COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2433 **Cir. Ct. No. 2010FA75**

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

IN RE THE MARRIAGE OF:

PATRICIA MARIE KITTELSON,

PETITIONER-RESPONDENT,

V.

ANDREW HOWARD KITTELSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Andrew Kittelson appeals an order dismissing Patricia Kittelson's petition for divorce.[1] Andrew argues the circuit court erroneously exercised its discretion by: (1) granting Patricia's motion for voluntary dismissal without considering the factors set forth in ***Clark v. Mudge***, 229 Wis. 2d 44, 599 N.W.2d 67 (Ct. App. 1999); and (2) failing to address his guardian's motion for leave to file a counterclaim. We agree. We therefore reverse the court's order and remand for the court to apply the ***Clark*** factors and consider the guardian's motion.

BACKGROUND

¶2 Andrew and Patricia were married on September 11, 1982. On November 16, 2003, Andrew was involved in an ATV accident and suffered a traumatic brain injury. Following his injury, Andrew was found to be incompetent, and Patricia was appointed permanent guardian of his person and estate. However, on March 11, 2008, Andrew's social worker petitioned to have Patricia removed as guardian, alleging Patricia "[was] making decisions regarding Andrew's care and well-being based on what would be in her own best interest financially, instead of what is in Andrew's best interest." Patricia was subsequently removed as guardian, and Mississippi Valley Guardians, Inc. (MVG) was appointed as her replacement.

¶3 Patricia petitioned for divorce on June 18, 2010, alleging the marriage was irretrievably broken. On Andrew's behalf, MVG filed a "Response and Counterclaim" requesting a judgment of divorce, property division, and other

[1] Because the parties share the same last name, we refer to them by their first names throughout this opinion.

relief. About one year later, Patricia moved to dismiss her divorce petition. In a supporting affidavit, Patricia averred she "no longer believes that the marriage is irretrievably broken and has an economic need for the marriage to continue." She also stated that, after considering her own and Andrew's financial needs, she no longer believes continuing the divorce action is in either party's best interest.

¶4 MVG subsequently advised the circuit court that, after filing Andrew's "Response and Counterclaim" to the divorce petition, it discovered that a guardian may not pursue a divorce action on a ward's behalf without the court's permission. *See* WIS. STAT. §§ 54.25(2)(d)1., 54.25(2)(d)2.k.[2] Accordingly, MVG moved for leave to file a counterclaim seeking a judgment of divorce. MVG requested that its motion be heard during the hearing on Patricia's motion to dismiss.

¶5 A hearing on the motion to dismiss was held on August 19, 2011. Testimony at the hearing focused on the Kittelsons' financial situation, specifically whether Patricia could afford to proceed with the divorce action and whether dismissing the divorce petition would benefit Andrew by making it easier for him to qualify for medical assistance. The circuit court ultimately granted Patricia's motion to dismiss, subject to certain conditions. The court did not specifically address MVG's motion for leave to file a counterclaim, but, by dismissing the divorce action, it effectively denied that motion.

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

DISCUSSION

¶6 Andrew contends the circuit court erred by granting Patricia's motion for voluntary dismissal of the divorce petition. WISCONSIN STAT. § 805.04(2) provides that, after a defendant has filed a responsive pleading, "an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper." Whether to grant a motion for voluntary dismissal under § 805.04(2) lies within the circuit court's discretion. ***Clark***, 229 Wis. 2d at 49. Five factors the court must consider when deciding the motion are:

> [1] the plaintiff's diligence in bringing the motion; [2] any "undue vexatiousness" on the plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss.

Id. (quoted source omitted). We will affirm a circuit court's decision to grant a motion for voluntary dismissal if the court applied the proper law to the relevant facts and used a rational process to arrive at a reasonable result. ***Id.*** at 50.

¶7 Andrew argues the circuit court erroneously exercised its discretion because it failed to consider the five factors set forth in ***Clark***. We agree. In its oral ruling on Patricia's motion to dismiss, the court reasoned:

> [Patricia petitioned] for a divorce. She's testified she doesn't think her marriage is irretrievably broken and this—as [Andrew's counsel] says, 13 months have gone by and there's been extensive work done by both sides and very effective assistance of counsel to make sure we find out what's available and everything. She's—as [the guardian ad litem] has said, it's difficult to say what's personally in the best interest of [Andrew], but right now we're just basically looking at a financial problem as to what's best for his finances, and right now it appears what's going on is the county is paying the vast majority of

> his costs and there is some money available here that could be used to pay the guardianship back for their large expenses that they've paid, which I'll find reasonable and due, and the same with the fees I'm sure that Ms. Kittelson has had to pay[.]

The court apparently concluded that dismissing the divorce petition would be financially beneficial to Andrew because Patricia could "spend down" certain assets by paying attorney fees and other bills, which would allow Andrew to qualify for medical assistance. *See* ***Tannler v. Wisconsin Dep't of Health & Soc. Servs.***, 211 Wis. 2d 179, 191-92, 564 N.W.2d 735 (1997) (Abrahamson, C.J., concurring) (explaining the practice of "spending down" or divesting oneself of assets to be eligible for medical assistance). However, in reaching this conclusion, the court did not apply any of the five factors set forth in ***Clark***. Accordingly, the court erroneously exercised its discretion by failing to apply the proper legal standard.

¶8 We also agree with Andrew that the court erroneously exercised its discretion by dismissing the divorce petition without first considering MVG's motion for leave to file a counterclaim. As indicated, under WIS. STAT. § 54.25, a guardian needs the court's permission to initiate divorce proceedings on the ward's behalf. *See* WIS. STAT. §§ 54.25(2)(d)1., 54.25(2)(d)2.k. Before granting the guardian that power, the court must find, by clear and convincing evidence, that the ward lacks evaluative capacity to make decisions regarding the initiation of divorce proceedings. *See* WIS. STAT. § 54.25(2)(d)1. Furthermore, the court may only authorize the guardian to initiate divorce proceedings if that power is "necessary to provide for the [ward's] personal needs, safety, and rights[.]" *See* ***id.***

¶9 Here, the court did not consider whether Andrew lacked evaluative capacity to initiate divorce proceedings or whether granting MVG that power was necessary to provide for Andrew's personal needs, safety, and rights. In fact, the court wholly failed to address MVG's motion for leave to file a counterclaim. Instead, the court implicitly denied the motion when it granted Patricia's motion to dismiss. We agree with Andrew that the court erroneously exercised its discretion in this respect. We also note that Patricia does not respond to Andrew's argument that the court erred by failing to consider MVG's motion. Arguments not refuted are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶10 We therefore reverse the order granting Patricia's motion for voluntary dismissal of the divorce petition. We remand to the circuit court with directions to: (1) apply the five voluntary dismissal factors set forth in ***Clark***; and (2) address MVG's motion for leave to file a counterclaim.

By the Court.—Order reversed and cause remanded with directions.

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