COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP1319
2011AP1485

Cir. Ct. No. 2007FA91

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

IN RE THE MARRIAGE OF:

CHRISTOPHER THOMAS SEILER,

PETITIONER-APPELLANT,

V.

AMBER RIHA F/K/A AMBER JEAN SEILER,

RESPONDENT-RESPONDENT.

APPEALS from orders of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated appeals, Christopher Thomas Seiler challenges two separate postjudgment trial court orders entered almost four

years after the parties' 2007 divorce. Seiler appeals orders: (1) requiring that Seiler reimburse the county for guardian ad litem fees incurred postjudgment in the amount of $892.50 and (2) denying Seiler's WIS. STAT. § 806.07 (2011-12)[1] motion to vacate the divorce judgment. We conclude that both orders were the result of a proper exercise of discretion and affirm.[2]

¶2 At the time of the parties' divorce hearing, Seiler was in custody having been sentenced to prison following the revocation of his probation. Seiler was also facing new criminal charges involving the sexual assault of a minor. The parties furnished a signed marital settlement agreement (MSA) which provided that Amber Riha would be awarded sole legal custody and primary physical placement of the parties' two minor children. The trial court approved the MSA as fair and reasonable and ordered that it be incorporated into the findings of fact, conclusions of law and judgment of divorce.

¶3 In September 2008, Seiler filed his first motion seeking to modify the divorce judgment to award joint legal custody and court-ordered visitation. The court commissioner deferred a decision and ordered the parties to mediation. The mediation report stated that Seiler was serving a forty-five-year prison sentence and had been ordered to have no contact with minor females. Thereafter, Seiler's judgment of conviction was amended to clarify that the sentencing court did not intend to automatically impede Seiler's contact with his own minor

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Given our conclusions, we also deny Seiler's motion for summary reversal filed May 6, 2013.

children. The amended judgment provided that issues concerning Seiler's contact with his minor children should be left to the family court.

¶4 The family court appointed a guardian ad litem (GAL) and at a subsequent hearing, the court commissioner dismissed Seiler's modification motion without prejudice. In its written order, the court commissioner indicated that Seiler's motion was "statutorily insufficient to meet the threshold for raising the issues of custody and placement in a way that would merit court involvement[.]"[3] On November 24, 2009, the court commissioner entered an additional order providing that the county would pay the GAL fees totaling $892.50 and that Seiler would be responsible for reimbursing the county.

¶5 Seiler amended and refiled his motion to modify the divorce judgment's custody and placement provisions, this time alleging that abuse by Amber and her new husband constituted a substantial change in circumstances. Seiler also filed a motion objecting to the order for GAL fees. In February 2010, following a hearing, the court commissioner entered a written order again dismissing Seiler's motion to modify the divorce judgment as "statutorily insufficient."

¶6 Seiler filed a request for de novo review. Though the trial court originally denied Seiler's request as untimely, on February 17, 2011, it conducted

[3] There is no transcript in the record from this hearing. It appears that the court commissioner determined that Seiler's motion failed to allege a legally cognizable substantial change of circumstances as required by WIS. STAT. § 767.451.

a hearing on Seiler's objection to payment of the GAL fees.[4] Seiler's motion alleged that the GAL failed to fulfill his statutory duties and that under WIS. STAT. § 767.407(6), the court did not have the authority to order "an indigent party to pay for guardian ad litem fees." After considering Seiler's arguments, the trial court concluded that the amount of the GAL fees was reasonable and that Seiler should be responsible for payment:

> When I looked at the bill I didn't see anything that appeared to be out of the ordinary. It appeared to be well documented.… [T]he costs appear to be reasonable, and not only in their costs themselves but in time.
>
> And it appears that given the limited number of options that were available here, you were the precipitating factor in causing that bill to be incurred. And then Ms. Riha should not be saddled with the concept that she should have to pay this. This is somewhat akin to over-litigation given what is entailed here and what the available options were at the time of placement….
>
> I would have entered the same type of order that makes you pay for the costs so that the costs are properly assessed against the person who necessitated them being incurred….
>
> I don't see anything there that would warrant anything but imposing those costs against you, and that's what I'm going to do. And so I'm going to order that you reimburse the court for the $892 in guardian ad litem's fees.

¶7 The trial court also rejected Seiler's assertion that because he was eligible for the appointment of counsel in his criminal case, he was necessarily indigent for purposes of collecting the GAL fees. The trial court explained that

[4] The trial court explained that it had decided to grant a de novo hearing on whether Seiler should be required to pay the GAL fees because, given a series of procedural missteps, it was unclear whether the court commissioner's order was ever perfected in a way that enabled Seiler to seek judicial review. We previously directed Seiler to address in his appellant's brief whether this court has jurisdiction to review the trial court's March 1, 2011 order for payment of GAL fees. Having reviewed the record, we are satisfied that we have jurisdiction to consider the trial court's order which the trial court, itself, characterizes as arising from a de novo hearing.

the county is able to "take what money they can take on a collection action from your wages in the prison system" and that Seiler was able to make "some contribution:"

> If you aren't working, then Ozaukee County will never collect it. If you are working, Ozaukee can collect some of your prison wages at a very slow rate, and that's what will happen.

On March 1, 2011, the court entered a written order requiring Seiler to reimburse the county for the GAL fees.

¶8 Thereafter, Seiler filed a WIS. STAT. § 806.07 motion to vacate the parties' original divorce judgment, alleging that the judgment was defective because it was entered without a hearing concerning the children's custody and placement. On April 25, 2011, the trial court entered an order summarily denying the motion because it was not brought within a reasonable time given that Seiler had filed numerous postjudgment motions over the years but never a motion to vacate the judgment. The trial court emphasized the importance of finality especially given that this judgment involved the interests of minor children. Upon receipt of Seiler's reconsideration motion, in a June 2, 2011 written decision, the trial court expanded its reasoning, pointing out that at the time of the divorce hearing, Seiler was in custody serving a sentence and facing a criminal trial on serious charges involving sexual assault of a minor. The trial court determined that it would have been difficult for Seiler to exercise any custody or placement rights and that Seiler was aware of this when he chose to sign the MSA: "The court believes that Mr. Seiler was well aware of these issues, and chose to proceed with his divorce. As a result, it [cannot] be said that extraordinary circumstances are present."

The trial court properly exercised its discretion when it ordered Seiler to reimburse the county for the guardian ad litem fees.

¶9 Seiler argues that because he is indigent, the trial court lacked the authority to order him to reimburse the county for GAL fees under WIS. STAT. § 767.407(6), which provides:

> The guardian ad litem shall be compensated at a rate that the court determines is reasonable. The court shall order either or both parties to pay all or any part of the compensation of the guardian ad litem.… If both parties are indigent, the court may direct that the county of venue pay the compensation and fees.… The court may order a separate judgment for the amount of the reimbursement in favor of the county and against the party or parties responsible for the reimbursement….

Relying on ***Olmsted v. Circuit Court for Dane Cnty.***, 2000 WI App 261, 240 Wis. 2d 197, 622 N.W.2d 29, Seiler argues that an indigent party may not be ordered to pay GAL fees where the other party is not indigent.

¶10 The ***Olmsted*** case is distinguishable on its facts. There, the court held that an order requiring an indigent party to pay GAL fees "at the inception or during the pendency of an action" infringed on the party's due process right of access to the courts, thus constituting an erroneous exercise of the trial court's discretion. ***Id.***, ¶¶10-11. The court specifically stated, however, that it was not reviewing "whether a court may, in its discretion, order reimbursement at the conclusion of litigation" for the payment of GAL fees made by the other party or by the county. ***Id.***, ¶11 n.6. In the present case, Seiler was required to pay his share of fees for past, not future, services, and his access to the court was not impeded. Moreover, WIS. STAT. § 767.407(6) allows the court to order "either or both parties to pay all or any part of" the GAL fees. In determining that Seiler should be responsible for payment, the trial court considered that Seiler filed the

meritless, later-dismissed motions, and likened the situation to one involving overlitigation. The GAL fees order was in compliance with § 767.407(6) and constituted a proper exercise of discretion.

¶11 Furthermore, the ***Olmsted*** court declined to address "the proper standard for determining indigence for purposes of paying guardian ad litem fees." ***Id.***, ¶3 n.3. Here, Seiler never proved that he was indigent for purposes of WIS. STAT. § 767.407(6), arguing only that he was eligible for appointed counsel. Courts make determinations of indigency for various purposes. The determination in each instance depends on the specific facts presented to the decision maker. The trial court was not required to find that Seiler was indigent and somehow exempt from all responsibility to repay the county based simply on his assertion that he qualified for appointed counsel.

The trial court properly exercised its discretion when it denied Seiler's motion to vacate the parties' 2007 divorce judgment.

¶12 We also reject Seiler's contention that the trial court erroneously exercised its discretion in refusing to vacate the three and one-half year old divorce judgment under WIS. STAT. § 806.07(1)(h). Whereas § 806.07(1)(a) through (g) describes specific circumstances under which a court may permit relief, sub(1)(h) is a catch-all provision allowing the court to relieve a party from a judgment based on the existence of extraordinary circumstances. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶¶32, 34, 326 Wis. 2d 640, 785 N.W.2d 493. "[E]xtraordinary circumstances are those where the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts." ***Id.***, ¶35 (citations omitted). We will not reverse a trial court's order denying a § 806.07 motion for relief if the record shows that the court exercised its discretion and that there is a reasonable basis for its

determination. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541-42, 363 N.W.2d 419 (1985).

¶13 Seiler argues that the trial court erroneously exercised its discretion in determining that his motion was untimely. To the extent Seiler asserts that there is no temporal requirement for a motion brought under WIS. STAT. § 806.07(1)(h), he is mistaken. Section 806.07(2) requires that motions brought under the catch-all provision "shall be made within a reasonable time." *See* ***M.L.B.***, 122 Wis. 2d at 544-45. Determining what is a "reasonable" amount of time requires a case by case analysis of all relevant factors, including the reasons for any delay and the prejudice caused to the other party. ***State ex rel. Cynthia M.S. v. Michael F.C.***, 181 Wis. 2d 618, 627-28, 511 N.W.2d 868 (1994). Given that the divorce judgment was entered in 2007 and that Seiler filed numerous postjudgment motions,[5] letters and other documents, there was a sufficient basis for the trial court's determination that Seiler's motion to vacate the original judgment was not brought within a reasonable time. This is especially true considering the prejudice to Amber Riha, who relied on the finality of the judgment and has since remarried.

¶14 Further, the trial court properly exercised its discretion in concluding that Seiler's motion failed to demonstrate extraordinary circumstances justifying relief. Seiler maintains that the original judgment was defective because the trial court "failed to hold a hearing directed at custody and placement of the parties' minor children" under WIS. STAT. § 767.41(1). What Seiler fails to account for is

[5] It also appears from the record that Seiler never requested de novo review of the court commissioner's dismissal without prejudice of his motion to modify custody and placement.

that he entered into a MSA concerning the custody and placement of his children. As a general rule, stipulations are binding on the parties and will not be disturbed absent a "plain case of fraud, misunderstanding or mistake." *See* ***Schmidt v. Schmidt***, 40 Wis. 2d 649, 653-54, 162 N.W.2d 618 (1968).

¶15 Seiler misconstrues WIS. STAT. § 767.41(1) as requiring a hearing on undisputed issues of custody and placement. Pursuant to § 767.41(2)(b), the parties' MSA represented that "both parties agree[d] to sole legal custody with the same party[,]" and the trial court approved the agreement, implicitly finding that it was in the children's best interests. Similarly, that the trial court approved the MSA without requiring a specific placement schedule does not warrant reopening the divorce judgment. As noted in the trial court's written decision denying Seiler's WIS. STAT. § 806.07 motion, given Seiler's custodial status, requiring more specificity would have been unreasonable given the uncertainty of his future. The trial court properly found that Seiler was aware of and considered this when he signed the MSA and proceeded with the divorce. The record supports the trial court's determination that Seiler's agreement was a deliberate, conscious choice and that he failed to show any duress, coercion, or other extraordinary circumstances that would justify vacating the divorce judgment.

By the Court.—Orders affirmed.

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