COURT OF APPEALS DECISION DATED AND RELEASED

January 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3183

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

In re the Marriage of:

BORISAV PETROVIC,

Petitioner-Appellant,

v.

DRAGICA PETROVIC,

Respondent-Respondent.

APPEAL from orders of the circuit court for Racine County: ALLEN PATRICK TORHORST, Judge. *Affirmed in part; dismissed in part*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Borisav and Dragica Petrovic were divorced pursuant to a judgment entered in the trial court on November 5, 1992. Maintenance was held open as to both parties on an indefinite basis.

In December 1994, Borisav moved to modify the divorce judgment to require Dragica to pay maintenance to him. In a written document captioned "ORDER--MAY 11 & 15, 1995," the trial court denied the motion. That order was entered in the trial court on June 5, 1995. Notice of its entry was given by Dragica to Borisav in accordance with § 806.06(5), STATS., on June 6, 1995.

On June 21, 1995, Borisav filed a motion requesting reconsideration of the order entered on June 5, 1995, pursuant to § 805.17(3), STATS., and relief from that order pursuant to § 806.07(1)(a), (b) and (h), STATS. On October 2, 1995, a document captioned "ORDER--SEPTEMBER 21, 1995" was entered in the trial court denying Borisav's request for reconsideration and refusing to grant relief pursuant to § 806.07(1).

On November 14, 1995, Borisav filed a notice of appeal from both the order entered in the trial court on June 5, 1995, and the order entered on October 2, 1995. We dismiss the appeal from the June 5, 1995 order for lack of jurisdiction. We affirm the October 2, 1995 order.

Section 805.17(3), STATS., applies to a reconsideration motion filed after a postdivorce evidentiary hearing. ***Schessler v. Schessler***, 179 Wis.2d 781, 782, 508 N.W.2d 65, 65 (Ct. App. 1993). Section 805.17(3) extends the time permitted an aggrieved party for appealing a final order if he or she files a timely motion for reconsideration. ***Schessler***, 179 Wis.2d at 783, 508 N.W.2d at 66.

Borisav timely filed a motion for reconsideration of the June 5, 1995 order within twenty days of its entry as required by § 805.17(3), STATS. However, because the trial court did not decide the motion within ninety days after entry of the June 5, 1995 order, it was deemed denied on September 3, 1995. *See* ***Wainwright v. Wainwright***, 176 Wis.2d 246, 250, 500 N.W.2d 343, 345 (Ct. App. 1993). The time permitted for Borisav to appeal the June 5, 1995 order therefore commenced running on September 3, 1995. *See* ***id.***; § 805.17(3). Moreover, because notice of entry of the June 5, 1995 order had been given by Dragica within twenty-one days of its entry, the time permitted Borisav for appealing was reduced to forty-five days, establishing a deadline of October 18, 1995. ***Salzman v. DNR***, 168 Wis.2d 523, 531, 484 N.W.2d 337, 339 (Ct. App. 1992). Because Borisav failed to file a notice of appeal until November 14, 1995,

and because failure to appeal a final order within the time limits specified in § 808.04, STATS., and § 805.17(3) deprives this court of jurisdiction, we dismiss the appeal from the June 5, 1995 order. *See* ***Wainwright***, 176 Wis.2d at 250, 500 N.W.2d at 345.

Borisav timely appealed from the order entered on October 2, 1995, denying his motion for reconsideration and his motion for relief under § 806.07(1), STATS. We will address each of these motions separately.

An appeal cannot be taken from an order denying a motion for reconsideration which presents the same issues as those determined in the order sought to be reconsidered. ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis.2d 661, 665, 422 N.W.2d 154, 155 (Ct. App. 1988). Although a party may move a trial court to reconsider its orders or judgments, he or she must present issues other than those determined by the original judgment or order if the order denying reconsideration is to be appealable. *See* ***Ver Hagen v. Gibbons***, 55 Wis.2d 21, 26, 197 N.W.2d 752, 755 (1972). To determine whether new issues exist, we must compare the issues raised in the motion for reconsideration with those disposed of in the June 5, 1995 order. *See* ***Harris v. Reivitz***, 142 Wis.2d 82, 87, 417 N.W.2d 50, 52 (Ct. App. 1987).

After comparing the issues raised in the motion for reconsideration with the issues disposed of in the June 5, 1995 order, we conclude that Borisav cannot appeal the portion of the October 2, 1995 order denying his motion for reconsideration. In the June 5 order, the trial court determined that there had not been a substantial change in the circumstances of the parties since the time of the divorce and that modification of the divorce judgment to award maintenance to Borisav was unwarranted. In making this determination, it found that Dragica remained unable to pay maintenance, that Borisav's earning capacity had not diminished since the time of the divorce, and that Borisav was physically and mentally capable of obtaining and holding a job. It found unconvincing Borisav's testimony that he suffered from depression which prevented him from obtaining or seeking employment.

In his motion for reconsideration, Borisav again raised the issue of whether he was physically and mentally capable of working. While he presented additional evidence to support that argument, the issue of whether he

was able to work had already been decided by the trial court in its June 5, 1995 order. Since the motion for reconsideration therefore did not raise a new issue, Borisav may not challenge the order denying it on appeal. *See* ***Ver Hagen***, 55 Wis.2d at 26, 197 N.W.2d at 755 (holding that a motion for reconsideration did not raise a new issue when it set forth additional evidence related to an issue already decided by the trial court).

While Borisav cannot challenge the portion of the October 2, 1995 order denying reconsideration, his appeal was properly taken from the portion of the order denying his motion for relief under § 806.07(1), STATS. We affirm that portion of the order.

A trial court's order denying a motion for relief under § 806.07, STATS., will not be reversed absent an erroneous exercise of discretion. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 541, 363 N.W.2d 419, 422 (1985).[1] An erroneous exercise of discretion will not be found if the record shows that the trial court exercised its discretion and a reasonable basis for the trial court's determination. ***Id.*** at 542, 363 N.W.2d at 422.

Borisav sought relief in the trial court pursuant to § 806.07(1)(a), (b) and (h), STATS. He refers to the statutory standards set forth in these three subsections in the argument section of his brief on appeal, pointing out that a trial court may relieve a party from an order based upon mistake, inadvertence, surprise, excusable neglect, newly-discovered evidence or any other reasons justifying relief from the operation of the order. However, he does not discuss these standards further, except to say that § 806.07(1)(h) must be liberally construed to allow relief whenever such action is appropriate to accomplish justice. He contends that allowing the supplemental evidence offered by him in support of his motion for relief would have been appropriate to accomplish justice.

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[1] The "erroneous exercise of discretion" standard has the same meaning as the former "abuse of discretion" standard. ***Allstate Ins. Co. v. Konicki***, 186 Wis.2d 140, 149 n.3, 519 N.W.2d 723, 726 (Ct. App. 1994).

Because Borisav's brief does not discuss the law applicable to excusable neglect, mistake, inadvertence, surprise or newly-discovered evidence, or apply that law to the facts of his case, we conclude that the issue of whether relief was warranted under § 806.07(1)(a) or (b), STATS., was inadequately briefed. Borisav's cursory discussion of § 806.07(1)(h) also constitutes inadequate briefing.

We may decline to review issues which are inadequately briefed. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992); ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988). However, we will briefly discuss them here because it is clear that an erroneous exercise of discretion in denying Borisav's motion has not been shown.

As pointed out by the trial court, the supplemental evidence from Dr. Donald Jacobsen and Dr. D.P. Bogunovic was evidence which could have been presented at the original evidentiary hearing on Borisav's motion for modification. Jacobsen and Bogunovic offered supplemental testimony concerning Borisav's depression and back problems and the effect those problems had on his ability to work. However, Borisav indicated that these health problems existed before he filed his motion for modification and testified concerning them at the hearing on that motion.

As discussed by the trial court, Borisav's motion for relief under § 806.07, STATS., established no excusable neglect or justification for failing to present this evidence in a timely fashion.[2] Moreover, as also noted by the trial court, to the extent this evidence would have been relied upon by the vocational consultants who testified at the hearing on the motion for modification, it was cumulative since evidence regarding Borisav's depression and back problems had already been considered by them.

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[2] It appears that Borisav might be arguing that his failure to present Jacobsen's testimony at the original hearing on the motion for modification was excusable because his depression rendered him emotionally unable to admit his depression to a doctor at that time. The trial court was not required to accept this explanation, particularly since the record indicated that Borisav told vocational consultants of his depression and testified concerning it at the hearing on his motion for modification.

Borisav also offered a supplemental report from Laura Koritsoglou in support of his motion for relief. That report was based on the reports of Jacobsen and Bogunovic and concluded that Borisav was unable to work. However, the trial court correctly noted that Koritsoglou had rendered this same opinion at the original hearing on the motion for modification and that her opinion had been considered by the trial court.

In denying the motion, the trial court also pointed out that the new evidence proffered by Borisav did not affect its previous finding that Dragica was unable to pay maintenance. Based on that finding, the trial court reasonably concluded that the new evidence would not lead to a result different from that set forth in the order denying maintenance.

Based upon this record, the trial court properly determined that Borisav failed to demonstrate excusable neglect, mistake, surprise or inadvertence under § 806.07(1)(a), STATS. Because the evidence was cumulative and with reasonable diligence should have been discovered earlier, the trial court also properly refused to set aside the order pursuant to § 806.07(1)(b), based upon newly-discovered evidence. *See* § 805.15(3), STATS. Since the facts also failed to demonstrate that the interests of justice compelled relief from the June 5, 1995 order, the trial court acted within the scope of its discretion in denying relief under § 806.07(1)(h). *See* ***Conrad v. Conrad***, 92 Wis.2d 407, 418, 284 N.W.2d 674, 679 (1979).

By the Court.—Appeal from order entered on June 5, 1995 dismissed; order entered on October 2, 1995 affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.