COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2918 **Cir. Ct. No. 2007FA334**

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

IN RE THE MARRIAGE OF:

GAYLAN LANCE RABINE,

PETITIONER-APPELLANT,

V.

ROSE ANN RABINE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 LUNDSTEN, P.J. Gaylan Rabine appeals the judgment dissolving his marriage to Rose Rabine and deciding contested issues involving their children

and property. Gaylan argues that the circuit court erred regarding the placement of the children and child support and, further, that the court erred in requiring the sale of the family house for purposes of the property division. Gaylan also complains that the circuit court erred as a matter of law when it did not respond to issues raised by Gaylan's prejudgment motions by issuing an order addressing each. We reject Gaylan's arguments, and affirm the circuit court.

Background

¶2 In August 2007, Gaylan Rabine filed this action for divorce in Sauk County from Rose Rabine. They have four children. The circuit court ordered the appointment of a guardian ad litem (GAL) for the children. Subsequently, on February 17 and June 17, 2009, there was an evidentiary hearing on the contested aspects of the divorce.

¶3 On January 29, 2010, the circuit court issued a nonfinal memorandum decision on the placement of the children and the property division. That decision included split placement of the children and a mandate to sell the family house so the proceeds could be evenly divided between Gaylan and Rose. The decision explained that joint custody was not contested and that the parties had waived maintenance, and further stated that child support would be addressed at a later date.

¶4 On May 24, 2010, Gaylan, by motion, requested child support in his favor and also sought, among other things, reconsideration of the circuit court's mandate to sell the house. On June 2, 2010, after a hearing, the circuit court declined to order child support or to change its decision on the house sale.

¶5 In August 2010, as part of a separate CHIPS action, the circuit court in Shawano County issued a temporary order placing all four children with Gaylan full time. On August 5, 2010, Gaylan filed a motion with the divorce court, asking the court to reconsider its prior rulings in light of the separate CHIPS proceeding. On August 20, 2010, the divorce court issued the final judgment of divorce. That judgment contained terms of the divorce consistent with the court's January 29 and June 2, 2010 rulings. Gaylan appeals.

Discussion

A. Pending Motions

¶6 Gaylan argues that the circuit court erred as a matter of law when the court entered the divorce judgment without addressing some of the topics raised in Gaylan's prejudgment motions. We reject this argument.

¶7 Gaylan asserts that the circuit court did not expressly address all of the issues raised in his May 24, 2010 motion, including whether placement should have been revisited to account for Rose having moved. Gaylan also complains that the court failed to respond to his August 5, 2010 motion, filed after the CHIPS proceeding had commenced, that sought to revisit the house sale, custody, child support, and placement issues, and also sought to have the circuit court refrain from signing the final divorce judgment "pending further review by [the circuit] court."

¶8 Gaylan's argument on appeal is that reversal of the judgment is required because he "had a right under WIS. STAT. § 802.01(2) to have the court consider those motions." More specifically, he asserts that he had a right to an explicit ruling from the court addressing the merits of the issues he raised.

WISCONSIN STAT. § 802.01(2)[1] addresses the procedure for pleadings and motions in civil matters, and generally states that "[a]n application to the court for an order shall be by motion." The statute explains how motions are made, when supporting papers are to be served with the motion, and what "[f]ormal requirements" apply. *See* § 802.01(2)(a), (b), and (d). The statute also provides for certain recitals in a court order that responds to a motion:

> (c) *Recitals in orders*. *All orders*, unless they otherwise provide, shall be deemed to be based on the records and papers used on the motion and the proceedings theretofore had and *shall recite the nature of the motion, the appearances, the dates on which the motion was heard and decided, and the order signed*. No other formal recitals are necessary.

WIS. STAT. § 802.01(2)(c) (emphasis added).

¶9 Without elaboration, Gaylan asserts that this language *requires* that, in response to all motions, "the court must … issue an order reciting ... the court's action thereon." However, WIS. STAT. § 802.01(2)(c) says nothing about a right to an order or, more particularly, that a court must grant or deny all motions in a written order. Rather, the provision describes what an *issued* order "shall recite" and what, lacking other indications, an order is deemed to be based on.

¶10 Gaylan's argument is further undermined by a case he cites in his brief. Specifically, Gaylan cites ***Berna-Mork v. Jones***, 173 Wis. 2d 733, 740, 496 N.W.2d 637 (Ct. App. 1992), where we stated the rule that "[a] motion which is not acted on by the trial court is deemed denied." *See* ***id.*** at 739-40 (applying "the logic of this rule" to a situation where the circuit court did not expressly rule on an

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

alternative ground raised in support of a summary judgment motion). Far from concluding that this "deemed denied" route meant that we must reverse because the moving party was denied a right, we gave the court's implicit denial legal effect. *See* ***id.*** at 739-42.

¶11 Gaylan also makes what we understand to be a slightly different contention, which he bases on the standard of review applicable to discretionary decisions. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 ("A circuit court's discretionary decision is upheld as long as the court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" (citation omitted)). Gaylan seems to argue that, because the standard of review asks if the circuit court addressed relevant facts, applied the proper law, and used a rational process, it necessarily follows that we must reverse whenever a record does not reveal these steps. However, such an approach would conflict with the well-established rule that we may affirm the circuit court's result even when the circuit court's reasoning is lacking. *See* ***Alsum v. DOT***, 2004 WI App 196, ¶17, 276 Wis. 2d 654, 689 N.W.2d 68 ("'When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion.'" (citation omitted)); *cf*. ***LeMere***, 262 Wis. 2d 426, ¶27 (addressing a discretionary decision, and stating that incomplete application of statutory factors may be upheld if the failure to correctly apply the law is harmless).

¶12 Accordingly, we deem the motions identified by Gaylan to be denied, and the only possible question is whether the record supports the denials. In this section of his brief-in-chief, Gaylan does not address this question, and we decline to address undeveloped arguments. Elsewhere in his briefing, Gaylan

presents developed arguments on a subset of the motions' topics. We address these arguments, along with other arguments, below.

B. The House Sale

¶13 Gaylan makes two arguments directed at the circuit court's decision to require the sale of the family house so that the marital property could be evenly divided. First, Gaylan argues that the pendency of the separate CHIPS case involving the marital children required that the circuit court refrain from entering a judgment that required the house sale. Second, Gaylan argues that the circuit court's decision to order immediate sale of the house must be reversed because it "was based upon mistaken findings." We reject both arguments.

1. Pending CHIPS Case

¶14 Gaylan argues that the circuit court should have refrained from entering a final judgment mandating the house sale because the separate Shawano County CHIPS action was pending. Gaylan asserts that, by entering the judgment, the divorce court improperly took action conflicting with the CHIPS action, since the CHIPS court has within its purview the "basic needs" of the children, which includes the basic need for shelter. Gaylan further points out that, after the divorce judgment was entered, the CHIPS court in fact ordered that the house sale be stayed.

¶15 Gaylan bases his argument on WIS. STAT. § 48.15, a statute in the children's code titled "Jurisdiction of other courts to determine legal custody." As pertinent to Gaylan's argument, § 48.15 states that "the jurisdiction of the court

assigned to exercise jurisdiction under [the CHIPS provision] is paramount."[2] Gaylan fails to show that the circuit court's actions ran afoul of § 48.15.

¶16 Gaylan relies on ***State ex rel. Rickli v. County Court of Dane County***, 21 Wis. 2d 89, 123 N.W.2d 908 (1963), which discusses a former version of WIS. STAT. § 48.15 that also contained the "paramount" language. *See* ***id.*** at 94-95. In particular, Gaylan relies on the ***Rickli*** court's explanation that the divorce court retains jurisdiction to act so long as the court's actions do not conflict with a "juvenile court" exercising jurisdiction under § 48.15:

> [Section 48.15] makes the jurisdiction of the juvenile court paramount to that of the divorce court. This means at least that the burden is on the divorce court to avoid taking action which is or is likely to be in conflict with action taken by the juvenile court. As a matter of comity, the divorce court should under most circumstances stay its proceeding when a proceeding involving the same child is instituted in the juvenile court until the juvenile court reaches a determination. *But it seems reasonable that the divorce court retains jurisdiction to do anything which does not conflict with the orders and findings of the juvenile court.*

[2] WISCONSIN STAT. § 48.15 states, in full:

> Except as provided in s. 48.028(3), nothing in this chapter deprives another court of the right to determine the legal custody of a child by habeas corpus or to determine the legal custody or guardianship of a child if the legal custody or guardianship is incidental to the determination of an action pending in that court. Except as provided in s. 48.028(3), the jurisdiction of the court assigned to exercise jurisdiction under this chapter and ch. 938 is paramount in all cases involving children alleged to come within the provisions of ss. 48.13 and 48.14 and unborn children and their expectant mothers alleged to come within the provisions of ss. 48.133 and 48.14(5).

Rickli, 21 Wis. 2d at 96-97 (emphasis added); *see also* ***id.*** at 97-99 (addressing circumstances where a divorce court issued an order "squarely in conflict with the order of the … juvenile court," and vacating the divorce court's order).

¶17 As Gaylan acknowledges, this language from ***Rickli*** does not state a blanket rule that all divorce cases must be stayed when there is also a CHIPS action concerning a marital child. To the contrary, ***Rickli*** explains that a divorce action need *not* be stayed to the extent that the divorce court's action "does not conflict with the orders and findings of the juvenile court." *See* ***id.*** at 97.

¶18 Turning to the facts before us, we discern no conflict. The final divorce judgment was entered on August 20, 2010. That judgment made final the property division, including the mandate to sell the house so the proceeds could be equally divided between Gaylan and Rose. At that point, although the CHIPS proceeding had commenced, so far as Gaylan explains there was no order or finding in the CHIPS case relating to the sale of the house or otherwise relating to the divorce's property division. Subsequently, on September 20, 2010, the CHIPS court stayed the divorce judgment's mandate to sell the house. There is no dispute that this CHIPS order controlled and had the effect of staying the house sale.[3] And, if any doubt remained, after the CHIPS court issued its stay, the divorce court issued its own stay on the sale of the house, consistent with the CHIPS action.

[3] The question of whether the CHIPS court acted properly in staying the house sale is not before us.

¶19 In sum, Gaylan fails to persuade us that these events constitute a conflict under ***Rickli*** and WIS. STAT. § 48.15.[4]

¶20 Before moving to the next issue, we note that Gaylan appears to complain that the circumstances of this case have unfairly left him with *no* legal options going forward, even if the eventual outcome of the CHIPS action would clearly justify revisiting the decision of the court in this action to order the sale of the house. Without commenting on the specific facts here, we observe that, while it is generally true that a final property division cannot be revised or modified, *see* WIS. STAT. § 767.59(1c)(b), Wisconsin courts have granted relief from property division judgments by applying WIS. STAT. § 806.07(1), which allows a circuit court to relieve a party from a judgment for listed reasons. *See* ***Washington v. Washington***, 2000 WI 47, ¶4 n.2, 234 Wis. 2d 689, 611 N.W.2d 261 (stating that § 806.07(1)(h) has been applied to property divisions in divorce cases); ***Thorpe v. Thorpe***, 123 Wis. 2d 424, 426, 367 N.W.2d 233 (Ct. App. 1985) (applying § 806.07 to grant relief from a property division). In fact, Gaylan filed a § 806.07 motion post-judgment in this action, and the circuit court has stayed consideration of that motion pending this appeal.

2. Findings Underlying The Decision To Order An Immediate Sale

¶21 Gaylan separately contends that, regardless of the CHIPS proceeding, the circuit court erroneously exercised its discretion when it ordered

[4] At one point in his brief-in-chief, Gaylan generally asserts that the divorce court's entry of its final judgment "created a multitude of legal issues that would not have existed had the divorce court held its final judgment until conclusion of the CHIPS Cases." However, apart from the house sale topic, Gaylan does not proceed to develop specific arguments about any other "issues" created by the divorce judgment that might run afoul of WIS. STAT. § 48.15. Accordingly, we do not otherwise address the topic.

the immediate sale of the house, as opposed to a "deferred" sale. Gaylan argues that the court erroneously exercised its discretion because its decision was based on four "mistaken findings" about the financial circumstances. We are not persuaded.

¶22 The division of property in a divorce case is a decision entrusted to the circuit court's discretion. ***LeMere***, 262 Wis. 2d 426, ¶13. "A circuit court's discretionary decision is upheld as long as the court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** (citation omitted). There is a presumption of equal division, and a court may deviate from this presumption after considering statutory factors. WIS. STAT. § 767.61(3); *see also* ***LeMere***, 262 Wis. 2d 426, ¶16 (discussing WIS. STAT. § 767.255(3), which was subsequently renumbered as § 767.61(3)).

¶23 Here, the circuit court explained that its decision to require the house sale was based on the equal division presumption. On appeal, Gaylan does not present a developed argument that the circuit court was required to deviate from the presumption. Gaylan also does not dispute that the house was the only significant asset of the marriage.

¶24 Gaylan does direct an argument at the process the circuit court specified for equally dividing the value of the house. Gaylan argues that, rather than ordering a sale and division of the proceeds, the court should have let Gaylan keep the house, giving Rose "a deferred property division of 50% of the appraised equity in the marital residence." In support of this position, Gaylan explains that he proposed to the circuit court that it defer the sale of the house "until, at the latest, the first mortgage was paid off, which would have coincided roughly with

the eldest child's high school graduation in June, 2016." Gaylan also explains that his plan would avoid negative financial consequences by, for example, allowing Gaylan to keep favorable mortgage conditions that cannot be duplicated if the house is sold. We are not persuaded that the circuit court was required to adopt Gaylan's proposal.

¶25 First, Gaylan provides no legal argument supporting the proposition that a court may issue an order that has the effect of delaying the equal division of property for as much as six years, contingent on variables that include the pay-off of the mortgage. Thus, we observe that Gaylan has not demonstrated that his proposal was legally viable. Moreover, even assuming that Gaylan's proposal was legally viable, we cannot conclude that the circuit court erroneously exercised its discretion in rejecting the proposal.

¶26 The circuit court concluded that an immediate sale of the family house was "the only equitable disposition [of the divisible property] considering all of the circumstances of these parties." Gaylan contends that this decision relies on incorrect or unreliable information, which Gaylan labels "mistaken findings." Gaylan makes the following arguments:

- The court believed that Gaylan "could rent a three bedroom apartment for $690 per month which is what he is paying now for his mortgage payment," but in reality Gaylan's mortgage payment at the time was $540 per month and has since risen to $580 per month and the rental housing in the area that might accommodate the family was $750 per month.

- The court erroneously believed that Gaylan and Rose would each receive $35,000 in proceeds when, instead, the proceeds would likely be "about $25,488" each.

- The court believed that Rose would use the sale proceeds to find her own housing, but the court did not require the proceeds to be placed in a trust account for that purpose.

- The court did not provide a "grace period following the execution of a purchase and sale agreement within which [Gaylan] might relocate his family," which meant that Gaylan would have to move to "expensive, short term transient housing …, further reducing the amount of proceeds."

¶27 Gaylan made these arguments to the circuit court, and the court rejected them. We are not persuaded that the rejection of these arguments was unreasonable. First, the court was not required to accept the factual basis for any or all of Gaylan's arguments, and we may assume that the court rejected some or all of them. Second, assuming for argument's sake that Gaylan's factual assumptions are true, at most the arguments show that an immediate sale came with some financial disadvantages. Perhaps more to the point, the court was faced with two imperfect choices—one with financial disadvantages to Gaylan, and another that deprives Rose of her equal share for as much as six years. We cannot conclude that the court misused its discretion when it chose the more straightforward and immediate division of the divisible property.

¶28 As to Gaylan's assertion that the circuit court erred because it did not provide that Rose's portion of the proceeds be placed in a trust, Gaylan once again provides no supporting legal argument and no significant factual argument. To the extent the court assumed that Rose *would* use the proceeds of the house sale toward housing, we discern nothing impermissible about that assumption. Further, regardless whether Rose would use the proceeds for housing, it would remain true that she was entitled, under the statutory presumption, to those proceeds.

C. Child Support

¶29 Gaylan makes arguments directed at the circuit court's June 2, 2010 nonfinal ruling not to require child support from either party. For example, Gaylan argues that the circuit court, when declining to require child support from Rose, impermissibly excluded Rose's "karaoke income" from her gross income and ignored evidence of Rose's earning capacity. We do not discuss the merits of these and similar assertions because we conclude that Gaylan has forfeited his challenge.

¶30 On August 5, 2010, after the CHIPS proceeding commenced, Gaylan filed a motion requesting, among other things, that the circuit court consider the child support topic anew, stating that "[t]he court should reconsider its prior rulings with respect to … child support in view of the changed circumstances." "[C]hanged circumstances" is a reference to the Shawano County CHIPS proceeding that overrode the divorce court's split placement and, instead, placed all four children with Gaylan full time. Thereafter, Gaylan sent a letter to the circuit court, received by the court on August 18, 2010, stating that "[t]he *only immediate relief* that was sought by my motion of August 5, 2010, was the suspension of the listing of the residence" (emphasis added). At the close of the letter, Gaylan then vaguely stated that, at some undisclosed point in time, Gaylan sought "a further hearing to be set on my motion to reconsider your earlier rulings." Judgment was entered by the court two days later, on August 20, 2010, and the court did not revisit the child support topic but rather entered judgment in accordance with its June 2, 2010 ruling.

¶31 These facts demonstrate forfeiture. As shown, before the child support decision was finalized in the divorce judgment, Gaylan effectively

informed the court that it should *not* revisit the topic of its June 2 child support ruling, but rather should at some future time revisit the topic based on new circumstances. Thus, although Gaylan made the arguments in the circuit court that he repeats on appeal, he effectively abandoned those arguments prior to the final judgment. *See* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656 ("A litigant must raise an issue with sufficient prominence such that the trial court understands that it is being called upon to make a ruling.").

¶32 We also note that events post-judgment have seemingly rendered the issue moot. The record before us discloses that the topic of child support has been revisited. A December 13, 2010 temporary order requires Rose to pay child support to Gaylan in the amount of $465 per month, unless Rose submits evidence that she has applied for at least twenty jobs per month. The order also states that it is in effect indefinitely. Gaylan notes this order in his brief, but never addresses how its contents compare to the relief he seeks on appeal. So far as we can tell, the order has the practical effect of giving Gaylan substantially similar relief to what he purports to seek on appeal. Accordingly, we conclude that the issue is, for practical purposes, moot.

D. GAL Recommendation Regarding Placement

¶33 Gaylan complains that, when deciding placement of the children, the circuit court improperly relied on a written recommendation from the children's GAL. That recommendation was submitted by the GAL after the divorce trial, but prior to the court's decision on placement. Consistent with the recommendation, the court's placement decision generally provided that Gaylan would have primary placement of the three boys, and that Rose would have primary placement of the

daughter. Gaylan raises two arguments regarding the GAL's recommendation. We reject both.

1. Communication Of Wishes

¶34 Gaylan complains that the circuit court improperly relied on statements in the GAL's written recommendation about the wishes of one of the children. This argument relates to two statutory provisions. One requires the GAL to communicate the children's wishes to the court. The other permits the court to consider that communication. More specifically, WIS. STAT. § 767.407(4) provides that, "[u]nless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's … physical placement." WISCONSIN STAT. § 767.41(5)(am)2. provides that the circuit court, when deciding placement, "shall consider … [t]he wishes of the child, which may be communicated … through the child's guardian ad litem."

¶35 Gaylan argues that, to the extent the GAL communicated the children's wishes, the record must reflect that the children "wanted" the GAL to communicate their wishes. Gaylan seemingly thinks this requirement flows from WIS. STAT. § 767.407(4), where it states, "*[u]nless the child otherwise requests*, the guardian ad litem shall communicate to the court the wishes of the child" (emphasis added). We disagree. The statute states that the GAL "shall communicate … the wishes" unless a contingency is met—the child requests "otherwise." Gaylan provides no basis for concluding that any child made such a request.

¶36 Gaylan also asserts that we should read into these provisions the requirement that a child's wishes may not be communicated by the GAL solely through a non-evidentiary written recommendation, but rather must take

evidentiary form. We need not address the merits of this argument because it was not preserved. When the GAL reported the wishes of the children to the circuit court, the circuit court allowed the parties to submit briefs addressing the topic. Gaylan submitted a brief, but did not argue that the GAL's recommendation was not in the form of admissible evidence and was therefore improper.

2. Attachment Of The Daughter To Rose

¶37 Apart from the wishes of the children, Gaylan complains that the circuit court improperly treated as evidence specific factual assertions in the recommendation submitted by the GAL. We understand the GAL and Gaylan as agreeing that, apart from the wishes of a child, the recommendation, which was submitted after the evidentiary hearing, was not a proper way to bring additional evidence before the court. We nonetheless disagree with Gaylan's assertion that the circuit court improperly relied on factual assertions in the GAL's recommendation.

¶38 Gaylan focuses his attention on the GAL's assertion that Gaylan and Rose's daughter was primarily attached to Rose. Pertinent here, the GAL wrote: "I recommend that [the daughter's] placement be primarily with Rose. She is very young and has lived with Rose for most of her life. This is her primary attachment and I believe that it would be extremely difficult for [the daughter] to change that situation at this stage of her life."

¶39 The problem with Gaylan's argument is that the circuit court did not treat this "primary attachment" assertion as an evidentiary fact. Rather, the court treated it as a reasonable inference by the GAL from the trial evidence, one that the circuit court shared. The circuit court wrote: "The evidence did show as reported by the guardian ad litem that [the daughter] was particularly attached and

bonded to her mother. The evidence also shows that the three boys were attached and bonded to [Gaylan]. The Court finds that this is a logical result based upon the placement history of these children with the three boys having primary placement with Gaylan and the daughter having primary placement with Rose Ann." The court went on to write: "[The daughter] is primarily attached to her mother and I agree with the guardian ad litem that to change the situation at this stage of her life would be harmful to [the daughter]." Thus, the circuit court is merely expressing agreement with the GAL's inference.

¶40 Moreover, our review of the trial evidence shows that this inference is amply supported by the evidence. For example, the trial evidence showed that the daughter was primarily placed with Rose over the majority of the daughter's life, and there was testimony that Rose was "[v]ery close" to the daughter.

Conclusion

¶41 For the reasons discussed, we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.