COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1946 **Cir. Ct. No. 2010FA160**

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

IN RE THE MARRIAGE OF:

MICHAEL S. EISENGA,

PETITIONER-APPELLANT,

V.

CLARE A. EISENGA,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed.*

Before Sherman, Blanchard, and Kloppenburg, JJ.

¶1 PER CURIAM. Michael Eisenga appeals an order dismissing his post-divorce motion to modify child placement and a subsequent order denying his motion for reconsideration of the dismissal. However, after Michael filed a notice of appeal, we issued an order in which we concluded that Michael's appeal of the original order was untimely and, therefore, that we lack jurisdiction to review that order. Noting that our jurisdiction over a motion for reconsideration is limited to review of issues that were not decided in a circuit court's original decision, we instructed the parties to address in their appellate briefing the threshold jurisdictional issue. We conclude that we have jurisdiction over only one issue that Michael raises on appeal, an equal protection claim, and we reject his equal protection argument. Accordingly, we affirm.

BACKGROUND

¶2 Michael and Clare Eisenga divorced in 2011. The judgment of divorce included a placement schedule for the parties' three children. In 2015, Michael filed a motion in the circuit court to modify the placement schedule and a subsequent supplemental modification motion, along with supporting materials, alleging that there had been a substantial change in circumstances since the last placement order and that modification was in the children's best interests. We treat the original motion and the supplemental motion as one, referring to them collectively as the "modification motion." As discussed below, Michael apparently had the option of filing the modification motion with a circuit court commissioner, with the opportunity for de novo review by the court of an adverse ruling by the commissioner, but decided to bypass the commissioner route.

¶3 Clare filed a motion to dismiss Michael's modification motion, which the circuit court granted. The court concluded that, even assuming that all

allegations in Michael's supporting materials were accurate, the modification motion did not raise issues that required an evidentiary hearing.

¶4 In making its decision, the circuit court explicitly addressed Michael's assertions that the children had each reached school age, and therefore had come to have different needs since the divorce, and that Clare was working outside the home and pursuing a master's degree. The court also addressed Michael's allegations that certain third-party witness statements submitted on Clare's behalf to an arbitrator during divorce negotiations had been falsified. The court concluded that the averments in Michael's affidavits in support of the motion, when considered in context of the arguments advanced by Michael, "are insufficient as a matter of law to meet the requisite standard" of establishing that there had been a substantial change in circumstances such that it was necessary for the court to hold an evidentiary hearing. Regarding the allegedly falsified witness statements, the court concluded that the alleged falsification does not constitute a substantial change in circumstances justifying a hearing, both because the statements were used during negotiations several years before Michael filed the modification motion and thus were not newly discovered, and because it was "incumbent on" Michael's attorney to "verify" statements used in negotiations. The court also determined that Michael failed to establish through his affidavits that maintaining the existing placement arrangement would be detrimental to the children's best interests.

¶5 Michael filed a motion for reconsideration, which contained four arguments: (1) the circuit court had applied the wrong legal standard by prematurely considering the children's best interests, rather than limiting its ruling to whether Michael had satisfied the threshold requirement of demonstrating that there were reasonable grounds to find that there had been a substantial change in

circumstances; (2) the court should reconsider whether Michael's averments in his affidavits, and the reasonable inferences drawn from the averments, constitute a substantial change in circumstances; (3) the court should reconsider whether the allegedly falsified witness statements constituted a substantial change in circumstances, because Michael only recently discovered that they had been falsified and lacked the opportunity or a reason during negotiations to question their veracity; and (4) the court violated Michael's equal protection rights by not holding an evidentiary hearing on his modification motion, because Michael would have automatically been granted an evidentiary hearing if he had filed the modification motion with a circuit court commissioner, instead of with the circuit court judge.

¶6 The circuit court denied the motion for reconsideration, explaining that the court had given proper consideration in its original decision to the allegations in the materials supporting Michael's modification motion and their reasonable inferences and had properly concluded that they were insufficient to establish a substantial change in circumstances. The court concluded that Michael's motion for reconsideration failed to "present either newly discovered evidence or establish a manifest error of law or fact."

¶7 Michael appeals. He does not challenge our conclusion, reflected in our order, that his appeal of the original order was untimely and that, therefore, we lack jurisdiction to review the original order. Instead, he raises on appeal the same

four issues that he raised in his motion for reconsideration and contends that they are new issues from those he raised in his original motion.[1]

DISCUSSION

¶8 This court lacks jurisdiction to consider an appeal of an order denying a motion for reconsideration that presented the circuit court with the same issues that were disposed of by the original judgment or order. *See* ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 25-26, 197 N.W.2d 752 (1972) (a motion for reconsideration "must present issues other than those determined by the order or judgment for which review is requested in order to appeal from the order entered on the motion for reconsideration"); *see* ***Silverton Enters., Inc. v General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). To resolve this jurisdictional issue we apply what our courts have referred to as the "new issues test," which simply means that we compare the issues raised in the motion for reconsideration with the issues disposed of in the original decision and order, and address only the new issues. *See* ***Harris v. Reivitz***, 142 Wis. 2d 82, 87-88, 417 N.W.2d 50 (Ct. App. 1987). We are to apply this test "liberally," meaning in favor of a conclusion that we have jurisdiction in close call situations. *See* ***id.***, 142 Wis. 2d 82, 88.

¶9 Applying this standard, we conclude that we lack jurisdiction over each of the issues that Michael raises on appeal, except his argument that the circuit court violated his equal protection rights.

[1] The guardian ad litem for the children has not filed a brief in this appeal, but instead joins in Clare's position that the circuit court properly exercised its discretion in denying Michael's motion for reconsideration.

¶10 We first dispose of Michael's argument that, if he raised even one new issue in his motion for reconsideration, we have jurisdiction over all of the issues he raised. Michael fails to provide authority that supports this position, and, in fact, there is contrary authority.

¶11 Michael points to the fact that in ***Harris*** we concluded that the order denying reconsideration was appealable even though two of the issues raised in Harris's motion for reconsideration were new and one was old. *See* ***id.*** at 88-89. However, we did not explicitly indicate that we would review on appeal the issue that was not new and, in fact, we dismissed the appeal in its entirety without reaching the merits after concluding that the circuit court lacked jurisdiction and, therefore, we lacked jurisdiction. ***Id.*** at 93.

¶12 Further, it would run contrary to the purpose of the new issues test if we were to review any issue that the circuit court disposed of in its original decision. The new issues test is based on the concern that "a motion for reconsideration should not be used as a ploy to extend the time to appeal from an order or judgment when the time to appeal has expired." ***Silverton***, 143 Wis. 2d at 665 (citations omitted); *see also* ***Ver Hagen***, 55 Wis. 2d at 25. If we failed to apply the new issues test to each issue we would effectively be extending the time to appeal the court's original decisions on issues that are not new, despite Michael's untimely appeal of those decisions.

¶13 Applying the new issues test here, it is obvious that, with the exception of Michael's equal protection argument, the circuit court considered and ruled on each of the issues that Michael raised on reconsideration in its original decision and order. As our summary above reveals, Michael merely slightly repackaged the three issues in his motion for reconsideration.

¶14 This means that the only issue we have jurisdiction to address is whether the circuit court erroneously exercised its discretion by rejecting the equal protection argument. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. In ***Koepsell's***, we explained as follows the standard that courts are to apply in reviewing motions for reconsideration:

> To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. A "manifest error" is not demonstrated by the disappointment of the losing party. It is the "wholesale disregard," misapplication, or failure to recognize controlling precedent.

275 Wis. 2d 397, ¶44 (citations omitted).[2]

¶15 Some additional explanation is necessary before we turn to the merits on the equal protection issue. The parties agree that, in filing his modification motion, Michael could choose between two procedural starting points: filing his motion with a commissioner (with the option for de novo review by a circuit court judge if he did not prevail before the commissioner), or instead bypassing the commissioner and filing the motion with a circuit court judge.[3] Michael chose to bypass the commissioner and to address his motion to the judge

[2] Without going into details, we observe that, even if we had jurisdiction to address the three issues that we conclude do not meet the new issues test, we would conclude that Michael's arguments as to each fails on the merits under the standard set forth on motions for reconsideration in ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 ("To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact.").

[3] Although the parties do not explain the details, we follow what seems to be the shared assumption of the parties that Michael had these options by virtue of local circuit court rules or informal practices in the county.

in the first instance. As explained above, the judge dismissed Michael's motion without holding an evidentiary hearing based on the court's conclusion that Michael failed to meet the threshold of establishing that there had been a substantial change in circumstances since the entry of the court's last child placement order.

¶16 Michael asserts that, under WIS. STAT. § 757.69(8) (2015-16),[4] if he had first filed with a court commissioner and then sought de novo review by the circuit court, the court would have automatically granted his request for a hearing. Therefore, Michael argues, the court's resolution of his modification motion without holding an evidentiary hearing resulted in a denial of Michael's equal protection rights. In other words, Michael argues that, had he first filed with a commissioner, § 757.69(8) would have entitled him to an evidentiary hearing before the court, but because he chose to file his motion directly with the court he was denied the right to an automatic hearing. According to Michael, the court's denial of his request for an evidentiary hearing therefore violated his equal protection rights.

¶17 We struggle to understand this argument on multiple levels, including its questionable premise that, had Michael not prevailed on a motion he could have filed with the commissioner, then the court would have been required

[4] WISCONSIN STAT. § 757.69(8) provides that all decisions of circuit court commissioners "shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party," and that the party is entitled to a hearing de novo in the appropriate circuit court branch if the party requests such a hearing.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

to hold an evidentiary hearing. In any case, we resolve this argument on the following grounds.

¶18 First, while Michael referenced the concept of equal protection in presenting arguments to the circuit court, in his motion for reconsideration he failed to fully develop an equal protection argument supported by controlling legal authority. In his motion for reconsideration, Michael argued that he was entitled to an evidentiary hearing because it would be "patently unfair and an unequal protection of the law" "for two different standards to exist in similar cases based solely on whether a motion is heard first by a commissioner versus a judge." However, in support of his argument, Michael relied primarily on an unpublished per curiam decision, which, pursuant to Wisconsin appellate rules, cannot be cited except under limited circumstances not applicable here. *See* WIS. STAT. RULE 809.23(3). And, in a similar vein, Michael fails to sufficiently develop the argument on appeal, again making only passing references to the concept of equal protection and again offering the unpublished per curiam decision as the primary support for his argument, without clearly explaining why we should conclude that the circuit court violated his constitutional rights by dismissing the action without holding a hearing. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

¶19 Second, assuming without deciding that Michael is correct in arguing that the circuit court would have been required to hold an evidentiary hearing on a request for a de novo review of an adverse decision by a commissioner, Michael fails to explain how he could raise this constitutional challenge despite the fact that he elected to take the route that he now says disadvantaged him. *See* ***State v. Gove***, 148 Wis. 2d 936, 940-43, 437 N.W.2d 218 (1989) (holding that defendant forfeited right to raise constitutional confrontation

issue created by unavailability of child witness by failing to object on that ground during trial and post-conviction proceedings). In ***Gove***, the court explained that "[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." ***Id.*** at 944.

¶20 Michael attempts to distinguish ***Gove*** on the ground that it involved a criminal defendant's constitutional rights and "[c]constitutional protections available to parties in criminal matters are substantially different than those available to civil litigants." However, Michael does not attempt to explain why we should conclude that the right that Michael seeks to protect in this family court action is entitled to *greater* protection than the right of Gove to move to bar excludable evidence that could incriminate him at a criminal trial. Michael's choice to bypass the commissioner route meant that the court could dismiss his modification motion without an evidentiary hearing because the motion failed, on its face, to demonstrate that there had been a substantial change in circumstances justifying an evidentiary hearing. *See* WIS. STAT. § 802.06(2).

CONCLUSION

¶21 For the foregoing reasons, we conclude that the only issue raised on appeal over which we have jurisdiction is Michael's asserted equal protection violation argument and we reject this argument.

By the Court.—Order affirmed.

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