

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1693-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

**SUSAN H. H. BY HER GUARDIAN WESTERN
WISCONSIN GUARDIAN SERVICES, AND HER
GUARDIAN AD LITEM THOMAS RHORER,**

PETITIONERS-RESPONDENTS,

v.

BRANDON A. H.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Brandon H. appeals the judgment divorcing him from Susan H.¹ He challenges the sufficiency of the evidence to support the trial court's determination that the marriage was irretrievably broken, given that neither he nor Susan so testified at the divorce hearing. We conclude, however, that the trial court's determination was sufficiently supported by Susan's prior affirmation under oath that the marriage was irretrievably broken and by testimony from Susan's guardian about why Susan had filed for divorce before she had been declared incompetent to make decisions regarding marriage.

BACKGROUND

¶2 Brandon and Susan were married in 1995. At that time, Susan had been declared incompetent to deal with property or contract matters, but was allowed to make decisions regarding marriage. In 1997, Susan filed and then dismissed a divorce action. She filed the present divorce action in March of 1999. Brandon moved to dismiss the action in April based on Susan's indication to the family court commissioner that she wished to remain married.

¶3 At the hearing on Brandon's motion to dismiss, Susan's attorney suggested that, rather than dismissing the action outright, the court order a ninety-day reconciliation period.² The court agreed to do so. The court noted, however, that it questioned Susan's competency to make decisions regarding marriage, and suggested that Susan's guardian ad litem in the guardianship matter consider

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

² The reconciliation period was also supported by an attorney who had been appointed as guardian ad litem for Susan in her guardianship proceedings and appeared at the motion to dismiss in that capacity, although his order of appointment for the divorce case was not officially entered until August 24, 1999.

moving to amend the terms of the guardianship. Accordingly, it ordered that the case would be dismissed in ninety days if the parties were still together at that time and no changes had been made in the guardianship.

¶4 Susan's guardianship status was amended in June to provide that she was not competent to exercise the right to marry, stay married or change her marital status. Thereafter, Susan's guardian moved to substitute for Susan in the divorce action and to terminate the reconciliation period.

¶5 The only witnesses at the divorce hearing were Brandon and Susan's guardian. Brandon testified that he did not believe the marriage was irretrievably broken. He admitted that he sometimes hollered at Susan, and that he had been charged with disorderly conduct for an incident in which he had hit Susan and left her by the side of the road out of town.

¶6 The guardian testified that Susan had expressed her desire to divorce Brandon when Brandon was out of the house in a drug and alcohol program at the VA hospital in Tomah. Susan told the guardian that Brandon was drinking and having blackouts and that the two would go to bars together. She said that she didn't want to be with Brandon when he was doing drugs. The guardian knew that Susan had her phone number changed in order to avoid calls from someone looking for Brandon, and that she also had the locks changed while Brandon was in the VA hospital.

¶7 The guardian also believed that a divorce would be to Susan's economic benefit. He testified that Susan had inherited a house worth about one hundred thousand dollars from her parents, but that the house had to be sold in order to avoid foreclosure after Brandon took out a mortgage and failed to make payments. Susan's SSI benefits were also being reduced as the result of

Brandon's failure to pay taxes. The guardian ad litem also argued that a divorce would be in Susan's best interest for financial reasons.

STANDARD OF REVIEW

¶8 We will sustain a circuit court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2).

ANALYSIS

¶9 The sole issue on appeal is whether the trial court erred in finding that the parties' marriage was irretrievably broken. WIS. STAT. § 767.12(2)(b) provides in relevant part:

If the parties have not voluntarily lived apart for at least 12 months immediately prior to commencement of the action and if only one party has stated under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation.... If the court finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken

¶10 Here, the parties did not live apart for a year prior to the action, and only Susan stated under oath in her petition for divorce that the marriage was irretrievably broken.³ Therefore, the trial court needed to consider all relevant factors, including the circumstances giving rise to the petition and the prospect of reconciliation in order to determine whether the marriage was irretrievably broken. It did so.

³ Brandon points out that neither party testified that the marriage was irretrievably broken. The statute, however, does not require that the oath or affirmation occur during testimony.

¶11 The trial court noted that the divorce petition was filed because Susan was scared, as evidenced by her changing the locks on the house and her telephone number. It also found that Brandon had taken advantage of Susan financially, when Susan needed every penny she could get. Contrary to Brandon's contention, we are satisfied that the trial court could properly consider the parties' economic circumstances as a relevant factor. The trial court further found that there was no prospect of reconciliation because Susan was not competent to make a decision regarding reconciliation. We conclude that the trial court's ultimate finding that the marriage was irretrievably broken was supported by the record and was not clearly erroneous.

¶12 Brandon asserts that the trial court "specifically granted permission for the parties to continue to cohabit even though the legislature has expressed itself saying that the state should not condone sexual conduct outside the institution of marriage." He then argues that it was inconsistent to find that the marriage was irretrievably broken if the parties could continue to live together. We disagree with Brandon's characterization of the trial court's remarks. The record shows that when Brandon asked whether he and Susan could still live together, the trial court responded:

You can live together but you will not have any legal responsibility for the other. Which means that your debtors can't come after her.... [T]he marriage is ended as of today's date, okay. That doesn't say that you can't live together, but no one is going to be responsible for the other one after today's date, legally responsible.

¶13 We do not construe the trial court's statement that Brandon and Susan could continue to live together as "permission." It was simply an acknowledgment that there was nothing in the judgment of divorce which would

prohibit it. Wisconsin has no statute criminalizing cohabitation or the private sexual activity of consenting adults. WIS. STAT. § 944.01. The trial court accurately advised Brandon that it was legal for the parties to continue to live together if they chose to do so. It did not condone such action or encourage it.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

