COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2271 **Cir. Ct. No. 2003FA62**

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

JASON P. STEMPIN,

PETITIONER-RESPONDENT,

V.

CYNTHIA K. WEISS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MARY K. WAGNER, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Cynthia K. Weiss appeals from an order modifying a physical placement schedule to give Jason P. Stempin greater periods of physical

placement of the parties' minor child during the school year.[1] She argues that the circuit court utilized the wrong standard in determining whether to modify the physical placement schedule and that the evidence does not support the circuit court's determination that there was a substantial change of circumstances and that modification is in the child's best interest. We affirm the circuit court's order.

¶2 Cynthia and Jason lived in California when their son, Hayden, was born on August 4, 1999. An October 7, 1999 order from a California court acknowledged that Hayden spent ninety-five percent of his time with Cynthia and set child support to be paid by Jason. When Cynthia indicated that she would move to Wisconsin, the parties stipulated to a custody and visitation agreement that went into effect August 1, 2002. The agreement allowed Cynthia to move to Wisconsin with Hayden on December 26, 2002, and provided for nearly equal physical placement until the move. The agreement acknowledged Jason's intent to relocate to Wisconsin upon completing his master's degree in January 2003 and provided for alternating weekly placement after Jason's relocation to Wisconsin. The order incorporating the parties' stipulation was entered in the California court October 30, 2002, and registered in Wisconsin on January 20, 2003.

¶3 In February 2004, Cynthia petitioned pro se for modification of physical placement, legal custody, and child support. By a March 23, 2004 mediated parenting agreement, the parties continued the weekly alternating placement schedule with joint legal custody.[2] On August 31, 2004, Jason filed a

[1] This appeal was originally captioned, "In re the Marriage of: Jason P. Stempin v. Cynthia K. Weiss." These parties were never married. The caption has been amended accordingly.

[2] The parenting agreement was incorporated into an order entered by the family court commissioner on May 12, 2004.

pro se[3] petition for modification of custody and physical placement. As grounds for modification, he alleged that Cynthia was emotionally unstable, that she had been arrested for aggravated battery for an attempted assault to a police officer, domestic battery, and criminal damage to property, that her fourteen-year-old son was being released from a treatment facility and would be residing with Cynthia, that Hayden had begun to exhibit behavior problems after long periods in Cynthia's care, and that Hayden was about to start school and needed a stable environment.

¶4 When a family court commissioner first heard Jason's petition on October 20, 2004, it was deferred for a three-month period with no change in placement. The matter was finally heard on June 20 and 21, 2005. Joint legal custody was continued. The physical placement schedule was modified so that during the school year, Hayden resides with Jason and Cynthia has placement every other weekend and alternating Tuesdays and Thursdays after school until 6:00 p.m. The order provides that during the summer the parties share physical placement with four consecutive days each week, with each parent allowed a consecutive ten-day vacation period in the summer. The previously agreed upon holiday schedule is kept in place and days off school are also to be allocated equally.

¶5 WISCONSIN STAT. § 767.325(1) (2003-04),[4] governs the modification of a physical placement order. The circuit court may not modify

[3] Jason is pro se in this appeal as well.

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

physical placement within two years of the initial order unless it finds upon substantial evidence that the current custodial conditions are physically or emotionally harmful to the child. § 767.325(1)(a). After a two-year cooling off period, *see* ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 764, 498 N.W.2d 235 (1993), modification may be made when the court finds that it is in the best interest of the child and there has been a substantial change of circumstances. § 767.325(1)(b). Whether to modify a placement or custody order is directed to the circuit court's discretion. ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. When, as here, a party argues that the circuit court erroneously exercised its discretion by applying an incorrect legal standard, we independently review that issue of law. ***Id.***

¶6 Cynthia argues that Jason's August 31, 2004 petition for modification was filed within the two-year truce period and the circuit court was required to find that the current custodial conditions were physically or emotionally harmful to Hayden. WIS. STAT. § 767.325(1)(a). We note that the effective date of the California October 30, 2002 order was August 1, 2002, and, therefore, Jason's petition may be deemed to fall outside the two-year period.[5] However, we need not consider whether the date of entry or the effective date of

[5] Cynthia suggests that the starting point for the two-year period is the date the California order was registered in Wisconsin, January 20, 2003. She argues in her reply brief that under WIS. STAT. § 806.24, entitling foreign judgments to "full faith and credit," the California initial order is not effective in Wisconsin until registered in this state. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm.***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

In the circuit court Cynthia argued that the parties' stipulated parenting agreement incorporated by the order entered May 12, 2004, was the starting point. The circuit court soundly rejected that position and looked to the placement schedule set by the California court as the initial order.

the California order should be utilized as the starting point for the two-year truce period.

¶7 ***Paul M.J. v. Dorene A.G.***, 181 Wis. 2d 304, 313, 510 N.W.2d 775 (Ct. App. 1993), explains that if the effective date of the modification order falls outside the two-year period, the modification may be based on the best interests of the child standard. In short, the burden of proof is determined by the intended effective date of the modification order. We recognize that in ***Paul M.J.*** this court held that the circuit court lacked authority to entertain the father's petition and to enter an order substantially modifying physical placement during the two-year period because the father's motion made no prima facie allegations that judicial intervention was authorized under WIS. STAT. § 767.325(1)(a), and the father made no attempt to meet that burden of proof. ***Paul M.J.***, 181 Wis. 2d at 314. The same result is not mandated here because at first Jason's modification petition was simply deferred for a three-month period. The petition was not finally heard until long after the expiration of the two-year truce period. The circuit court properly applied the § 767.325(1)(b) burden of proof.

¶8 We turn to Cynthia's claim that there was not a substantial change of circumstances supporting modification of the physical placement schedule. Whether the moving party has established a substantial change in circumstances, as required under WIS. STAT. § 767.325(1)(b)1.b., is a question of law that we decide de novo. ***Greene v. Hahn***, 2004 WI App 214, ¶23, 277 Wis. 2d 473, 689 N.W.2d 657. However, we must give weight to the circuit court's decision because the determination is "'heavily dependent upon an interpretation and analysis of underlying facts.'" ***Id.*** (citation omitted).

¶9 The circuit court found that although Cynthia has a long history of emotional issues, more recently those issues have manifested themselves in out of control behavior, including the throwing of a chair at a window, and a tendency to explode or get overly excited by situations. Implicit in the circuit court's comment that "kids learn what they see," is the recognition that Hayden is getting older and being more influenced by parental conduct. The circuit court also pointed to evidence that Cynthia is unable to parent Hayden when he is out of control. The circuit court found that Cynthia's inability to recall the problems and treatment recommendations concerning her older son was not a good sign of parenting. An additional change is that Hayden is now of school age and had a high number of school tardinesses. It was also noted that Hayden is diagnosed with attention deficit hyperactivity disorder and has exhibited emotional problems at school. These findings are not clearly erroneous and demonstrate a substantial change of circumstances.

¶10 The circuit court's conclusion that the change of physical placement during the school year is in Hayden's best interest is also sound. The driving force behind the change is the need to provide Hayden consistent and steady direction during the school year. The circuit court found Hayden would get that consistency in Jason's home during the school week. Jason testified that he had success in calming Hayden and redirecting his behavior. The circuit court found Jason's testimony credible. This was sufficient to rebut the presumption in WIS. STAT. § 767.325(2)(b), that having substantially equal periods of physical placement is in the best interest of the child. We conclude that the change in the physical placement schedule was a proper exercise of discretion.

By the Court.—Order affirmed.

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