COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-0380

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

IN RE THE MARRIAGE OF:

DEBORAH MARTIN-SEMROW,

PETITIONER-RESPONDENT,

V.

MARC RAYMOND SEMROW,

RESPONDENT-APPELLANT,

HURLEY, BURISH & MILLIKEN, S.C.,

CO-APPELLANT,

NANCY WETTERSTEN, GUARDIAN AD LITEM,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

EICH, J. Marc Semrow and Hurley, Burish & Milliken, S.C., the law firm representing him in this divorce action, appeal from an order requiring his former wife, Deborah Martin-Semrow, to pay Semrow's share of the guardian ad litem's fees from property division "equalization" payments she had been ordered to pay to Semrow over time. The law firm argues that Semrow had assigned his interest in the property settlement to the firm as a partial payment of attorney fees, and that the assignment constitutes a "prior lien" on the equalization payments which the court lacks authority to extinguish by diverting the funds to the guardian ad litem.

Because the purported assignment is not part of the record on appeal, and because the firm has not persuaded us that the judgment exceeds the court's authority, we affirm. Additionally, we conclude that the firm's appeal is not frivolous under § 809.25(3), STATS., as the guardian ad litem argues.

During the Semrows' divorce, the court appointed Attorney Nancy Wettersten as guardian ad litem for the couple's minor children. The divorce judgment, which was fully stipulated by the parties, contained a provision for dividing the equity in their home. Deborah was awarded the house and, in exchange, was directed to pay Semrow the sum of $16,455 in five annual installments, beginning December 31, 1995, and ending May 31, 2000. The judgment also found Wettersten's fees to be reasonable and directed the Semrows to pay them within two years—expressly reserving jurisdiction to "enter an order for [the] fees to be paid out of payments owing between the parties … in the event [they] remain unpaid after two years." Finally, the judgment authorized Wettersten to "apply to the [c]ourt for an order … for payment of fees to be

deducted from any remaining property division payments owing between the parties to be paid directly to the guardian ad litem."

Semrow failed to pay his share of Wettersten's fees and, approximately two years after the judgment was entered, she moved the court for an order directing payment of her fees to be "deducted from any remaining property division payments owed to [Marc Semrow]." Semrow and the law firm objected, and the firm appeared at the hearing on Wettersten's motion,[1] arguing that Semrow had assigned his interest in the property division payments to the firm, and that the assignment deprived the court of jurisdiction to order that Wettersten be paid out of those funds.

The trial court granted Wettersten's motion, relying on the portion of section 767.045(6), STATS., authorizing the court to "order either or both parties to pay all or any part of the compensation of the guardian ad litem," and the language contained in the judgment which we have quoted above. As indicated, both Semrow and the firm appeal from the order.[2]

The firm repeats its argument that the trial court's order subordinates its prior assignment of Semrow's settlement proceeds, and that the court lacks authority to divert these funds to Wettersten for payment of her fees. We note first that, while the firm was not a party to the stipulation leading up to the judgment, there is no doubt that, as Semrow's attorneys, they had notice of its terms. Indeed,

[1] Semrow did not appear and the attorney for the firm indicated to the court that he was appearing in the matter only on the firm's behalf.

[2] While Semrow's failure to appear at the motion hearing would appear to waive any right to appeal, we needn't address that issue because, having stipulated to the very result that was obtained in this case, it is difficult to see how he was aggrieved by the trial court's order.

the record indicates that not only was the firm directly involved in negotiating and finalizing the agreement, but it voiced no objection to those portions of the judgment providing for diversion of Semrow's equalization payments if he failed to pay his share of Wettersten's fees. It thus appears that the firm took the assignment will full knowledge that such a result could well come to pass.[3]

We needn't proceed any further in such an analysis, however, because the fatal flaw in the firm's appeal is that there is no evidence in the record of the purported "assignment" on which the firm rests its case—there is only the non-testimonial statement by one of the firm's attorneys that such a document exists. Without more, that statement, unaccompanied by any evidence of record, is insufficient to establish the firm's claim to funds so plainly designated by the court for other purposes upon the occurrence of the specified event.

Anticipating such a result, the firm, citing ***State v. Salter***, 118 Wis.2d 67, 73, 346 N.W.2d 318, 322 (Ct. App. 1984), contends that the attorney's statement should be considered an "offer of proof" sufficient to preserve the record for appeal. This is not a situation like ***Salter***, however, where counsel made an offer of proof to preserve a testimonial objection—a statement as to what the witness would testify to, if asked. This is a situation where the firm's case is based in its entirety on a written document in its possession, and the document was neither presented to the trial court nor made a part of the record on this appeal. And it is a fundamental proposition of appellate law and procedure that our review

[3] The firm argues that because Semrow never stipulated in the divorce proceedings that he would never assign or encumber the property settlement payments, he had every right to assign them to his attorneys. The fact is, as we have stressed above, that, on this very firm's advice, Semrow agreed to the entry of a judgment earmarking those payments for the guardian's fees should he default on his obligation to pay them, which he indisputably did.

is limited to the record before us. ***In re Ryde***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977).

Finally, the firm argues that the order is beyond the trial court's authority because § 767.045(6), STATS., does not allow the court to redirect property settlement payments to satisfy a claim for guardian ad litem fees. There is no dispute that the statute permits the court to order payment of the guardian's fees, and that Wettersten's fees are reasonable in amount, as the trial court found. The firm contends, however, that the only method authorized by the statute for enforcing payment of the guardian's fees is the court's use of its contempt powers. Section 767.045(6) which, as indicated, authorizes the court to order payment of the guardian's fees concludes with the statement that "[t]he court may enforce its orders under this subsection by means of its contempt power." The statute does not, however, either expressly or by fair implication, prohibit the court from ordering a party who later defaults on his or her obligation under the judgment, to satisfy that obligation through means specifically set forth in the judgment itself. In other words, it does not invalidate the order entered by the court in this case. It simply authorizes the court to order the parties to pay the guardian's fees, and it states that the court "may"—as opposed to "shall"—enforce such an order through contempt proceedings.

Contempt is, to be sure, one method of enforcing the terms of a judgment. But § 767.045(6), STATS., does not say that it is the only one. The very judgment Semrow stipulated to provided another, simpler, method of ensuring payment of the guardian's fees. This is not a situation, as the firm attempts to paint it, where the court is ordering payment of the fees "out of the assets of the marital estate"—although we note that the firm does not offer any authority for the

proposition that such an order is impermissible.[4] We are satisfied that the court had the authority to enter such a judgment and to enforce it by a subsequent order.

Finally, Wettersten, summarizing the arguments she makes earlier in her brief, requests that we declare the firm's appeal to be frivolous and impose costs and fees pursuant to § 809.25(3), STATS. An appeal is frivolous under the statute when the appellant knew or should have known that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. *See* ***Verex Assurance, Inc. v. AABREC, Inc.***, 148 Wis.2d 730, 735, 436 N.W.2d 876, 878 (Ct. App. 1989). On review, we apply an objective standard: what should a reasonable person in the position of this litigant know or should know about the facts and the governing law? *See* ***Stoll v. Adriansen***, 122 Wis.2d 503, 513, 362 N.W.2d 182, 188 (Ct. App. 1984).

Wettersten argues that the firm's position is "indefensible" because it knew all along that the court was retaining jurisdiction to order payment of her fees, and knew full well that, under the terms of the judgment, the property-division equalization payment could be used for that purpose in the event of either party's default in payment of his or her share of those fees. Wettersten also contends that a reasonable attorney should realize that evidence must be produced to support a position, which, as we have said, was not done in this case.

While there is some merit in Wettersten's contentions, we are not satisfied the appeal was frivolous. While the result seems to us to be plainly

[4] We doubt that there is such a thing as the Semrows' "marital estate" at this time. Their marriage was dissolved in 1995 and their marital "estate" was valued and divided—and presumably extinguished—at that time pursuant to the terms of the judgment of divorce.

indicated, the firm is correct in stating that there are no cases directly addressing the situation presented here. Rejection of an appeal is not the test of frivolousness under the statute, ***In re Estate of Bilsie***, 100 Wis.2d 342, 350, 302 N.W.2d 508, 514 (Ct. App. 1981), and we cannot say that it was unreasonable for the firm to press its arguments—in effect, to test the legal sufficiency of its claims.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.