COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 1999

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. 98-1365

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

IN RE THE MARRIAGE OF:

TINA MARIE OLSON,

JOINT-PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

BRUCE ALAN OLSON,

JOINT-PETITIONER-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Oneida County: PATRICK J. MADDEN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Bruce Olson appeals an order denying his motion for relief from his divorce judgment. He argues that the trial court erroneously applied § 806.07, STATS., failed to exercise discretion when it denied his request for a hearing and failed to provide any rationale for its decision. He further argues that the trial court's failure to appoint a guardian ad litem for the minor whose paternity was questioned is reversible error. Tina Olson cross-appeals an order refusing to find Bruce in contempt. She contends that Bruce's failure to make payments required by the divorce judgment constitutes contempt of court subjecting him to sanctions under ch. 785, STATS., including reasonable attorneys fees.

We conclude that the record supports the trial court's determination to deny Bruce's motion for relief from judgment. The state of the record, however, does not permit us to review the trial court's decision to deny Tina's motion for contempt sanctions. Consequently, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

The parties were married in 1974 and divorced in 1986. Bruce had a vasectomy in 1981. When Tina bore a fourth child in 1983, Bruce did not raise any question concerning the paternity of the child at that time. Bruce signed a joint petition for divorce and a stipulation for a temporary order, stating that all four children were born to the parties. He also signed a marital settlement agreement, stipulating that "[t]he parties shall be awarded joint legal custody of their minor children" and listing all the children born during their marriage by name and birth date. The divorce judgment provided for support and custody of the parties' four minor children. Later, in 1989, both parties appeared in court with counsel on a motion to modify child support. No question concerning paternity was raised at that time.

In the fall of 1997, Tina filed a motion for revision of child support and a motion for remedial contempt. On January 15, 1998, the trial court held a hearing on her motion and made various rulings including one for dependency deductions for income tax purposes. No testimony was taken. The court held that Tina's motion for revision of child support and motion for remedial contempt raised only legal issues to be addressed on briefs.

On February 25, 1998, during the pendency of the motion proceedings, Bruce first raised the issue of the youngest child's paternity for the first time. He filed a motion for relief from the divorce judgment and sought an order for genetic testing to confirm paternity. Bruce accompanied his motion with an affidavit stating:

> My ex-wife assured me repeatedly that I was the father of the child despite my vasectomy, and that she did not have sexual relations with anyone else at the time of … conception. … I also did not have any post vasectomy semen examinations done to see if I was fertile or not after the surgery.
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> ….
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> On June 12, 1997, after I delivered a semen specimen to Dr. Varma, I was informed that no sperm were present. …
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> In response to the negative semen specimen, Dr. Varma emphasized to me that a negative semen specimen now does not definitely establish that I was infertile in 1982 when [A.] was conceived. He further explained that where doubt now exists, however, the only way of clearly establishing paternity would be by genetic testing ….

On briefs and without further hearing, the trial court made no detailed findings, but in a written order ruled that Bruce's motion was "not appropriately brought for consideration by the Court and cannot be reopened pursuant to Wisconsin Statute Section 806.07." The court also stated that "there has been no purposeful contempt of the Order of the Court in that there has been

an ongoing series of negotiations between the parties over a number of years causing the Court to then apply the law to the facts of this case." The court ordered that Tina was entitled to receive $ 3,787.42 from Bruce according to the divorce judgment.

Bruce argues that the trial court misapplied § 806.07(1)(h), STATS., because extraordinary circumstances present equitable reasons for relief. A trial court's order denying a motion for relief under § 806.07 will not be reversed on appeal unless there has been 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). An appellate court will not find an unreasonable exercise of discretion if the record shows that the circuit court exercised its discretion and that there is a reasonable basis for the court's determination. ***Id***. at 542, 363 N.W.2d at 422. The term "discretion" contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards. ***Id***.

Section 806.07(1)(h), STATS., "is written in broad terms and obviously extends the grounds for relief beyond those provided for in the preceding subsections: under subsection (h) the ground for granting relief is 'justice' and the time for bringing the motion is 'reasonable.'" ***Id***. at 544-45, 363 N.W.2d at 423. As indicated, such motions must satisfy both time and substantive criteria. The one-year time limit does not apply to § 806.07(1)(h), but the time frame must be reasonable. *See* ***id***. at 552-53, 363 N.W.2d at 426-27.

With respect to the substantive inquiry, this court has adopted an "extraordinary circumstances" test. ***Id***. at 549, 363 N.W.2d 425. Under that test, a court must determine whether, in view of all the facts, "extraordinary

circumstances" exist which justify relief in the interests of justice. ***Id***. at 552-53, 363 N.W.2d 426-27.

In ***M.L.B.***, D.G.H. sought relief from an out-of-wedlock paternity agreement. The supreme court held the following factors, if proven, to be extraordinary circumstances justifying relief: (1) M.L.B., the child's mother, lied about having no sexual partner other than D.G.H. during the conceptive period; (2) on the basis of that lie, D.G.H. agreed to be designated the father; (3) at the time, D.G.H. was eighteen years old, unemployed and had no advice of counsel; (4) no blood tests were taken; (5) D.G.H. could not remember being informed he had a right to a blood test or that he could consult an attorney before signing the paternity agreement; (6) blood tests later conclusively revealed D.G.H. not to be the child's father; and (7) a court's failure to reopen the issue of paternity has significant future ramifications for the adjudged father and child. *See* ***Sprayer Supply, Inc. v. Feider***, 133 Wis.2d 397, 408 n.4, 395 N.W.2d 624, 628 n.4 (Ct. App. 1986).

In exercising its discretion, the circuit court should consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments, including whether: the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; the claimant received the effective assistance of counsel; relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; there is a meritorious defense to the claim; and there are intervening circumstances making it inequitable to grant relief. ***M.L.B.***, 122 Wis.2d at 552-53, 363 N.W.2d at 427. "Subsection (h) should be used only when the circumstances are such that 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***. at 550, 363 N.W.2d at 426 (quoting ***Bankers Mtg. Co. v. United States***, 423 F.2d 73, 77 (5th Cir.1970) (emphasis in original)).

Also, although ***M.L.B***. does not specifically require an evaluation of the child's best interests before reopening a judgment, "evidence relating to this factor will be highly relevant to 'whether there are intervening circumstances making it inequitable to grant relief.' " ***Johnson v. Johnson***, 157 Wis.2d 490, 500, 460 N.W.2d 166, 170 (Ct. App. 1990). "Therefore, under subsec. (1)(h), an evaluation of [the child's] best interests, as well as evidence on all the other applicable ***M.L.B***. factors, should be considered." ***Johnson***, 157 Wis.2d at 500, 460 N.W.2d at 166.

Here, the trial court did not explain in its decision what facts it considered and the reasoning process by which it concluded that § 806.07, STATS., did not provide relief. As ***M.L.B.*** stated: "[T]he task the circuit court in this case should have performed was to evaluate the facts set forth in the petition to determine whether, if true, they would constitute extraordinary circumstances justifying relief. If the circuit court concluded that they did, the circuit court then should have held a hearing to determine the truth of the allegations." ***Id***. at 553, 363 N.W.2d at 427. Nonetheless, we generally look for reasons to sustain a trial court's discretionary determination. ***Schauer v. DeNeveu Homeowners Ass'n***, 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1995). We may sustain a trial court's decision to deny relief under § 806.07 even though the circuit court's reasoning may be inadequately expressed. ***Id***. In such cases, we may independently examine the record to determine if it provided a basis for the trial court's decision. *See* ***id***.

We conclude that the record supports the trial court's decision that Bruce's petition failed to meet the criteria necessary to entitle him to relief under § 806.07(1)(h), STATS. The circumstances of this case differ dramatically from those of ***M.L.B.*** Unlike ***M.L.B.***, the child was not born out of wedlock to teenage parents, but was the fourth child born to Tina and Bruce during their twelve-year marriage. Bruce and Tina were in their thirties at the time of their divorce. Although Bruce knew that he had a vasectomy making conception unlikely, he accepted, apparently without question, his wife's statement that the child was undoubtedly his. He signed a joint petition for divorce, as well as other legal documents, representing that the child was his own. Following his divorce, Bruce appeared in court at a motion hearing, represented by counsel, and raised no question concerning paternity.

In ***M.L.B.***, there was no adjudicated determination of paternity and the support agreement was made "under circumstances in which it is difficult to conclude that D.G.H. made a deliberate, conscious choice." ***Id***. at 556, 363 N.W.2d at 428. Here, in contrast, based upon a joint petition signed by Bruce, the divorce court adjudicated the parties' youngest as a child of the marriage. The record before this court, containing proceedings over the past fifteen years, reveals no suggestion that Bruce's agreements with respect to support and paternity were anything other than a "deliberate, conscious choice." *See* ***id***. Finally, Bruce's petition fails to speak to the child's best interests. On the record before it, the trial court could reasonably conclude that both the child's best interests and public policy weigh heavily in favor of the finality of the divorce judgment.

Bruce also argues that the trial court erred because it "ignored the availability of relief under § 767.466," STATS.[1] Based upon our foregoing discussion, it is obvious that subsecs. (2) and (3) would not provide relief. The remaining subsec. (1) requires a showing of "good cause." Bruce does not suggest how an analysis of "good cause" differs from an analysis under § 806.07(1)(h), STATS., of "reasons justifying relief." Also, he does not provide an analysis of why this statute, which applies to paternity judgments, should also apply to divorce judgments. To address his argument we would first have to develop it for him. We will not develop an appellant's argument for him. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

We conclude that the record supports the trial court's implicit determination that Bruce's petition was not brought within a reasonable time nor presented reasons justifying relief from judgment. Also, because Bruce's petition failed to satisfy minimum legal standards for a guardian ad litem appointment, we conclude that the trial court's failure to appoint a guardian ad litem was not reversible error. Bruce relies on ***Johnson***, 157 Wis.2d at 493, 460 N.W.2d at 167, for the proposition that a guardian ad litem appointment is mandatory in the circumstances presented here. We disagree. A petition to reopen must on its face

[1] Section 767.466, STATS., provides:

> **Motion to reopen judgment based on statement acknowledging paternity.** A judgment which adjudicates a person to be the father of a child and which was based upon a statement acknowledging paternity … may, if no trial was conducted, be reopened under any of the following circumstances:
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> **(1)** At any time upon motion or petition for good cause shown.
> **(2)** Upon a motion under s. 806.07.
> **(3)** Within one year after entry of the judgment upon motion or petition.

demonstrate a minimal degree of merit to justify the appointment of a guardian ad litem. In ***Johnson***, less than one year after the divorce judgment, the mother stated not only that her former husband had a vasectomy, but claimed that he was not the father because she had had an affair at the time of conception with one T.B., and that she believed that T.B. was the father. Those alleged circumstances led the court to conclude that the child's welfare was directly at issue. ***Id.*** 460 N.W.2d at 168. Here, more than fifteen years have elapsed without any allegation that another individual may be the father. We conclude that Bruce's petition fails to put the welfare of the child directly at issue. Because the record supports the trial court's discretionary decision to reject his petition on its face, we do not reverse it on appeal.

Next, Tina argues that the trial court erroneously concluded as a matter of law that there was no "purposeful" contempt of court. She argues it is undisputed Bruce did not make the payments ordered in the divorce judgment and failed to offer any valid defense to her claims for remedial sanctions for contempt. Although the trial court agreed Bruce failed to make the ordered payments and ordered that he owed Tina approximately $3,787, it did not find him in contempt.

A remedial sanction is defined in § 785.01(3), STATS., as a "sanction imposed for the purpose of terminating a continuing contempt of court." Section 785.01, defines contempt of court as "intentional … [d]isobedience, resistance or obstruction of the authority, process or order of a court." Section 785.04(1)(d), STATS., provides that a remedial sanction may be imposed to insure compliance with a prior order of the court. The sanction may include "[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court." Section 785.04(1)(a), STATS. Tina contends that the court's order requiring Bruce to pay previously owed sums does not fully

compensate her because she incurred expenses in bringing a legal action to enforce the judgment. In ***Town of Seymour v. City of Eau Claire***, 112 Wis.2d 313, 320, 332 N.W.2d 821, 824 (Ct. App. 1983), we concluded that § 785.04(1)(a) authorized the trial court to award attorney fees and litigation expenses incurred while prosecuting a contempt action.

Before finding contempt, however, a trial court must determine that (1) the defendant has the ability to pay the support or should be able to pay if he can work and refuses, and (2) the refusal to pay is willful and with the intent to avoid payment. ***Balaam v. Balaam***, 52 Wis.2d 20, 29, 187 N.W.2d 867, 872 (1971). A contempt finding presents questions of fact. *See* ***Currie v. Schwalbach***, 132 Wis.2d 29, 36, 390 N.W.2d 575, 578 (Ct. App. 1986); s*ee also* ***Holy Name School v. DILHR***, 109 Wis.2d 381, 386, 326 N.W.2d 121, 124 (Ct. App. 1982) (Questions concerning conduct and intent are questions of fact). Also, because Tina proved noncompliance with the court order, the burden of proof is on Bruce to show that his conduct was not contemptuous. *See* ***Balaam***, 52 Wis.2d at 30, 187 N.W.2d at 872-73.

The trial court erroneously characterized the issue whether Bruce purposefully failed to pay as an issue of law. No testimony was taken on January 15, 1998. The trial court did not make any particularized findings of fact; therefore, we cannot determine on what basis it found that Bruce's nonpayment was not "purposeful." If the trial court does not make particularized findings of fact, an appellate court may (1) affirm the judgment if clearly supported by the preponderance of the evidence; (2) reverse if not so supported; or (3) remand for findings and conclusions. ***State v. Williams***, 104 Wis.2d 15, 22, 310 N.W.2d 601, 605 (1981). Here, it was undisputed that Bruce failed to comply with the court's order, but no testimony was taken on the issue of his intent. Therefore, we reverse

the order and remand for further proceedings on this issue. On remand, the trial court may accept testimony to determine whether non-payment was contemptuous.

By the Court.—Order affirmed in part; reversed in part, and cause remanded with directions. Costs awarded to cross-appellant.

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