue to be home schooled, Link would take responsibility for teaching science, and Thompson-Link would be responsible for all other subjects. The counselor was given the authority to arbitrate disputes over the curriculum. Based on this stipulation, the circuit court ordered that the judgment be amended by the terms of the stipulation. Approximately five months later, the parties stipulated to a different counselor and the court ordered that the judgment be amended accordingly.

¶4 In July 2006, Link filed a motion to modify the judgment to require the children to attend public school in the Madison School District or the Brodhead School District and to modify the physical placement schedule accordingly.[3] In his accompanying affidavits, Link averred that he believed the children were suffering emotionally and educationally from continued home schooling and excessive time spent in the home with their mother and would benefit by being enrolled in public school. He also averred that he had attempted to negotiate the issue of school enrollment and the alternative placement modification with Thompson-Link, but without success.

[3] The motion also asked that, if the request to change the schooling were denied, one of the parties' minor children be placed with him on alternating Saturday nights. The court referred this issue to Family Court Counseling Services, and it is not relevant to this appeal.

¶5 Thompson-Link filed a motion to dismiss Link's motion on a number of grounds, and both motions were addressed at a hearing. The parties disputed the meaning of the provision in the judgment that "home schooling will be subject to review after this two-year period." Link argued that it meant the court was to review a dispute over whether to continue home schooling after two years on motion of either of the parties. Thompson-Link disputed this construction, arguing that it meant review by the parties, that is, a discussion between them. According to Thompson-Link, if Link wanted to change the provision for home schooling, he had to move under WIS. STAT. § 767.325(1)(b) to modify the judgment by requesting that he be given sole decision-making authority for the choice of schooling and show a substantial change of circumstances, which his motion did not do.[4]

¶6 The circuit court dismissed Link's motion. It rendered an oral ruling and subsequently issued a written decision. The court determined that, while it was otherwise uncertain of the meaning of "subject to review," the phrase was not intended to confer on the court the authority to modify the children's schooling.

[4] "Legal custody" is defined as "the right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order." WIS. STAT. § 767.001(2)(a). Major decisions include "choice of school." Section 767.001(2m). Joint legal custody incorporates the definition of legal custody and is "the condition under which both parties share legal custody and neither party's legal custody rights are superior, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order." Section 767.001(1s). In making an order of joint legal custody, the court may give to one of the parents the sole power to make specified decisions, notwithstanding § 767.001(1s). WIS. STAT. § 767.24(6)(b).

Under WIS. STAT. § 767.325.(1)(b), a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if there has been a substantial change in circumstances since the last order affecting legal custody or physical placement and the court determines that modification is in the child's best interests.

The court also stated that, if it had believed the stipulation intended to convey that authority to the court, it would not have accepted the stipulation. The court concluded that, regarding a change to public school enrollment, Link had not alleged a substantial change in circumstances sufficient to survive Thompson-Link's motion to dismiss and had not specifically requested that the court amend the judgment regarding custodial decision-making authority.

DISCUSSION

¶7 Link appeals the circuit court's order dismissing his motion. His primary contention is that the court erred in concluding that the marital settlement agreement, incorporated into the judgment, did not delegate authority to the court to decide whether home schooling should continue. According to Link, this is the plain meaning of phrase "subject to review," but, if there is an ambiguity, this is the most reasonable reading. Because he had the right to court review of this issue based on the stipulation incorporated into the judgment, he asserts, he did not need to show a substantial change in circumstances. Thompson-Link responds that the court properly determined that the marital settlement agreement, incorporated into the judgment, did not delegate to the court the authority to decide whether the children should be home schooled.

¶8 Generally, when the disputed provision in a divorce judgment is a stipulation between the parties that the court has incorporated into the judgment without modification, the court seeks a construction of the stipulation that will effectuate what appears to be the intention of the parties. ***Duhame v. Duhame***, 154 Wis. 2d 258, 264, 453 N.W.2d 149 (Ct. App. 1989). If the language of the stipulation is plain, the court applies that plain meaning. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 30-31, 577 N.W.2d 32 (Ct. App. 1998). Whether a written

instrument is ambiguous is a question of law, which we review de novo. ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987).

¶9 If the court determines that the stipulation is reasonably susceptible to more than one meaning, the circuit court resolves the ambiguity based on the surrounding circumstances. ***Id.*** The court may properly consider the entire record in determining the parties' intent. ***Weston v. Holt***, 157 Wis. 2d 595, 601, 460 N.W.2d 776 (Ct. App. 1990). If there is an ambiguity, the intent of the parties is a question of fact, and we do not set aside a circuit court's findings of fact unless they are clearly erroneous. ***Id.***

¶10 We conclude the phrase "subject to review" is ambiguous. As the circuit court recognized, it could reasonably mean review by the parties alone or by the guardian ad litem or, as Link contends, review by the court. It could also reasonably mean that the parties would review this issue with the co-parenting counselor.

¶11 We therefore turn to the court's determination of the parties' intent. The court found the parties did not intend, by use of the phrase "subject to review," to confer on the court the authority to decide whether home schooling should continue. Although neither party testified at the hearing, neither complains of the lack of the opportunity to do so; essentially the attorneys represented to the court what their clients intended. The court was obviously very familiar with the parties and the course of the proceedings in this action.[5] The court explained in its oral ruling that it was taking into account how highly contested the matter of home

[5] The judge presiding on this motion was the same judge who had entered the judgment of divorce and approved the subsequent stipulations to amend the judgment.

schooling was and how determined both parents were to hold on to their parental rights. The court was also aware of the detailed provisions in the judgment and the amendments to resolve other areas of dispute using third parties. The court's finding that the parties did not intend to give the court the authority to decide if home schooling should continue is supported by the record and is not clearly erroneous.[6]

¶12 It is unclear to us whether Link is also arguing that, even absent a provision in the judgment providing for court review of the continuation of home schooling and absent a motion for modification of legal custody to give one party sole decision-making authority on this issue, the court was obligated to decide whether home schooling should continue. We do not see that he presented this argument in a developed manner to the circuit court, and we conclude it is not sufficiently developed on appeal.

¶13 Link cites this sentence from our decision in ***Lawrence v. Lawrence***, 2004 WI App 170, ¶16, 276 Wis. 2d 403, 687 N.W.2d 748: "The court may of course make a particular decision that falls into the category of 'major decisions' when there is a dispute between the parties and the dispute is properly before the court." In ***Lawrence***, the parties stipulated to giving the guardian ad litem and the family court counselor impasse-breaking authority on the choice of their child's school, and this stipulation was incorporated into the judgment. ***Id.***, ¶2. We rejected one party's contention that this provision was not authorized by statute

[6] We recognize that there may be an issue whether a circuit court is bound by the parties' intent with respect to an ambiguous stipulation incorporated into the judgment that purportedly obligates the court to assume a role, where, as here, the court was not aware of that purported meaning and would not have incorporated the stipulation into the judgment if it had been aware. However, we need not address this issue.

and was against public policy because, according to that party, it "transfers to third parties the court's authority to decide custody disputes." ***Id.***, ¶¶5, 22. In explaining why impasse-breaking authority on choice of school was not equivalent to the determination of legal custody, we stated:

> While WIS. STAT. § 767.24(1) imposes on the court the obligation to make provisions on legal custody and physical placement that are "just and reasonable … as provided in this section," no statute obligates the court to make the decisions specified as major decisions in WIS. STAT. § 767.001(2m). Rather, making these decisions is the responsibility of one or both of the parents. The court's obligation is to determine how to allocate the responsibility for major decisions and other decisions when awarding joint custody, *see* § 767.24(6)(am) and (b), and this obligation entails determining whether to approve any agreement between parents on that allocation. *The court may of course make a particular decision that falls into the category of "major decisions" when there is a dispute between the parties and the dispute is properly before the court.* However, the entire statutory scheme makes clear that, in general, the legislature intends that one or both parents are responsible for making the particular decisions on an ongoing basis.

Id., ¶16 (emphasis added).

¶14 Link does not explain how this paragraph supports the proposition that parties have the right, absent a stipulation that the court has accepted, to have the court break impasses on major decisions when the parties share that authority. Indeed, the paragraph suggests just the opposite. Link also appears to overlook the qualification in the italicized sentence: "when the dispute is properly before the court." *See* ***id.*** Link does not explain how the issue is properly before the court if "subject to review" does not mean review by the court.

CONCLUSION

¶15 We conclude the court properly determined that the phrase "subject to review" does not mean, as Link contends, a review by the court of the continuation of home schooling. Accordingly, we affirm the circuit court's order dismissing his motion for review by the court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.