

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 2002

Cornelia G. Clark
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. 01-1775
STATE OF WISCONSIN**

Cir. Ct. No. 00FA300

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

NADINE M. BUTLER,

PETITIONER-APPELLANT,

V.

**ESTATE OF ROBERT A. BUTLER, CHRISTINA M.
KORSHAVN AND STUART A. KORSHAVN, SPECIAL
ADMINISTRATORS,**

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County:
J. D. MCKAY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Nadine Butler appeals a divorce judgment. She argues that the trial court erroneously found that her marriage was irretrievably

broken and that there was no reasonable prospect of reconciliation. Because the record supports the trial court's determination, we affirm the judgment.

¶2 The parties were married in 1975 and have one minor child, born in 1985. In February 2000, the parties separated and, in March, Nadine filed a petition for divorce. Robert counter-claimed for a judgment of divorce.¹ Before the final hearing, Robert was hospitalized. He had been suffering from depression, multiple sclerosis and cancer.

¶3 At the final hearing on May 11, 2001, Nadine moved to withdraw her divorce petition. The court granted her motion. Robert was unable to attend the final hearing, and his attorney asked the trial court to be appointed Robert's guardian ad litem and to waive Robert's appearance. Counsel stated that Robert was heavily medicated and "it is not feasible under any way, shape, or form for him to be present." The court stated that it would waive Robert's appearance under the circumstances. In response to the court's question whether Robert understood the nature of the proceedings, his attorney responded, "[T]he only thing that he said to me was to say 'yes' when I asked the following question: 'Do you want to be divorced today from Nadine?'" Counsel stated that up to that point Robert "was not able to say anything He was noncommunicative."

¶4 Nadine testified as follows:

Q. Do you believe the marriage is irretrievably broken?

A. I—I believe that if we had more time it may not be.

Q. You recognize you don't have the time?

¹ Robert's counter-claim, signed by counsel, admitted Nadine's allegation that the marriage was irretrievably broken.

A. Yes, I do. Yes, I'm sorry, I do.

Q. I'm sorry, too.

A. At this time, yeah. ...

¶5 Counsel also asked Nadine whether she believed Robert “thinks the marriage is irretrievably broken,” to which Nadine replied, “At this time he does.” The trial court found that the marriage was irretrievably broken and that there was no reasonable chance of reconciliation.

I've listened to the testimony of the petitioner in this matter. I believe it was appropriate to waive the appearance of the respondent ... under the circumstances. ... [Counsel] derived ... a clear understanding that [Robert] wished to proceed with the divorce. That was true today. That was true yesterday. That was certainly true last week.

The court entered judgment of divorce. Robert died the day following the hearing.

¶6 WISCONSIN STAT. § 767.12(2)(b) provides that if one party has stated under oath that the marriage is irretrievably broken, the court shall consider all relevant factors and, if it finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken.² Here, both parties initially petitioned for divorce on the ground of irretrievable breakdown. Although Nadine later moved to withdraw her petition, she testified to the effect

² WISCONSIN STAT. § 767.12(2)(b)1 provides:

(b) If the parties have not voluntarily lived apart for at least 12 months immediately prior to commencement of the action and if only one party has stated under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation.

1. If the court finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken

that unless there was more time, the marriage was irretrievably broken. She acknowledged that there was no more time. She also stated that Robert believed the marriage was irretrievably broken. Based upon the facts and circumstances, along with Nadine's testimony and the statement of Robert's guardian ad litem, the trial court could reasonably determine that there was no prospect of reconciliation and that the marriage was irretrievably broken. Therefore, we do not overturn its determination on appeal.

¶7 Nadine argues, nonetheless, that neither her testimony nor the guardian ad litem's statement complies with WIS. STAT. § 767.12(2), which requires at least one party to state under oath that the marriage is irretrievably broken. We disagree. Nadine's testimony complies with this requirement. We are satisfied that her statement, "if we had more time it may not be" and her recognition that there was no more time conveyed the meaning that the marriage was irretrievably broken.

¶8 Nadine further contends that the trial court erroneously determined that there was no reasonable prospect of reconciliation. We are unpersuaded. It is undisputed that Robert's medical condition left him incapable of all but the most minimal communication. It is also undisputed that despite this condition, he was able to articulate the desire to be divorced. Nadine also testified that she recognized that the parties had no more time to effect reconciliation. Under these circumstances, the trial court's finding is not erroneous.

By the Court.—Judgment affirmed.

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

