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DISTRICT IV

April 6, 2023

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You are hereby notified that the Court has entered the following opinion and order:

2021AP906
2021AP1746

Jamie Marie Mamerow v. Brian Robert Mamerow
(L.C. # 2019FA1539)

Before Blanchard, P.J., Kloppenburg, and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian Mamerow appeals the order and judgment finalizing his divorce from Jamie Mamerow. Brian also appeals an order denying his motion for relief from that judgment under WIS. STAT. § 806.07 (2021-22).[1] Based on our review of the briefs and record, we conclude at conference that this appeal is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Further, we grant Jamie's motion to this court for fees and costs under WIS. STAT.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted. Separately, we refer to the parties by their first names given their shared last name.

RULE 809.25(3) (frivolous appeal). We affirm the judgment of divorce and remand for a determination of the appropriate amount of "costs, fees, and reasonable attorney fees" awarded under RULE 809.25(3)(a).

Brian argues that the circuit court erred in adopting a January 2020 mediated agreement of the parties regarding physical placement of their children. The alleged error was that the court failed to make a determination that this "agreement was fair and reasonable[,] and that the parties understood it." As part of that argument, Brian contends that the circuit court erred in denying his motion for relief from the divorce judgment on the grounds that Brian, as a pro se participant in the January 2020 mediation of physical placement, did not understand that the result would be final and essentially unmodifiable for two years under WIS. STAT. § 767.451(1)(a). As we explain below, we reject these arguments based on the fact that the parties later, in August 2020, negotiated an agreement on physical placement that was incorporated into the divorce judgment by agreement in February 2021, supplanting the January agreement reached through mediation. Brian does not establish that any feature of the January 2020 mediated agreement resulted in error when the court adopted the August 2020 negotiated agreement that became part of the judgment the following February, in part at Brian's own request.

We now provide a brief background for context. In January 2020, the parties successfully mediated an agreement regarding custody and placement. The circuit court issued an order approving and adopting the mediated agreement, determining that it "appear[ed] on its face to be a reasonable method of meeting the needs of the minor children" and was "in the best interests of the children." The court further directed that the mediated agreement be incorporated into a martial settlement agreement. Throughout proceedings to this point, Brian was pro se, while Jamie was represented by counsel.

Brian, newly represented by counsel, then took the position that the mediated agreement was not in the best interests of the children, and requested that the order adopting the agreement be vacated. The circuit court denied the motion to vacate, but it set a briefing schedule for a potential motion by Brian to seek relief from the order under WIS. STAT. § 806.07. The court further expressed the hope that the parties would attempt to negotiate changes to the existing agreement instead of litigating. Brian did not file a motion for relief from the order. Instead, he negotiated with Jamie to make changes to the existing order on custody and placement, which as we have explained had adopted the mediated agreement. This resulted in a new partial marital settlement agreement, which the circuit court adopted by an order in August 2020, stating that the agreement's "terms and conditions shall be incorporated into the parties' Judgment of Divorce."

The circuit court finalized the divorce at a stipulated hearing in February 2021. At the hearing, Brian testified that he "had the opportunity to read and revise" the new partial marital settlement agreement, which he acknowledged "expanded on" the earlier mediated agreement. Brian further testified that he understood the new agreement and that he was requesting that the circuit court grant the parties a judgment of divorce based in part on "the partial marital settlement agreement regarding custody and placement and its terms and conditions." In its written findings of fact, the court determined that the new partial marital settlement agreement was "fair and reasonable to both parties, was agreed to by the parties, and was entered knowingly, understandingly, and voluntarily by the parties with full knowledge and meaning of the consequences." The court further determined that the "best interests of the children are served by … physical placement as set forth" in the new agreement.

With this as background, we turn to Brian's argument on appeal, beginning with his contention that the circuit court failed to properly determine that the parties freely entered into a reasonable and fair agreement. Brian begins from the correct premise that a circuit court, when determining whether to accept a stipulation of parties to divorce proceedings, has a "duty to make sure before entering judgment based on the stipulation that the parties were fully informed of its effect." *See* ***Conrad v. Conrad***, 92 Wis. 2d 407, 419, 284 N.W.2d 674 (1979); WIS. STAT. § 767.34. However, Brian does not dispute the following: the circuit court clearly met this duty with respect to the only physical placement stipulation that was actually adopted and then incorporated into the judgment of divorce, namely, the August 2020 stipulation. Therefore, Brian in effect concedes that what the circuit court did in February 2021 was sufficient under authority that includes ***Hottenroth v. Hetsko***, 2006 WI App 249, 298 Wis. 2d 200, 727 N.W.2d 38, a case that Brian himself cites. In ***Hottenroth***, this court upheld a circuit court's approval of a stipulation after we determined that the circuit court had demonstrated its familiarity with the parties' partial stipulation regarding custody and placement; "heard the attorneys[] question[] the parties on their understanding and agreement; and made its own determination that the stipulations were fair and reasonable." *See* ***id.***, ¶44. Brian asserts that the circuit court here "should have taken" these steps earlier, when the parties sought approval of the January 2020 mediated agreement. But he does not develop a legally supported argument that the court's later and undisputedly appropriate handling of the final divorce hearing should be reversed based on anything that the circuit court did or did not do in the earlier proceedings.

It is the same with Brian's contentions based on WIS. STAT. § 806.07(1)(h), which focus on his alleged lack of understanding in presenting to the circuit court the earlier, mediated stipulation, and does not come to grips with all of the facts summarized above regarding the

negotiated, new partial marital settlement agreement.[2] As the background above shows, Brian is not in a position to seek relief from the earlier stipulation because it was not adopted into the final judgment by the circuit court. He had the opportunity to move for relief from the earlier stipulation and chose instead to negotiate for concessions from Jamie regarding placement, after which he testified in February 2021 that he understood the new agreement and requested its adoption. After hearing testimony from the parties, the court determined that the negotiated agreement was "fair and reasonable" to them and was in the children's best interests.

It is fatal to Brian's WIS. STAT. § 806.07(1)(h) argument that he fails to take into account any of this history; he cannot show that the circuit court erroneously exercised its discretion in denying relief from the judgment. He fails to explain how any alleged misunderstanding that he had regarding the earlier mediated stipulation could establish a basis for relieving him from the

[2] Our supreme court has explained the following regarding the disposition of a motion made under WIS. STAT. § 806.07(1)(h):

> In exercising its discretion in determining whether it should grant relief from a judgment [under WIS. STAT. § 806.07(1)(h)], the circuit court "must consider a wide range of factors" in determining whether extraordinary circumstances are present, always keeping in mind the competing interests of finality of judgments and fairness in the resolution of the dispute. We have explained that these factors include, but are not limited to, the following:
>
> > 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.

Miller v. Hanover Ins. Co., 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493 (citations omitted).

judgment incorporating the later stipulation that he participated in negotiating and endorsed at the February 2021 hearing. In his brief-in-chief he makes two passing references to the later stipulation being reached "within the framework" of the earlier stipulation. In his reply brief, Brian states that the later agreement "merely fine-tuned summer and holiday placement" while maintaining an "extremely lopsided placement favoring Jamie." These references to similarities between the two stipulations do not even begin to constitute a legally supported argument for reversal of the circuit court's adoption of the later stipulation into the judgment of divorce.

We turn to Jamie's motion to this court for costs and attorney fees, based on a claim that Brian's appeal is frivolous under WIS. STAT. RULE 809.25(3). In order to award fees and costs for a frivolous appeal, we must determine that the entire appeal is frivolous, *i.e.*, that each argument raised is frivolous. *See* ***Baumeister v. Automated Prod., Inc.***, 2004 WI 148, ¶¶26-27, 277 Wis. 2d 21, 690 N.W.2d 1; RULE 809.25(3)(a). Further, "to find an appeal frivolous we must find that the appeal (1) was filed in bad faith for the sole purpose of harassing or maliciously injuring another or (2) is without any reasonable basis in law or equity." ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 841, 520 N.W.2d 93 (Ct. App. 1994); *see also* RULE 809.25(3)(c).

We conclude that Brian's arguments lack any reasonable basis in law or equity. As explained above, each of Brian's arguments fails to come to grips with the basic procedural history of this case, which is obviously relevant to any claim for relief from judgment of divorce along the lines sought by Brian. We conclude that Brian knew or should have known this. For example, as summarized above, during the final hearing he personally requested that the circuit court finalize the divorce, including the negotiated partial stipulation, which he acknowledged "expanded on" the earlier stipulation he now attempts to challenge. Further, for the same reasons, we conclude that Brian's appellate counsel also should have recognized the lack of a

reasonable basis in law or equity for the appeal and that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. *See* WIS. STAT. RULE 809.25(3)(c)2. Brian has filed a response to Jamie's motion, but nothing in the response leads us to any other conclusions.

For these reasons, we direct that costs be awarded to Jamie, apportioned evenly between Brian and his counsel. *See* WIS. STAT. RULE 809.25(3)(b). Accordingly, we remand to the circuit court for a determination of the appropriate amount of "costs, fees, and reasonable attorney fees" awarded under RULE 809.25(3)(a), to be assigned half to Brian and half to counsel. *See* ***Lucareli v. Vilas County***, 2000 WI App 157, ¶8 & n.4, 238 Wis. 2d 84, 616 N.W.2d 153; ***Zhang v. Yu***, 2001 WI App 267, ¶23 n.4, 248 Wis. 2d 913, 637 N.W.2d 754.

IT IS ORDERED that the judgment and order appealed from are summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the motion to declare the appeal frivolous is granted and the matter is remanded to the circuit court for a determination of Jamie's reasonable costs, fees, and attorney fees.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals