COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1290

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

IN RE THE MARRIAGE OF:

SUSAN SOBIESKI,
N/K/A SUSAN M. MALONEY,

PETITIONER-APPELLANT,

V.

LEO G. SOBIESKI,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 CURLEY, J. Susan Sobieski, now known as Susan M. Maloney, appeals the trial court's order denying her motion to reopen several post-divorce

judgments awarding money to the guardian ad litem and a psychologist hired in contemplation of a custody trial, and giving her former husband a reduction in a debt owed to her. Maloney argues that the trial court erroneously exercised its discretion by refusing to reopen the judgments. We affirm.

I. BACKGROUND.

¶2 Maloney commenced her divorce action on July 14, 1992, by filing a summons and petition seeking a divorce from her husband, Leo G. Sobieski. The parties were ultimately divorced on May 3, 1995. Between the date of the commencement of the divorce action and the date of the divorce, numerous motions were heard. Due to the parties' inability to amicably resolve the custody and visitation issues, the trial court appointed a guardian ad litem for the children and ordered a psychologist to conduct a psychological evaluation in contemplation of a custody trial.

¶3 Ultimately, at the time of the divorce, the parties entered into two marital settlement agreements; one dealing with the future care and custody of their children, and the other resolving all their financial issues. These agreements were approved by the trial court and incorporated into the findings of fact and conclusions of law. As it relates to the present appeal, the financial agreement required each party, beginning on July 1, 1995, to pay a percentage of their salaries towards the support of the child or children not in their primary care (two of the three children resided with Sobieski and the other child lived with Maloney). The parties also were obligated to divide the social security benefits that Maloney and one child received. Jewelry owned by Maloney was to be sold, with the parties splitting the proceeds. The parties' agreement also required them to share uninsured medical expenses for the children and school tuition costs. The

outstanding debt to the guardian ad litem and the psychologist was split between the parties.

¶4 Approximately two years after the divorce, on April 18, 1997, Sobieski brought a motion seeking to have the trial court find Maloney in contempt. The motion alleged, among other things, that Maloney owed Sobieski money for child support arrearages, uninsured medical expenses, and tuition bills. Sobieski also requested a general accounting of the monies owed. The motion was scheduled to be heard on May 19, 1997. On May 6, 1997, Maloney wrote to the Family Court Commissioner requesting an adjournment of the hearing due to the fact that her former attorney was no longer willing to represent her and she had not obtained new counsel. Because Maloney was unable to hire a new attorney until several days before the scheduled hearing date, the hearing was postponed and, instead, a pretrial was held. After the pretrial was conducted and the parties left the courtroom, the trial court directed the clerk to write to the attorneys and to give them a new date for the hearing. On the appointed new date, after no one appeared, the trial court discovered that no notices had been sent to the parties.

¶5 In June 1998, the guardian ad litem filed a motion seeking from Maloney both her fees and the outstanding fees due the psychologist who had been hired to do the custody evaluation. Following the filing of the guardian ad litem's motion, Sobieski's attorney wrote the trial court and requested that "my motion which was originally filed on April 18, 1997 [be] heard at the same time." The motions were consolidated and scheduled for a hearing on August 24, 1998. On August 18, 1998, Maloney wrote to the guardian ad litem copying the court, her former husband and his attorney, stating that "I was just informed that I am required to attend an all day training session being held at MATC on August 24, from 7:30-4:15 in order to maintain my part-time position." The guardian ad litem

honored Maloney's request to postpone the motions and obtained a new date of September 21, 1998 at 1:45 p.m. On September 16, 1998, Maloney again wrote to the guardian ad litem, with copies sent to the trial court, her former husband and his attorney. In this letter, she stated:

> As I conveyed, due to my foot injury, my immobility, my doctor's recommendation, and my lack of legal representation, I am not able to attend or proceed with your hearing for payment scheduled on Monday, September 21, 1998. As you are aware, I do not have the financial means for such payment and am in debt over $60,000–excluding mortgages–as a result of providing home, necessities, and shelter for all four children and solely supporting Mr. Sobieski's and my college-aged daughters.

¶6 On September 21, 1998, the trial court, at the urging of both Sobieski and the guardian ad litem, elected to proceed to hear the motion despite Maloney's absence. The trial court determined that, despite Maloney's absence and letter, the motion was properly before the trial court. Sobieski's attorney also advised the trial court that the foot injury which Maloney claimed prevented her from attending the hearing occurred prior to the August 24th hearing, and that Maloney's and Sobieski's children reported that Maloney's foot was neither casted nor bandaged. The trial court, noting that the docket sheet had eighty-eight entries (fourteen of which were for contested hearings), proceeded to hear the motion, stating that it "finds that this is an abuse of the processes of this court, and that the remedy sought is indeed a modest one."

¶7 At the September hearing, the trial court granted the guardian ad litem's request for a judgment because she had received no payments from Maloney for two years and granted a judgment to the psychologist for the outstanding bill. The trial court also granted Sobieski's motion. Sobieski had requested that the trial court credit certain expenditures he made against the

$80,000 lump sum payment due Maloney from him in May 2000, pursuant to the marital settlement agreement. Sobieski testified under oath that Maloney had not paid him child support for the two children in his care for the years 1995, 1996, and 1997, and no child support had been paid in 1998 as of the court date. Sobieski also testified that Maloney had: failed to sell her jewelry and split the proceeds; never paid certain utility bills that were her sole obligation, which he paid; and failed to pay any of the uninsured medical bills for the children or the tuition costs of the children. Sobieski also requested credit for $5,000 which was due him at the time of the divorce, but was ordered put in trust for future guardian ad litem fees. The $5,000 had been expended by the time of the motion. He also requested a contribution of $5,000 towards his $11,000 bill for attorney fees incurred since the divorce. The trial court agreed with all of Sobieski's requests and found that Sobieski was entitled to a $33,447.89 credit on the $80,000 he owed Maloney.

¶8 The trial court did, however, grant one small concession to Maloney. At the conclusion of the hearing, the trial court stated that it would stay the execution of the orders until October 12, 1998 at 8:15 a.m. to permit the petitioner to take whatever action she deemed appropriate.

¶9 Seventeen days later, Maloney, acting *pro se*, filed a motion asking the trial court "To reopen and reconsider all Findings of Fact and orders on the Trial of September 21, 1998 due to the disability of the Petitioner." Maloney also appeared at the adjourned date of October 12, 1998. No one else appeared. The record entry for this date states that, at this time, the trial court signed the amended findings of fact and conclusions of law, incorporating the orders of September 21, 1998, and adjourned Maloney's motion to November 2, 1998. Later, the matter

was adjourned to January 7, 1999, due to the trial court's anticipated absence on November 2, 1998.

¶10 On January 7, 1999, the trial court finally heard Maloney's motion to reopen the judgments. Maloney was represented by counsel at the hearing. Sobieski and the guardian ad litem were also present and opposed the motion. In explaining her failure to appear at the September 21st hearing, Maloney testified that while it was true that she injured her foot prior to the first scheduled hearing date in August 1998, she claimed she was totally disabled at the time of the September hearing and unable to attend. She also claimed great difficulty in retaining a lawyer.

¶11 In opposition to Maloney's motion to reopen, Sobieski testified that he saw Maloney through a window on or about the September hearing date and that Maloney was not using crutches or limping until she, apparently, saw him, at which time she suddenly appeared on crutches. Sobieski's attorney also pointed out to the court that Maloney's letter to the guardian ad litem, claiming her doctor ordered her off her feet, was written one day before she actually went to the doctor who issued the order.

¶12 After an extensive recitation of the history of the parties' litigation, the trial court refused to reopen the judgments. In its decision, the court noted that Maloney had had five lawyers during the pendency of this action, and that the trial court found it hard to believe that she could not have hired a lawyer by September when there are "in excess of 4,000 lawyers" in the Milwaukee metropolitan area. With regard to Maloney's explanation that she must have incorrectly dated her letter in explaining how she could have known on September 16 that her doctor would tell her on September 17 she was to stay off her feet, the trial court stated

that it disbelieved Maloney's account. The trial court did, however, mistakenly state that Maloney had not acted within the three-week period following the September 21 hearing, as it is undisputed that on day seventeen she filed her motion.

II. ANALYSIS.

¶13 Maloney makes several arguments. First, she claims the trial court erroneously exercised its discretion by proceeding to hear the motion scheduled for September 21, 1998, even though Maloney was not present. Next, she addresses the substantive issues decided during the hearing and claims that there was insufficient proof presented entitling Sobieski to a credit against the debt he owed to Maloney. Finally, she submits that the trial court erroneously exercised its discretion by denying Maloney's motion to reopen the judgment. Following our review of the entire record, we observe that in some regards, Maloney has misstated the facts. In any event, we are satisfied that the trial court properly exercised its discretion when it denied her motion to reopen the judgments.

¶14 Maloney first claims that the trial court erroneously exercised its discretion by not granting her a continuance of the September 21 hearing and claims that the trial court "proceeded with the hearing and enter[ed] an order against her without even noting her absence or mentioning the letter from her." All three assertions are incorrect.

¶15 At the September 21st hearing, the trial court stated, in response to the guardian ad litem's reference to Maloney's letter:

> There is on file a letter dated September 16, 1998 from Susan Maloney … indicating that she had called [guardian ad litem], indicated that there was a foot injury, and that because of her immobility and doctor's recommendation, name unknown, and her lack of legal representation, she is not able to attend or proceed with this hearing scheduled for today's date. The court will note and will include with any order by attachment, a copy of the docket sheet, that this matter has been before the court since 1992, and that the adjournments, failures to appear, and failures to cooperate with either the guardian ad litem or with the administration of justice in this court would make the operation of this court implausible [sic] if we permitted this kind of thing to go on.

The trial court then inquired of Sobieski's attorney if he had any additional information concerning Maloney's medical condition. Sobieski's attorney advised the court that the last hearing had been adjourned at Maloney's request because of a work-related obligation, and, until her letter of September 16, she never mentioned the foot injury. Further, Sobieski's attorney told the trial court that the children had indicated to their father that their mother's foot injury required neither a cast nor a bandage.

¶16 As is obvious from the transcript of the proceedings, the record defeats Maloney's claim that the trial court was unaware of Maloney's absence and failed to mention her purported "excuse." Consequently, we conclude that the trial court did not proceed without noting Maloney was absent, nor did it ignore her letter.

¶17 Next, Maloney claims that the trial court erroneously exercised its discretion because it failed to grant her a continuance. Maloney, however, never requested the trial court to grant her a continuance. Five days before the adjourned date, Maloney wrote a letter to the guardian ad litem, not the court, stating that "I am not able to attend or proceed with your hearing for payment

scheduled on Monday September 21." Maloney's letter to the guardian ad litem also advised the guardian ad litem "As you are aware, I do not have the financial means for such payment and am in debt over $60,000." Although Maloney copied the court with a letter she sent to the guardian ad litem, she never requested that the trial court adjourn the matter. In order to obtain an adjournment of the guardian ad litem's and Sobieski's motions, Maloney was obligated to do more than send a copy of her letter, addressed to the guardian ad litem, to the court. Thus, we determine that Maloney never requested the trial court to adjourn the matter and that the trial court properly exercised its discretion by proceeding in Maloney's absence. Indeed, the amended findings of fact and conclusions of law contain the following findings by the trial court:

> 1. The Petitioner mailed a letter to the court dated September 16, 1998 indicating she will not attend. The Court finds that the reason [sic] set forth by the Petitioner are inadequate and the Court proceeds.
>
> 2. The Court finds that Petitioner has abused the processes of the court.

Moreover, we note that the parties bringing the motions, which sought payment from Maloney for financial obligations, requested that the trial court hear their motions after having agreed to two previous adjournments. Under the circumstances, we agree with the trial court's observation that "I'm satisfied we've observed all of the amenities, all of the service, and [I'm] satisfied based on the record in this case, that there is no intention [by Maloney] of complying with the orders of this court."

¶18 We next address Maloney's claim that the trial court erroneously exercised its discretion when it denied Maloney's motion to reopen the judgments rendered in her absence. Maloney's motion urging the trial court to reopen the

judgments hinges on Maloney's allegation that she was "disabled" on the day of the hearing and unable to attend.

¶19 Motions to reopen a trial court judgment are governed by WIS. STAT. § 806.07(1).[1] The relevant subsections are:

> **Relief from judgment or order. (1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> ….
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

Motions for relief from judgments are directed to the sound discretion of the trial court. *See* ***Brown v. Mosser Lee Co.***, 164 Wis. 2d 612, 616-17, 476 N.W.2d 294 (Ct. App. 1991). The trial court has wide discretion in ruling on a motion to vacate a judgment. ***Town of Seymour v. City of Eau Claire***, 112 Wis. 2d 313, 322, 332 N.W.2d 821 (Ct. App. 1983). In exercising its discretion to grant relief from a divorce judgment, the family court should consider "factors relevant to competing interests of finality of judgments and relief from unjust judgments." ***Spankowski (Zuercher) v. Spankowski***, 172 Wis. 2d 285, 291, 493 N.W.2d 737 (Ct. App. 1992).

¶20 Additionally, this court must uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***Young v. Young***, 124 Wis. 2d 306, 310, 369 N.W.2d 178 (Ct. App. 1985); WIS. STAT. § 805.17(2). This court must also

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

uphold the trial court's factual findings even if this court may have come to a different conclusion. *See* ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 185-86, 502 N.W.2d 156 (Ct. App. 1993).

¶21 Maloney seizes on the trial court's mistaken recollection that Maloney had done nothing within the allotted twenty-one day window given to her by the trial court in arguing that the trial court erroneously exercised its discretion. She contends that because the trial court failed to recall that she filed her motion on day seventeen, that it erroneously exercised its discretion when it refused to reopen the judgments. We disagree.

¶22 At the September 21 hearing, the trial court merely gave Maloney twenty-one days with which to move the court for relief or indicate an interest in the proceedings:

> The court will also ask that all orders emanating from this hearing be served by five-day letter to the last known address of the party. The court will also stay execution of these orders for a period of 21 days from today's date at 8:15 in the morning. The purpose of setting it at that time and place, is that if there is any movement or indication of interest in these proceedings on the part of the petitioner, she will have that much of an opportunity to do so. And I would also ask that the orders be gotten out rather promptly. Thank you.
>
> [SOBIESKI'S ATTORNEY]: And does the court envision [the guardian ad litem] and I appearing at that time?
>
> [THE COURT]: Not unless documents are provided to you, indicating a purpose for your return. It's merely to give her additional two-week period roughly within which to demonstrate some of these things that we did what was done today [sic].

Consequently, the trial court did not promise to put the judgments aside if Maloney filed a motion.

¶23 Although the trial court knew previously that Maloney had filed a motion since she appeared in court on October 12, 1998, it apparently was unimpressed with Maloney's excuses contained in her motion because it proceeded to sign the findings of fact and conclusions of law containing the newly awarded judgments on the same day. While Maloney is correct that the trial court failed to recall that she had filed her motion within the twenty-one-day time frame, the trial court did not deny Maloney's motion based upon that ground. Rather, the trial court, after hearing Maloney's testimony that she was unable to attend the September 21 hearing because of her disability, found her account incredible. The trial court remarked:

> The Court frankly, hesitates to say this, but occasionally there come before this Court witnesses who the Court believes just plain not telling the truth [sic]. …And in my judgment, the veracity of the petitioner in this case not only has been questioned, but certainly has been reduced…. And to grant this motion would mean that all you had to do is to come back any time you felt like it and reopen any matter, any time, anywhere.

¶24 As noted, this court must uphold the trial court's findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). We deem the trial court's finding that Maloney was untruthful when she claimed that her foot injury prevented her from attending the September 21, 1998 hearing reasonable.[2] Maloney had demonstrated an unwillingness to attend scheduled hearings in the past for motions seeking money from her. It is undisputed that she delayed the

[2] The dissent suggests that the trial court failed to understand Maloney's argument that she simply misdated the letter. The record reflects that the trial court did not misunderstand Maloney's argument—it simply did not believe it. While Maloney's explanation may have been a reasonable one under different circumstances, here the trial court, as the fact finder, had the right to discount it based on its assessment of Maloney's credibility.

original date for the contempt motion brought by her former husband for over a year by claiming she needed to hire a lawyer. At the August 1998 hearing, she was granted an adjournment by the parties after she claimed a work obligation conflicted with the date. In September, the trial court finally heard the matter after the parties indicated a desire to proceed with their motions.

¶25 At the January hearing, it was confirmed that the allegedly disabling foot injury actually occurred before the date of the earlier scheduled August date. Maloney never told the guardian ad litem or her former husband that her injury prevented her from attending the earlier motion hearing. Moreover, given the history here, Maloney's explanation, that she wrote a letter dated September 16, 1998, claiming that her doctor's order dated September 17, 1998 prevented her from attending the hearing, was a result of her incorrectly dating her letter, was properly viewed by the trial court with a healthy dose of skepticism.

¶26 Further, the doctor's order presented to the trial court by Maloney merely states that she is to be "off (R) foot at all times." While coming to court on crutches is cumbersome, it is not impossible. Coupled with the long and tortured history of this divorce case, the trial court could rightfully decide that Maloney was simply using her injury in an attempt, again, to escape her financial responsibilities.

¶27 Thus, we conclude that there is ample evidence in the record to support the trial court's finding that Maloney was untruthful. As a result, we are satisfied that the trial court properly exercised its discretion and we affirm. Because of our decision in this first issue, it is not necessary for us to address the remaining arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶28 SCHUDSON, J. *(dissenting).* The trial court's denial of Maloney's motion to reopen was based, in significant part, on two clearly erroneous factual findings:

(1) Maloney failed to do anything for the three weeks following the default judgment. As the majority acknowledges, Maloney filed her motion to reopen during that period.

(2) Maloney, in her September 16 letter, was not truthful about her broken foot, given the fact that she did not see her doctor until September 17. As counsel for Maloney very logically and persuasively explains in his reply brief to this court:

> Maloney had a simple explanation for the discrepancy. She explained that she often makes mistakes on exact dates and offered documentary evidence of other times when she had done so. Thus, Maloney explained, although the letter was written on September 17, 1998, when she returned home from her physician, she must have mistakenly dated it September 16, 1998, as she had done on other occasions.
>
> Despite the fact that there is no dispute Maloney saw her doctor on September 17, 1998, and was told to stay off her feet, the respondent continues to advance a more sinister explanation for the discrepancy—Maloney wrote the letter on September 16, 1998, and lied about her medical condition. To believe the respondent, Maloney not only was untruthful when she wrote on September 16, 1998, that a physician had ordered her off her feet, she was also clairvoyant, for lo and behold, when she saw her physician the following day, the physician did just that.

> This is why much of the trial court's reasoning makes no sense. For example, in disposing of this issue, the trial court quipped, "you can't send a letter a day in advance about a doctor's evaluation that's going to take place the next day, unless you are prescient, and the Court's incapable of making that determination." When viewed in the light of the undisputed fact that Maloney did indeed see her physician on September 17, 1998, and that he in fact advised her to stay off her feet, this reasoning process actually supports, rather than undermines, Maloney's explanation of the events. Indeed, because the court found she could not have sent the letter "a day in advance" of the doctor's evaluation, it logically follows the letter must have been sent "after" the doctor's evaluation, with the wrong date, precisely as Maloney explained. It was therefore clearly erroneous to impugn her credibility on a matter where the evidence, and even the court's ruminations, suggest she was telling the truth.

(Citations and footnote omitted.) The trial court failed to understand this, and the majority offers nothing to counter this unassailable argument.

¶29 Granted, the protracted history of this case would frustrate even the most patient court. But the history the majority traces includes delays and adjournments resulting from various and sundry circumstances, many of which were unrelated to Maloney's conduct.

¶30 Understandably, the trial court was concerned about the lengthy delays. But ultimately, laboring under two critical misconceptions, the trial court denied Maloney her day in court. Because the record provides no factual basis to support that denial, I respectfully dissent.