COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP399 **Cir. Ct. No. 2014FA1277**

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

IN RE THE MARRIAGE OF:

SARAH MAE PAPPATHOPOULOS,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER THOMAS PAPPATHOPOULOS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed in part and reversed in part.*

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

¶1 FITZPATRICK, J. Sarah Pappathopoulos and Christopher Pappathopoulos were divorced in 2016.[1] Christopher appeals two parts of the judgment of divorce. First, Christopher contends that the circuit court's order continuing the appointment of a Parent Coordinator, over Christopher's objection, to decide various issues concerning the child of the parties exceeded the circuit court's authority. We agree and reverse those portions of the judgment of divorce. Second, Christopher argues that the circuit court erred in denying his maintenance claim. We conclude that the circuit court properly exercised its discretion in denying Christopher's maintenance claim and affirm that decision of the circuit court.

BACKGROUND

¶2 Sarah and Christopher divorced in December 2016 after fourteen years of marriage. The parties have one child who was twelve years old at the time of the divorce. Both parties are employed full-time with Sarah having somewhat higher income than Christopher.

¶3 While the divorce was pending, the parties entered into a stipulation that a Parent Coordinator would decide various disputed issues concerning their child, and the circuit court entered an order approving that stipulation. The stipulation and order provided that the Parent Coordinator's appointment was to terminate after one year unless both parties and the Parent Coordinator agreed to its continuation.

[1] For clarity, we will refer to the parties by their first names.

¶4 At trial Christopher objected to continuation of the appointment of the Parent Coordinator, but the circuit court continued the Parent Coordinator appointment order. The court also denied Christopher's request for maintenance payments from Sarah. Christopher appeals.

¶5 We will mention other pertinent facts below.

DISCUSSION

¶6 Christopher appeals two parts of the judgment of divorce. First, he argues that the order continuing the appointment of the Parent Coordinator, over his objection, to decide disputes regarding their child exceeded the circuit court's authority. Second, Christopher argues that the circuit court erred in denying his request for maintenance payments. We address each argument in turn.

I. The Terms of the Parent Coordinator Order Exceeded the Circuit Court's Authority.

¶7 As stated, Christopher argues that the parts of the circuit court's judgement which impose, over Christopher's objections, the Parent Coordinator exceeded the circuit court's authority. We agree and reverse the circuit court's order continuing the appointment of the Parent Coordinator.

A. Standard of Review.

¶8 Our discussion of this issue involves the interpretation and application of statutes, which are questions of law we review de novo. ***Hefty v. Strickhouser***, 2008 WI 96, ¶27, 312 Wis. 2d 530, 752 N.W.2d 820; ***Biel v. Biel***, 114 Wis. 2d 191, 193, 336 N.W.2d 404 (Ct. App. 1983).

B. The Stipulation and Order Appointing the Parent Coordinator and the Circuit Court's Order Continuing That Appointment.

¶9 While their divorce was pending, Christopher and Sarah entered into a detailed stipulation for the appointment of a Parent Coordinator and, on March 29, 2016, the circuit court entered an order accepting that stipulation.

¶10 Section VII of the stipulation and order, entitled "Term and Termination of Appointment," reads in pertinent part:

> We agree that the [Parent Coordinator's] term of appointment will be for twelve (12) months from the date of the court order approving his appointment renewable by agreement of both parties and the PC. At the end of this term, if either parent and/or the PC desire to terminate this appointment, it shall be terminated.

¶11 After considering the evidence at the December 2016 trial, the circuit court made the following finding:

> This has not worked out well at all, and it is abundantly clear that this couple is probably one of the worst two people at communicating for the benefit of their child that I've seen, even after the passage of two years. Usually I understand it when it's a divorce just happens and emotions are still high, but two years have passed.

Shortly thereafter, counsel for Sarah asked:

> [D]oes that mean the Court is requiring the parties to continue using the PC? Because his term expires in March [2017]. I know our position is we would like it to continue.

Christopher's counsel responded:

> And my client doesn't want it to continue. It's really costly.

The circuit court then made another finding:

> It is costly, but the only way that [child] is going to be protected from two parents who cannot work in her best interest is to have a parent coordinator.

¶12 The circuit court ordered the following at the conclusion of trial:

> So in the interest of [child] I am ordering that the parent coordinator *continue*, that the costs be split 50/50 until one of two things happen; the parent coordinator contacts the court and indicates that these two parents have learned how to communicate civilly in the best interest of their child or the court determines that upon motion of one the parties.

(Emphasis added.)

¶13 The judgment of divorce confirmed that order of the circuit court:

> 6. The parties have been working with Parent Coordinator, Marlin Kriss, to resolve disputes related to the minor child. In the interest of the minor child, the Court hereby orders that the parties *continue* to use the Parent Coordinator until one of the following occurs:
>
> a. The Parent Coordinator contacts the Court and indicates that the parties have learned how to communicate civilly in the best interest of the child; or,
>
> b. Upon Motion of one of the parties, the Court determines that the parties have learned how to communicate civilly in the best interest of their child.

(Emphasis added.) The provisions of the parties' prior agreements, including the parties' prior stipulation regarding the Parent Coordinator, were incorporated into the judgment of divorce.

¶14 Sarah does not contend that the parties' prior agreements authorized the circuit court to continue the appointment of the Parent Coordinator over

Christopher's objection.[2] Rather, Sarah argues that the court's action is authorized by WIS. STAT. § 805.06 and by WIS. STAT. §§ 767.01 and 767.41(1)(b) (2015-16).[3] We now consider, and reject, each of those arguments.

C. The Parent Coordinator Order is Not Authorized by WIS. STAT. § 805.06.

¶15 Sarah takes the position that the Parent Coordinator order entered by the circuit court over Christopher's objection is allowed under Wisconsin law because the Parent Coordinator is, in effect, a "referee" pursuant to WIS. STAT. § 805.06. Our supreme court has held that referees can be useful to circuit courts and parties, but an order appointing a referee must comply with the requirements of § 805.06. *See, e.g.,* ***State ex rel. Universal Processing Serv. of Wis. v. Circuit Ct. of Milwaukee Cty.***, 2017 WI 26, ¶2 n.3, 374 Wis. 2d 26, 892 N.W.2d 267. We conclude that the circuit court's order continuing the appointment of the Parent Coordinator contravenes the provisions of § 805.06.[4]

[2] Parties to a divorce action may, generally, stipulate to a provision in a divorce order even if the court would not otherwise have the statutory authority to order that provision absent the parties' consent. ***Lawrence v. Lawrence***, 2004 WI App 170, ¶6, 276 Wis. 2d 403, 687 N.W.2d 748. The parties concede that the original stipulation and order appointing the Parent Coordinator terminated on March 29, 2017.

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

[4] We do not address whether WIS. STAT. § 805.06 grants a circuit court authority to appoint a referee in an action affecting the family as was done here. Instead, we conclude that, even if such an appointment is permissible, the circuit court's order does not comply with § 805.06.

(continued)

1. Christopher Did Not Forfeit His Objection to the Parent Coordinator.

¶16 Sarah contends that Christopher forfeited his objection to the imposition of the Parent Coordinator order because he did not specifically object to the appointment of a referee. We reject Sarah's assertion that any argument was forfeited by Christopher.

¶17 First, at the time of trial, Christopher objected to any continuation of the Parent Coordinator appointment. That sufficed to give notice of his objection because, as discussed, the parties' stipulation and the circuit court's order provided that the appointment would terminate after twelve months unless both parties and the Parent Coordinator agreed to continue it.

¶18 Second, it is true that, in the circuit court, Christopher did not object to continuation of the Parent Coordinator order by using the term "referee" or referring to WIS. STAT. § 805.06. However, neither the circuit court nor Sarah used that term or referred to that statute. Nothing in the judgment of divorce, or any of the prior agreements or orders incorporated into the divorce judgment, mentions § 805.06 or a "referee." The first time anyone referred to the Parent Coordinator as a "referee," or asserted that § 805.06 applies, was in Sarah's briefing in this court. So, it is unsurprising that Christopher did not couch his objection in the circuit court in terms of § 805.06 or a referee, and we do not conclude that a forfeiture occurred.

In addition, Sarah contends that the continued appointment of the Parent Coordinator in this case does not violate any provisions of the Wisconsin Constitution. Because we resolve this appeal on statutory grounds, we need not reach any constitutional questions regarding the continuation of the Parent Coordinator order. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) ("[W]e should decide cases on the narrowest possible grounds and should not reach constitutional issues if we can dispose of the appeal on other grounds.").

¶19 In addition, "[r]ules of forfeiture and waiver are rules of judicial administration, and thus, a reviewing court may disregard a waiver or forfeiture and address the merits of an unpreserved issue in an appropriate case." ***Universal Processing***, 374 Wis. 2d 26, ¶53. Even if we had concluded that Christopher failed to properly raise this argument in the circuit court, we would exercise our discretion to address the merits.

¶20 We now discuss the reasons the circuit court's order continuing the appointment of the Parent Coordinator over Christopher's objection exceeded the court's authority.

2. The Parent Coordinator's Decisions Are Self-Executing.

¶21 A referee is required to write a report, and no action can be taken on the report except by motion to the circuit court. *See* WIS. STAT. § 805.06(5)(a) ("The referee shall prepare a report upon the matters submitted by the order of reference …."); § 805.06(5)(b) ("Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice.") In other words, the referee's report may not be "self-executing," but requires an order from the circuit court for it to have the force of law. ***Universal Processing***, 374 Wis. 2d 26, ¶64.

¶22 Here, the circuit court's grant of power to the Parent Coordinator goes well beyond the provisions of WIS. STAT. § 805.06. The circuit court ordered that the Parent Coordinator's decisions are "legally binding when made and will continue in effect unless modified or set aside by the Court." As a result, once the Parent Coordinator makes a decision, the parties are required to obey the decision immediately and can only stop implementation of the decision of the Parent Coordinator by requesting review in the circuit court.

¶23 This power of the Parent Coordinator granted by the circuit court exceeds the statutory authority of a referee because the Parent Coordinator's decisions must be obeyed immediately and do not require a circuit court's authority to be implemented. This procedure plainly side-steps the statutory requirement that the parties have an opportunity to object before the circuit court decides whether to adopt or reject a report of the referee.

3. Giving Weight to the Parent Coordinator's Decisions.

¶24 Next, a circuit court shall not review a referee's report by giving any deference to the referee. The standard of review of a referee's report in the circuit court is de novo. *See* ***Universal Processing***, 374 Wis. 2d 26, ¶77 and ¶¶83-86.

¶25 Here, by incorporating the parties' prior agreement regarding the Parent Coordinator, the circuit court will give "substantial weight" to the decisions of the Parent Coordinator. That standard conflicts with WIS. STAT. § 805.06 and is inconsistent with our supreme court's holding in ***Universal Processing*** which requires de novo review of any referee's report. "In a de novo review, the reviewing court reaches whatever decision it would reach independently of the decision of the prior decision maker." ***Id.***, ¶85. In deferring to the Parent Coordinator, there is the appearance of "an abdication of the circuit court's responsibility to exercise independent judgment." ***Id.***, ¶ 86.

¶26 Sarah attempts to distinguish that holding of ***Universal Processing*** based on the language in the parties' stipulation which states that the parties only "ask the court" to give substantial weight to the Parent Coordinator's decisions. This argument fails for two reasons. First, our supreme court has held that the question is whether the order itself violates the provisions of WIS. STAT. § 805.06 rather than any standards the circuit court may, or may not, apply in practice. *See*

Universal Processing, 374 Wis. 2d 26, ¶¶79-82. Second, regardless of the "ask the court" language in the stipulation, the circuit court has turned that same stipulation language into an order. The most reasonable reading of the circuit court's action is that it adopted the parties' request to apply a standard of review deferential to the Parent Coordinator rather than de novo review.

¶27 For those reasons, we conclude that the order continuing the Parent Coordinator appointment violates Wisconsin law regarding the standard of review of the Parent Coordinator's decisions.

D. Absence of an Exceptional Condition.

¶28 WISCONSIN STAT. § 805.06(2) states that "in actions to be tried without a jury," the appointment of a referee is "the exception and not the rule," and the appointment "shall be made only upon a showing that some exceptional condition requires it." At the trial, Sarah requested continuation of the Parent Coordinator order. In granting that request, the circuit court stated only one reason for the appointment: The child will be "protected" if there is a Parent Coordinator.

¶29 The parties do not dispute that they are unable to communicate effectively for the benefit of their child, and we do not question the circuit court's frustration with this situation. But, any order of a circuit court on issues affecting a child's best interests necessarily encompasses the protection of a child. A factor which is always present in any decision regarding a child cannot meet the statutory requirement of "a showing that some exceptional condition" exists which, in turn, requires a referee.

¶30 Therefore, we conclude that there has been no showing that an exceptional condition exists in this case which require the continued appointment of the Parent Coordinator.

¶31 In sum, we conclude that the circuit court's order continuing the appointment of the Parent Coordinator exceeded the circuit court's authority under WIS. STAT. § 805.06.

E. The Parent Coordinator Order is Not Authorized by WIS. STAT. §§ 767.01 or 767.41(1)(b).

¶32 Sarah also takes the position that the circuit court had the authority to order the appointment of the Parent Coordinator over Christopher's objections because of generalized provisions of Chapter 767. Sarah relies on WIS. STAT. § 767.01 which states that a circuit court in an action affecting the family has the "authority" to do "all acts and things necessary and proper." In addition, Sarah relies on WIS. STAT. § 767.41(1)(b) which states that, in rendering a judgment in an action affecting the family, "the court shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties, as provided in this section." Whether action taken by a circuit court under § 767.01 is "proper" is a question of law, and the same standard applies concerning the provisions of § 767.41(1)(b). *See* ***Biel***, 114 Wis. 2d at 193.

¶33 First, we observe that the statutory provisions Sarah points to do not authorize the circuit court to delegate its decision-making authority. Second, thirty-five years ago we rejected this sort of broad interpretation of the family law statutes advanced by Sarah. In ***Biel***, we addressed an order requiring that divorced parents, over one party's objection, submit to binding arbitration and concluded

that the order was not a proper exercise of authority under WIS. STAT. § 767.01. ***Biel***, 114 Wis. 2d at 194. The same rationale applies in this case.

¶34 Therefore, we conclude that neither WIS. STAT. § 767.01 nor WIS. STAT. § 767.41(1)(b) authorize the circuit court's continuation of the Parent Coordinator appointment.

¶35 For those reasons, we conclude that the parts of the judgment of divorce which continued the Parent Coordinator order after March 29, 2017 exceeded the circuit court's authority under WIS. STAT. § 805.06 and, therefore, those portions of the judgment of divorce are reversed.

II. The Circuit Court Properly Exercised its Discretion in Denying Christopher's Request for Maintenance.

¶36 We now consider Christopher's contention that the circuit court erred in denying his request for maintenance. We reject Christopher's arguments and conclude that the circuit court properly exercised its discretion in denying Christopher's maintenance claim.

A. Standard of Review.

¶37 A circuit court's decision about a maintenance claim will not be disturbed unless the decision constitutes an erroneous exercise of discretion. ***King v. King***, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999). We affirm a "discretionary decision if the court makes a rational, reasoned decision and applies the correct legal standard to the facts of record." ***Hokin v. Hokin***, 231 Wis. 2d 184, 190, 605 N.W.2d 219 (Ct. App. 1999). In addition, we uphold the circuit court's findings of fact unless those findings are clearly erroneous. ***Id.*** at 190-91.

B. Maintenance Objectives and Statutory Factors.

¶38 In determining whether maintenance should be awarded, the circuit court is to consider the factors enumerated by the legislature in WIS. STAT. § 767.56.[5] *See* ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 31, 406 N.W.2d 736

[5] The factors regarding maintenance set forth in WIS. STAT. § 767.56(1c) are:

> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.
>
> (c) The division of property made under s. 767.61.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.
>
> (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (i) The contribution by one party to the education, training or increased earning power of the other.
>
> (j) Such other factors as the court may in each individual case determine to be relevant.

(1987). The weight given to each relevant factor is committed to the circuit court's discretion. ***Metz v. Keener***, 215 Wis. 2d 626, 640, 573 N.W.2d 865 (Ct. App. 1997). The statutory factors regarding an award of maintenance "are designed to further two distinct goals." ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶29, 269 Wis. 2d 598, 676 N.W.2d 452. First, maintenance is designed to support the recipient spouse in accordance with the needs and earning capacities of both former spouses. ***Id.*** Second, a maintenance award must ensure that there is a fair and equitable financial arrangement between the parties. ***Id.***

C. Christopher's Undeveloped Argument.

¶39 Two statutory factors regarding maintenance are the earning capacity of the party seeking maintenance and the feasibility of that person becoming self-supporting. WIS. STAT. §§ 767.56(1c)(e) and (f). In addition, the support objective of maintenance considers the needs of the party requesting maintenance and the ability to pay of the other spouse. ***Rohde-Giovanni***, 269 Wis. 2d 598, ¶28. For those reasons, information about the incomes of the parties is significant to a maintenance decision. Nonetheless, both briefs filed by Christopher in this court fail to state the income of either party. The closest Christopher comes to specifying either party's income is his citation to a finding from the judgment of divorce that Sarah "is presently earning more than the Respondent."

¶40 Sarah's brief is somewhat more helpful in that it cites to Christopher's financial disclosure statement which states that Christopher has a total gross annual income of $91,572 per year. But, Sarah does not divulge her gross annual income in her brief filed in this court. Nonetheless, our review of the record shows that Sarah's financial disclosure statement stated that, at the time of

trial, she had $103,200 of total gross annual income. Neither party disputes the amount of income reported to the circuit court by Sarah.[6]

¶41 Because Christopher fails to inform us of the incomes of the parties, other than in a vague and relative sense, he fails to grapple with facts needed for a viable challenge to the circuit court's exercise of discretion in awarding maintenance. In other words, he does not discuss the necessary part of the maintenance analysis concerning his needs and Sarah's ability to pay. Moreover, Christopher's argument regarding maintenance is undeveloped in that he does not explain what maintenance order he believes the circuit court should have entered in terms of amount or length of the payments.

¶42 We need not consider undeveloped arguments. ***State v. O'Connell***, 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993). But, in part because Sarah never asserts that Christopher's maintenance argument is undeveloped, we address the merits of Christopher's claim.

D. Maintenance Analysis.

¶43 The circuit court's decision on maintenance was brief, but most of the facts concerning maintenance were not disputed. Instead, the circuit court focused on areas of dispute, and we will do the same. We conclude that the circuit court did not erroneously exercise its discretion in denying maintenance to Christopher.

[6] For context, we note that, because Sarah is scheduled to spend more time with the child, the circuit court ordered Christopher to pay $438 per month in child support to Sarah. That award is not a subject of this appeal.

¶44 Christopher's main argument regarding maintenance is that the circuit court erred in determining that he was "hiding income." The circuit court found Christopher's statements in discovery and at trial to be inconsistent, and the circuit court implicitly determined that Christopher was not credible regarding his total income. Christopher points to portions of the record which counter the findings of the circuit court regarding his income. Christopher asks us to give weight to evidence the circuit court rejected, but it is the circuit court's function, not ours, to weigh the evidence. We conclude that there was sufficient evidence in the record to support the circuit court's finding that Christopher was hiding income, and we affirm that portion of the circuit court's decision. This finding militates against Christopher's maintenance claim.

¶45 Next, the circuit court considered the length of the marriage as required by WIS. STAT. § 767.56(1c)(a). We find no error in the circuit court's determination that this was not a long-term marriage. The de minimis misstatement of the circuit court as to the length of the marriage (twelve as opposed to the actual fourteen years) does not change the conclusion that this was not a long-term marriage. This also supports the denial of maintenance.

¶46 The circuit court also found that Christopher did not contribute equally to the marriage, and this was a factor that weighed against an award of maintenance. The record supports the finding regarding Sarah's superior contributions to the marriage, both in the home and financially, because of lack of effort and lack of responsibility by Christopher. It was not an erroneous exercise of discretion for the circuit court to rely on those findings to conclude that maintenance should be denied to Christopher.

¶47 Finally, the circuit court found that both parties received their undergraduate degrees during the marriage, and Sarah received her masters degree during the marriage. However, the circuit court did not find that Christopher contributed to any increased earnings of Sarah. *See* WIS. STAT. § 767.56(1c)(i). This is consistent with the circuit court's finding regarding Sarah's contributions to the marriage. As a result, the circuit court did not determine that Christopher helped to increase Sarah's earning capacity and the record, as properly viewed by the circuit court, does not lead to a different conclusion.

¶48 Therefore, we conclude that the circuit court's findings support its appropriate exercise of discretion in denying maintenance to Christopher.

CONCLUSION

¶49 For those reasons, we reverse the parts of the judgment of divorce which continued the Parent Coordinator appointment after March 29, 2017 and affirm the circuit court's denial of maintenance to Christopher.

By the Court.—Judgment affirmed in part and reversed in part.

Not recommended for publication in the official reports.