COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3273

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

IN RE THE MARRIAGE OF:

EVELYN FERRER,

PETITIONER-RESPONDENT,

V.

DAVID I. LOPEZ,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

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

¶1 DYKMAN, P.J. David I. Lopez appeals from an order denying his motion for relief from a judgment of divorce. Lopez asserts that the trial court erroneously exercised its discretion by denying him WIS. STAT. § 806.07 (1997-

98)[1] relief from the remaining parts of the divorce judgment when it had previously granted that relief from the child placement and child support sections of the judgment. He also contends that by changing the child placement portion of the divorce judgment without finding that the current custodial conditions were physically or emotionally harmful to his children, the trial court violated WIS. STAT. § 767.325(1), which permits a change in physical placement within two years after the initial order only upon that finding.

¶2 We conclude that the trial court did not erroneously exercise its discretion by denying Lopez's WIS. STAT. § 806.07 motion. We further conclude that we do not have jurisdiction to address Lopez's assertion that the trial court violated WIS. STAT. § 767.325(1).

¶3 This case began as a stipulated divorce, with both parties pro se. The trial court asked Ferrer to prepare the judgment, which was to provide that the parties would have joint legal custody of their children. She did so, but a dispute arose over some child placement provisions that she attached to the judgment. A variety of hearings, in the trial court and elsewhere, led to the trial court's decision to reopen the child placement and support provisions of the divorce judgment. The family court commissioner entered a temporary order covering child placement and support. On August 4, 1999, about a year after the divorce was originally heard, the trial court held a trial. Lopez has not provided us with a transcript of the August 4 trial. The clerk's minutes of the trial show that both parties testified and that Exhibit 2, identified as a "Legal Custody and Physical Placement Agreement of August 4, 1999" was offered and received. Exhibit 2 is

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

an agreement signed by Lopez and Ferrer, which incorporates recommendations made by a family court counselor and recommendations of the children's guardian ad litem. The recommendations are appended to Lopez's and Ferrer's agreement. One of those recommendations is that Ferrer have sole legal custody of the parties' children.

¶4 A week before the August 4 trial, Lopez filed a motion under WIS. STAT. § 806.07 for relief from the oral judgment of divorce rendered on July 29, 1998. The trial court denied the motion in a decision dated November 10, 1999. It is from this order that Lopez appeals.

¶5 We will first address Lopez's contention that the trial court violated WIS. STAT. § 767.325(1) by changing its custody and physical placement order without finding that the current physical conditions were physically or emotionally harmful to the best interests of the children. While Lopez addresses this issue as a subset of his WIS. STAT. § 806.07 motion for relief from judgment, it is not that. The trial court changed its previous order granting the parties joint custody of their children at the August 4, 1999 trial. That is where the trial court arguably violated § 767.325(1). Lopez could have appealed from the August 4 judgment. Had he done so, he would have had ninety days within which to file his notice of appeal. *See* WIS. STAT. § 808.04(1). He did not do so. Instead, he makes his § 767.325(1) argument as a part of his § 806.07 argument. But by doing so, he runs afoul of the rule that we have jurisdiction over a motion for relief from a judgment only insofar as the matters decided in the order granting or denying relief from a judgment are new matters. The court in ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972), explained: "[I]t has frequently been held that an order entered on a motion to modify or vacate a judgment or order is not appealable where, as here,

the only issues raised by the motion were disposed of by the original judgment or order."

¶6 And, as the court noted in ***Ver Hagen***, ***Fred Miller Brewing Co. v. Knebel***, 168 Wis. 587, 588-89, 171 N.W. 69 (1919), explained this rule: "Since neither the consent of parties nor action of the court can extend the statutory time for the taking of an appeal, such a result cannot be reached by the indirect method of again moving for the same relief that was refused in the prior order." (Citation omitted.)

¶7 Lopez could have appealed the trial court's August 4, 1999 order and could have argued that the order violated WIS. STAT. § 767.325(1). He cannot extend the time for appealing that order by including this issue in his WIS. STAT. § 806.07 motion, and appealing from its denial. We cannot consider the matter further because we do not have jurisdiction to consider untimely appeals from civil orders. *See* ***McGee v. Racine County Circuit Court***, 150 Wis. 2d 178, 180, 441 N.W.2d 308 (Ct. App. 1989). We do note, however, that the clerk's notes show that on August 4, 1999, Lopez agreed to Ferrer having sole custody. An order or judgment reflecting the appellant's wishes does not aggrieve the appellant. We will not consider an appeal from a party not aggrieved by an order or judgment. *See* ***Weina v. Atlantic Mut. Ins. Co.***, 177 Wis. 2d 341, 345, 501 N.W.2d 465 (Ct. App. 1993).

¶8 We next consider Lopez's contention that the trial court erroneously exercised its discretion by refusing to vacate the portion of its July 29, 1998 oral order having to do with issues of maintenance and property division. He first argues that the trial court misinterpreted WIS. STAT. § 806.07(1)(a), which permits relief from an order because of "surprise." The surprise he asserts is that Ferrer

attempted to include several provisions concerning custody and placement in the judgment she prepared. But while Lopez may have been surprised, Ferrer was unsuccessful in obtaining a judgment containing the contested conditions. The record shows a judgment marked Exhibit 12, which appears to be a form found at a stationer, but the judgment is not signed by any court or judge. If Ferrer surprised Lopez, nothing happened as a result of his surprise. It was a year later, after Lopez had hired counsel, that a judgment was entered, after what had been scheduled as a contested divorce.

¶9 Lopez does not explain how Ferrer's attempt to insert provisions in the unsigned judgment aggrieved him. While her attempt was the immediate catalyst which provoked a custody study and the continuation and escalation of the dispute between the parties, it did not affect the proposed judgment. The proposed judgment was never signed. The trial court did not erroneously exercise its discretion by refusing to relieve Lopez from its oral order because of surprise.

¶10 Next, Lopez asserts that reopening the maintenance and property division provisions of the unsigned judgment will not prejudice Ferrer. We fail to see the logic of this assertion. What Lopez wants after reopening these provisions is a chance to argue that he should be awarded maintenance, given more property, and assigned fewer debts. Should he be successful, that would certainly prejudice Ferrer. Nor do we see why Lopez's mistaken belief that the trial court had reopened the entire divorce judgment should require the trial court to do so.

¶11 Next, Lopez argues that the trial court should have reopened the judgment of divorce because of fraud, misrepresentation, or other misconduct of an adverse party, as authorized by WIS. STAT. § 806.07(1)(c). He asserts that Ferrer, by attempting to add language to the proposed judgment of divorce,

committed fraud and misrepresented facts. But again, the judgment was not signed. The incident to which Lopez objects did have an effect—it alerted the trial court to the inadequacy of the parties' child placement agreement to resolve the disputes between them. And once this happened, there was nothing Lopez could do to prevent the trial court from inquiring into the best interests of the parties' children. Though Lopez views the trial court's response as "unlikely," it was hardly that. Trial courts are keenly aware that children's interests in stipulated divorce actions are not represented, except by their parents. When it becomes apparent, as it was here, that conflicts between the parents may adversely affect the children's interests, it is very likely that a trial court will act to insure that the parents' conflicts do not harm their children. The best that Lopez can show is that Ferrer attempted to commit fraud or misrepresentation, an action she denies. Attempted fraud or misrepresentation is not found in § 806.07 as a ground for relief from a judgment.

¶12 Lopez next asserts that he was entitled to relief from the divorce judgment because of extraordinary circumstances, a ground encompassed by WIS. STAT. § 806.07(1)(h). The circumstances Lopez relies on include the fact that he appeared pro se at the stipulated divorce hearing, that his attorney mistakenly believed that the trial court had vacated the entire divorce judgment and that she failed to raise the WIS. STAT. § 767.325(1) issue that he has raised here, and that it is unfair to grant relief from only a part of a stipulated divorce judgment because the judgment was predicated upon an integrated settlement agreement. Lopez explains that he gave up a chance of receiving maintenance in return for his wife's agreement concerning child placement and what the agreement refers to as "unlimited visitations."

¶13 We are not convinced. Lopez could have been represented in the early stages of his divorce but chose not to be. A change of heart is no reason to reopen a divorce judgment. And everyone who enters what Lopez refers to as a "global negotiated settlement" must realize that Wisconsin law permits some parts of divorce judgments to be changed. It is not possible for parties to place child support and placement issues outside the reach of future revision. Divorcing persons often agree to a property settlement and to waive maintenance, two decisions which are not susceptible to later change. But to do this in return for what one believes are beneficial child placement and support awards can lead to unwelcome consequences because those awards are always subject to change. There is nothing any divorce litigant can do to change this fact. If Lopez's "global negotiated settlement" argument could be an adequate reason to reopen divorce judgments, most divorce judgments would be subject to later attack. The trial court did not erroneously exercise its discretion by declining to reopen the balance of Lopez's divorce judgment under WIS. STAT. § 806.07(1)(h).

¶14 Ferrer has moved for costs and fees for a frivolous appeal, pursuant to WIS. STAT. § 809.25(3). She asserts that Lopez brought this appeal in bad faith and to harass her. We deny the motion. Our review of Lopez's arguments and authorities convinces us that it would not be possible to discount the arguable portions of his brief and conclude that this appeal was brought to harass Ferrer. We therefore deny her motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.