OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

May 1, 2013

To:

Hon. Maryann Sumi
Circuit Court Judge
Dane County Courthouse
215 South Hamilton, Br 2, Rm 7105
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Sara M. Vanden Brook
The Law Center for Children & Families
450 S. Yellowstone Drive
Madison, WI 53719-1068

Lane Robert Milde
505 Seven Nations Drive
Madison, WI 53713

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

2012AP333 In the matter of a change of name for minor under 14: Lane Robert Milde v. Amie Verboomen (L.C. # 2011CV4031)

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Lane Milde appeals an order granting the motion of Amie Verboomen to vacate an order changing the name of their child. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

The court granted the motion to vacate under WIS. STAT. § 806.07 after finding that Milde did not make a reasonable attempt to provide Verboomen with proper notice of the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

petition to change their child's name. Milde argues that the court erred because he properly complied with the legal requirements to provide notice to Verboomen.

The applicable statute lays out two possible paths for the petitioning parent to satisfy the requirement to provide notice to the nonpetitioning parent. Under the primary path, the petitioning parent must publish the notice and then provide proof of service in the same manner as required for a summons. WIS. STAT. § 786.36(1m)(a)1.; § 786.37(1) and (2). The summons statute provides a hierarchy of potential service methods, starting with personal service and then, if that cannot be achieved with reasonable diligence, service can be made by leaving a copy with a family member or competent adult at the person's residence. WIS. STAT. § 801.11(1)(a) and (1)(b). If neither of those methods occurs with reasonable diligence, the summons statute provides a third option, which is service by a combination of publication of a class 3 notice and mailing the notice "at or immediately prior to the first publication." WIS. STAT. § 801.11(1)(c).

The second, and alternate, path for satisfying the notice requirement is available when the nonpetitioning parent "cannot be found or provided with notice." WIS. STAT. § 786.36(1m)(a)2. In that situation, the petition may still be granted if the petitioning parent has made a "reasonable attempt" to find and provide notice to the nonpetitioning parent. ***Id.***

On October 17, 2011, at the first hearing on the name change petition, Milde provided the court with material that he claimed showed that, when the process server's attempt at personal service failed, Milde mailed the petition to Verboomen in a package on October 14, 2011. At the subsequent hearing on Verboomen's motion to vacate the name change order, she testified that, although she received that package from Milde, the petition was not one of the items in it. Verboomen testified that she did not receive any other notice from Milde.

The circuit court found that Milde did not make a reasonable attempt to give notice to Verboomen. On appeal, Milde relies on his assertion below that, after in-person service failed, he mailed notice to Verboomen in the package. However, it is clear that the circuit court believed Verboomen's testimony that the package did *not* contain the petition and, therefore, the court made a finding, albeit implicit, that Milde did not send the notice by mail. We normally defer to the circuit court's credibility determinations of witness testimony. ***Hottenroth v. Hetsko***, 2006 WI App 249, ¶19, 298 Wis. 2d 200, 727 N.W.2d 38. Milde has not provided any basis for us to conclude that the above finding was erroneous. That finding means that Milde did not satisfy the primary path provided in WIS. STAT. § 786.36(1m)(a)1. because he did not provide notice by any of the available summons methods, including by mail.

Furthermore, even if the court's finding that Milde did not mail the petition *is* erroneous, Milde still failed to show that he provided proper notice under the primary method. Milde did not comply with that method because his claimed mailing of the petition to Verboomen on October 14, 2011, did not provide notice in the same manner as a summons, since it was not mailed "at or immediately prior to the first publication," which occurred on September 14, 2011.

We need not address whether Milde made a "reasonable attempt" under WIS. STAT. § 786.36(1m)(a)2. to provide notice. That secondary method to satisfy the notice requirement is not available unless the other parent "cannot be found or provided with notice" in the manner required by subd. 1. Obviously, Verboomen could have been found and provided with notice by mail because Milde gave her correct home address to the process server and used it for his own untimely mailing, which Verboomen received.

The circuit court vacated the name change order in part on the ground of misconduct by Milde. *See* WIS. STAT. § 806.07(1)(c). We understand the court's oral decision to say that the misconduct was Milde's failure to provide proper notice to Verboomen. For the reasons above, we agree that Milde did not provide the required notice to Verboomen, and therefore we affirm the circuit court's order vacating the name change order.

Verboomen has filed a motion asking that we find this appeal frivolous. The rules of appellate procedure authorize this court to award costs, fees, and attorney fees as a sanction for a frivolous appeal, when the appeal was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or when the party or the party's attorney knew or should have known that the appeal "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c).

We award costs and attorney fees only when we deem an appeal frivolous in its entirety. ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14. Although it is well established that a single frivolous claim or argument will not automatically render an entire appeal frivolous, it does not follow that an arguably meritorious argument on any issue will necessarily preclude a finding that an entire appeal is frivolous. Rather, the test is whether, "under all the circumstances," the appeal is "'so indefensible that the party or his attorney should have known it to be frivolous.'" ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶¶28, 30, 277 Wis. 2d 21, 690 N.W.2d 1 (citation omitted).

Verboomen argues that Milde should have known that his appeal could not be successful because of the deference this court gives to circuit court findings on credibility matters.

Although we are inclined to give *pro se* appellants greater latitude with respect to their knowledge of the law, Milde does not provide us with an arguable basis to even doubt the circuit court's credibility finding.

We conclude that the appeal is frivolous in its entirety. We therefore affirm the order of the circuit court and award the respondent her costs and attorney fees pursuant to WIS. STAT. RULE 809.25(3). Because this court is not authorized to make factual findings, we remand for an additional determination of the amount of the attorney fees reasonably incurred in defending this appeal.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the motion for a finding of frivolousness is granted and the cause is remanded for an additional determination of the amount of the attorney fees reasonably incurred in defending this appeal.

Diane M. Fremgen
Clerk of Court of Appeals