

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2010AP1278

Cir. Ct. No. 1999FA11

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

EVA MARIE HARVEY,

PETITIONER-RESPONDENT,

V.

ZIMMERY O. HARVEY,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Zimmery Harvey, pro se,¹ appeals an order² denying his “motion to modify maintenance and grant relief to allow additional credits against arrears,” and an order denying his motion for reconsideration. He asserts the court erroneously exercised its discretion and failed to apply the proper standards of law. We affirm.

BACKGROUND

¶2 Zimmery and Eva Harvey were married in 1979. In October 1999, they legally separated and entered into a marital settlement agreement. Pursuant to the settlement agreement, which was incorporated into the judgment of legal separation, Zimmery was required to pay Eva \$1,500 per month in child support via wage assignment. Once their child reached nineteen years old or graduated high school, the \$1,500 amount would convert into maintenance.

¶3 Neither party set up a wage assignment. In April 2006, Eva filed a motion for remedial contempt against Zimmery, alleging he had not made all of the required support payments. Zimmery asserted that, between October 1999 and April 2006, he made child support and maintenance payments directly to Eva. The court held an evidentiary hearing. Following the hearing and briefing by the parties, the court found Zimmery in contempt for failing to make the required payments. The court, for the most part, rejected Zimmery’s evidence that showed payments he made because it could not “determine if these payments actually were for Ms. Harvey’s expenses or were for Mr. Harvey.” Instead, the court, relying on

¹ Zimmery was represented by counsel before the circuit court.

² We observe page six of the court’s order is not in the record. Page six of the court’s order was included in Zimmery’s appendix.

certain checks, determined Zimmery had only paid \$6,800 of his \$31,500 child support obligation. For maintenance, the court relied largely on the parties' tax returns and Zimmery's recent wage assignment and determined Zimmery had paid \$47,356.98 of his \$90,000 maintenance obligation.

¶4 Zimmery moved for reconsideration.³ He submitted additional documentation in support of his assertion that he had made all required payments directly to Eva. Following a hearing, the court denied his motion, reasoning, in part, that Zimmery failed to prove the evidence was “newly discovered evidence,” meaning that “it was not available with diligent effort in July when [the court] heard this case.” *See* WIS. STAT. § 805.15(3).⁴ The court rejected Zimmery's assertion that it was too expensive to obtain the evidence earlier.

¶5 Zimmery appealed. In *Harvey v. Harvey*, No. 2007AP676, unpublished op. and order (WI App Dec. 18, 2007), Zimmery asserted the circuit court erred by failing to consider the evidence he presented at the reconsideration hearing. In response, Eva argued Zimmery's documents were merely cumulative to the summaries received in evidence at the original contempt hearing. *Id.* at 2. Because Zimmery failed to file a reply brief in response to Eva's argument, we deemed Eva's assertion conceded. *Id.* We also concluded that Zimmery's argument in support of why he did not produce the evidence earlier was undeveloped and unsupported by the record. *Id.* at 3. Aside from correcting a

³ Zimmery also filed a separate motion to convert the judgment of legal separation into a judgment of divorce. The court subsequently granted this motion.

⁴ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

mathematical error in the court's arrears calculation, we affirmed the court's order.
Id.

¶6 In December 2008, Zimmery filed a motion for relief from the court's order, pursuant to WIS. STAT. §§ 806.07 and 805.15(3). Specifically, he asserted Eva had committed fraud on the court by claiming arrears, extraordinary circumstances warranted relief, and he had "additional documentary evidence that he was unable to discover exercising due diligence for presentation at previous hearings." Zimmery also moved to modify maintenance, pursuant to WIS. STAT. § 767.59.

¶7 The court held an evidentiary hearing. Following the hearing, the court determined Zimmery failed to establish that Eva committed fraud on the court. In a later written decision, the court determined Zimmery had failed to establish other "extraordinary circumstances" justifying relief. The court also denied Zimmery's request to modify maintenance. Zimmery moved for reconsideration, and the court denied his motion.

DISCUSSION

¶8 On appeal, Zimmery asserts the court erred by failing to grant relief and by failing to modify maintenance.⁵ Zimmery first contends the court erred by

⁵ Zimmery also raises what appear to be sub-arguments within these two arguments. For example, he asserts that, in 1999, the court did not consider the statutory maintenance factors before incorporating the settlement agreement into the judgment of legal separation, and, in 2006, the court erred by finding him in contempt. He also objects to a garnishment that occurred because of the arrears and the court's division of certain property. Not only are these arguments undeveloped, *see State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments), but they are beyond the scope of our review. Our review is limited to the court's denial of his motion for relief and the denial of his motion to modify maintenance.

denying his “motion for relief under WIS. STAT. §§ 805.15(3) and 806.07(1)(c)[,](h).”

¶9 At the outset, we observe that the circuit court did not consider Zimmery’s motion for relief in the context of WIS. STAT. § 805.15(3), newly discovered evidence, or § 806.07(1)(c), fraud.⁶ Allegations brought under these subsections must be brought within one year and, in this case, would have been untimely. *See* WIS. STAT. §§ 805.16(4), 806.07(2). Instead, it is evident from the record that the circuit court considered Zimmery’s allegations in the context of both § 806.07(1)(h), the catch-all provision for relief, and § 806.07(2), “fraud on the court.”

¶10 WISCONSIN STAT. § 806.07(1)(h) may be used to provide relief to a party whose motion “sounds in” another basis for relief but is brought outside the statutory time limitation. *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶13, 282 Wis. 2d 46, 698 N.W.2d 610. Additionally, an allegation of “fraud on the court” may be considered by the circuit court at any time. WIS. STAT. § 806.07(2).

¶11 The determination of whether to grant relief under WIS. STAT. § 806.07 lies within the circuit court’s discretion. *Sukala*, 282 Wis. 2d 46, ¶8. We will not reverse absent an erroneous exercise of discretion. *Id.* A court properly exercises its discretion when it uses a “process of reasoning that depends on facts that are in the record, or are reasonably derived by inference from facts of record, and a conclusion based on the application of the correct legal standard.” *Id.* “Because the exercise of discretion is so essential to the trial court’s

⁶ Further, it does not appear from the record that Zimmery raised a WIS. STAT. § 806.07(1)(c) fraud allegation before the circuit court.

functioning, we generally look for reasons to sustain discretionary determinations.” *Id.* (citation omitted).

¶12 The proper test for determining whether to grant relief under WIS. STAT. § 806.07(1)(h) is whether there are “extraordinary circumstances justifying relief in the interest of justice.” *Sukala*, 282 Wis. 2d 46, ¶13 (citation omitted). “Unique and extraordinary 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.*, ¶12 (citation omitted). In making the determination of whether extraordinary circumstances exist to justify relief, the circuit court examines:

whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether 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; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id., ¶11 (quoting *M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985)).

¶13 Here, the circuit court, after evaluating the factors outlined in *Sukala*, determined Zimmery had failed to show “extraordinary circumstances” existed to justify relief. The court first found the marital settlement agreement, which was incorporated into the judgment, was the “result of [Zimmery’s] conscientious, deliberate and well-informed choice.” The court observed Zimmery had conceded the agreement was fair and equitable and, through the agreement, waived both notice and the right to appear at the final hearing. The

court found Zimmery's testimony to the contrary incredible and concluded the fact that a wage assignment was not initially set up was not an extraordinary circumstance justifying relief from arrears.

¶14 Second, the court determined that Zimmery failed to prove he received ineffective assistance of counsel. The court found Zimmery waived his ineffective representation claim by failing to present former counsel for testimony at the motion hearing. Moreover, the court observed that Zimmery failed to present evidence of "egregious incompetence" or "extreme negligence" which would allow the court to find ineffective assistance of counsel as a matter of law.

¶15 Third, the court found that it had previously considered Zimmery's claim for maintenance and child support credit on the merits and determined Zimmery did not have a meritorious claim. Specifically, the court observed Zimmery had previously argued that he made substantial payments to Eva and the court had granted credits for some, but not all, of those payments. The court found Zimmery's "evidence on March 5, 2009 was in many respects, the same as that considered in July 2006." The court determined that any alleged difficulties in procuring evidence did not constitute extraordinary circumstances and observed "[Zimmery] has had his day in court" on the credit issue.

¶16 Finally, for Zimmery's "fraud on the court" allegation, the circuit court noted that, in 2006, it "had to make a determination as to which ... evidence it was going to apply credibility to, and [it] made that determination." The court found Eva "didn't make false recommendations [sic]⁷" in 2006 and that, in any

⁷ We assume the court meant to say "representations."

event, “any mischaracterization of the evidence that may have been presented ... [was] not made with the intent to defraud ... the court.”

¶17 Here, Zimmery objects to the circuit court’s factual determinations. First, he contends the 1999 judgment of separation was *not* the result of a conscientious, deliberate, and well-informed choice because: he was only contemplating separation, not divorce, when he entered into the marital settlement agreement; he signed the agreement without the assistance of counsel; he did not understand the requirements of the settlement agreement; he never waived his right to be present at the 1999 final hearing; and he never received notice for the hearing. He asserts Eva should have sought a wage assignment in 1999. He contends the record shows he received ineffective assistance of counsel, and the court erred by failing to consider his new evidence and by concluding he had presented his evidence previously. Finally, Zimmery contends Eva committed fraud and points to certain testimony from Eva that he contends is fraudulent.

¶18 We conclude the court did not erroneously exercise its discretion by determining Zimmery had failed to present extraordinary circumstances justifying relief. First, the record supports the court’s determination that Zimmery knowingly entered into the settlement agreement, waived his right to be present at the original final hearing, and failed to prove ineffective assistance of counsel.⁸ Next, even assuming Eva was required to set up the initial wage assignment, her failure to do so is not an extraordinary circumstance that would excuse Zimmery

⁸ Zimmery asserts that if we determine his counsel was not ineffective, we should then conclude the circuit court was biased against him and in collusion with Eva’s attorney. Zimmery’s allegation of judicial bias is undeveloped and we will not consider it. *See Pettit*, 171 Wis. 2d at 646-47.

from paying support. Further, to the extent Zimmery presented new evidence to the court at the 2009 hearing, we observe that the court, as it did at the 2007 reconsideration hearing, rejected Zimmery’s alleged difficulties in obtaining the evidence earlier. Moreover, the record reveals the court considered Zimmery’s evidence—it noted that it had always known Zimmery made payments for which the court did not give him credit. Zimmery was not given credit originally because the court could not determine whether the payments were for Eva or Zimmery. Credibility determinations and the weighing of evidence are in the province of the circuit court. *Johnson v. Miller*, 157 Wis.2d 482, 487, 459 N.W.2d 886 (Ct. App. 1990). Finally, because the record supports the court’s determination that Eva did not receive all the required payments, her testimony in support of this assertion was not “fraud on the court.”

¶19 Zimmery next contends the court erred by failing to modify maintenance. He asserts that “maintenance should be reduced to zero.” He contends, in conclusory fashion, that the court failed to “consider[] the dual objectives of maintenance” and “failed to apply the proper legal standards.”

¶20 To the extent Zimmery is asserting that the court failed to engage in a proper legal analysis in determining whether to modify maintenance, Zimmery’s argument is undeveloped and we will not consider it. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (We need not consider undeveloped arguments.). However, we observe the court’s decision references the dual objectives of maintenance and the need to “apply the factors of [WIS. STAT. §] 767.56.” The court then applied these objectives and factors to the Harveys’ circumstance and determined maintenance continued to be appropriate.

¶21 Zimmery's argument appears to be premised on the court's factual findings in support of continued maintenance. Specifically, he objects to findings the court made and those it failed to make, and the relative importance the court assigned to some evidence. Factual determinations and the weight given to evidence are in the province of the circuit court. *Johnson*, 157 Wis. 2d at 487. Here, the court's findings have support in the record; therefore, they will not be disturbed.

By the Court.—Orders affirmed.

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

