COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP392 **Cir. Ct. No. 2003FA104**

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

IN RE THE MARRIAGE OF:

CLAUDIA D. STUMPNER P/K/A CLAUDIA D. CUTTING,

PETITIONER-APPELLANT,

V.

CHARLES C. CUTTING, JR.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed.*.

Before Vergeront, P.J., Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. Claudia Stumpner appeals an order modifying a divorce judgment. We affirm.

¶2 Stumpner's ex-husband, Charles Cutting, moved for a change of placement in May 2009. The circuit court granted the motion.

¶3 Stumpner first argues that the motion should be reviewed under the stricter standard provided in WIS. STAT. § 767.451(1)(a) (2007-08)[1] because it was filed within two years after the last change of placement order, entered in 2007. We disagree. That statute provides that the time limit applies to motions filed within two years after "the final judgment determining legal custody or physical placement is entered under s. 767.41." That provision is not ambiguous. "The final judgment" under § 767.41 is the original judgment of divorce. Because § 767.451(1)(a) refers only to judgments under § 767.41, and not also to prior modifications made under § 767.451, it is clear that the two-year limit does not begin to run again with each new modification. Since the original judgment of divorce was entered in January 2004, § 767.451(1)(a) does not apply.

¶4 Stumpner next argues that, if the appropriate standard is instead the one found in WIS. STAT. § 767.451(1)(b), the court erred by concluding that a substantial change in circumstances had occurred. Whether there has been a substantial change in circumstances is a question of law that we review *de novo*, while giving weight to the circuit court decision. ***State v. Lucas***, 2006 WI App 112, ¶23, 293 Wis. 2d 781, 718 N.W.2d 184.

¶5 At the motion hearing in October 2009, Stumpner and Cutting both testified. Cutting testified that a court order of May 2009 prevented Stumpner from having unsupervised contact with their child Grace. The record shows that

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

this May 2009 order found Stumpner in contempt for violating a previous judgment, and would be in effect for two years. Cutting testified that Stumpner had not seen Grace since the week before the May 2009 order went into effect, and that she had not contacted him to arrange for supervised visitation.

¶6 Cutting argued that a change in circumstances was created by the contempt order limiting contact between Stumpner and their child. He also pointed out that Stumpner had not seen Grace for nearly six months before the October 2009 hearing. He argued that his proposal was to bring the placement order into line with the provisions of the contempt order.

¶7 In response, Stumpner argued that it would be improper to use the contempt order as a substantial change of circumstance because it is of "short duration," and because there was testimony that Stumpner had been complying with the existing placement order up until the contempt order. She further argued that the recent lack of visitation should not be regarded as a change because visitation was limited by the contempt order.

¶8 The court began its discussion by stating that "this case is not in a vacuum. In essence, the whole history of the record is before this court, everything that the court is aware of that has transpired…." The court discussed the facts underlying the contempt order related to the child's continuing contact with a relative of Stumpner's. On the subject of substantial change in circumstance, the court concluded, "the change in circumstances comes about" due to the conduct that was the subject of the contempt proceeding and that "harm is being done to this child that was not contemplated at the time of that last order."

¶9 We conclude there was a substantial change of circumstances since the 2007 placement order. We give considerable weight to the circuit court's

familiarity with the case and the events that led to the contempt order. Stumpner has not suggested any legal reason why her failure to prevent Grace's contact with her relative since the 2007 order cannot be considered a substantial change. To the extent Stumpner may now be arguing that the circuit court could not consider those prior matters because there was no transcript from them, we reject the argument. Stumpner had ample opportunity to object on that ground at the hearing, but did not. Furthermore, she did not claim that the circuit court's description of those matters was incorrect, or that she was not herself already familiar with those matters at the time.

¶10 We recognize that we later reversed the order Stumpner was found to be in contempt of, but we did so on procedural grounds that did not affect the ability of the court to consider Stumpner's conduct in the context of placement. *See* ***Stumpner v. Cutting***, 2010 WI App 65, 324 Wis. 2d 820, 783 N.W.2d 874.

¶11 Stumpner also argues that the circuit court did not consider whether the proposed change was in Grace's best interest. She asserts that "there was no statement" by the circuit court explaining why the 2007 placement order was no longer in Grace's best interest. This is not an accurate description of the record. The court spent most of two pages in the transcript on that issue, discussing why contact between Grace and Stumpner's relative was not in Grace's best interest.

¶12 Finally, Cutting moves for sanctions on the ground that this appeal is frivolous under WIS. STAT. RULE 809.25(3). While we agree with Cutting that Stumpner's argument on the two-year limitation is frivolous, we do not reach that conclusion as to the remaining arguments. Therefore, we deny the motion. *See* ***Baumeister v. Automated Prods., Inc***., 2004 WI 148, ¶34, 277 Wis. 2d 21, 690 N.W.2d 1 (every issue must be frivolous to award fees).

By the Court.—Order affirmed.

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