COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1237 **Cir. Ct. No. 2003FA977**

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

IN RE THE MARRIAGE OF:

JEFFERY R. SORONEN,

PETITIONER-RESPONDENT,

V.

KAREN R. SORONEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 NEUBAUER, P.J. Karen Soronen appeals from a circuit court order modifying the placement of her two minor sons. The modification resulted

from the de novo review of a temporary placement order entered by a family court commissioner (FCC). The FCC's temporary order transferred primary physical placement to Karen's former spouse and the sons' father, Jeffery Soronen. It supplanted an ex parte order entered by the FCC which provided Jeffery with sole physical placement based on allegations of child endangerment. Karen contends the circuit court erred in its determination that a modification of placement was appropriate. Karen also contends that the FCC lacked authority to enter an ex parte order and that the circuit court erred in continuing the ex parte order while the de novo review of the temporary placement order was pending. We reject Karen's challenges. We conclude that the circuit court did not err in its review of the FCC's temporary placement order. We further conclude that Karen's additional challenges stemming from the initial FCC ex parte order are moot. We affirm.

BACKGROUND

¶2 Jeffery and Karen were divorced on May 19, 2004. There were two children born of their marriage, ages five and two at the time of divorce. The parties stipulated to the custody and physical placement arrangement for their children and a partial judgment reflecting that agreement was entered by the court on March 17, 2004. The partial judgment granted Karen primary placement of the children and Jeffery one weeknight and every other weekend. The custody and placement arrangement entered on March 17 was in place for over five years when Jeffery filed an order to show cause on October 6, 2009, requesting modification

of placement for both minor children.[1] Both Jeffery and his sister, Kimra Moore, submitted affidavits in support of the order to show cause requesting modification. The affidavits alleged that Karen abused drugs and that the children were living in an unsafe and neglectful environment where they witnessed violence. In addition, Jeffery alleged Karen's live-in boyfriend, Ken Hansen, was engaged in drug trafficking and that Karen had permitted an acquaintance with a known drug habit, Abby Solheim, to transport the children while under the influence. It was Solheim's arrest for drug possession and operating under the influence while on her way to pick up the boys that prompted Jeffery to file the order to show cause.

¶3 Based on the affidavits of Jeffery and Kimra, the FCC appointed a guardian ad litem (GAL) on October 6 and ordered ex parte that Jeffery have sole physical placement of the children until a scheduled hearing on November 12, 2009. The physical placement provision of the FCC order was enforced when Karen was served on October 16, 2009.

¶4 Karen subsequently filed an ex parte motion on October 26, 2009, disputing the allegations in Jeffery and Kimra's affidavits, submitting negative drug test results for herself and Hansen, and requesting the children immediately be returned to her care. Jeffery, in turn, filed a supplemental affidavit on October 30, 2009, addressing, among other things, issues with the boys' schooling,

[1] The order to show cause additionally ordered Karen to demonstrate, at the November 12 hearing, why orders should not be granted requiring that (1) contact between the children and Karen be prohibited until the children had the opportunity to meet with the GAL, and that contact be prohibited between the children and Karen's live-in boyfriend, Ken Hansen; the children's half-brother, Jacob Fanelli; and the children's babysitter, Abby Solheim; (2) Karen submit to random drug testing and be prohibited from consuming alcohol or nonprescribed drugs when she had placement with the children; and (3) child support be revised to reflect the modification of placement.

including poor grades. The parties and the GAL appeared before the FCC on November 12, 2009. As a result of the hearing, the FCC ordered that Jeffery have temporary primary placement of the children and that Karen have alternate placement of the children every other weekend from Friday after school until Sunday at 7:00 p.m. and every Tuesday and Thursday after school until 6:00 p.m. On November 23, 2009, Karen filed a motion for de novo review of the FCC's November 12 temporary order.

¶5 The parties appeared before the circuit court on January 22, 2010. Karen's attorney argued that there was no evidence to support the allegations underlying the ex parte temporary order and requested that the court return the placement schedule to that set forth in the parties' judgment of divorce pending a full evidentiary hearing. Jeffery's attorney argued that the FCC's temporary order should stand pending the evidentiary hearing. The GAL indicated to the court that nothing in her investigation indicated drug use, drug trafficking, or drug history on behalf of Karen or her boyfriend, or that the children were failing to receive adequate food or clothing as alleged by Jeffery in his affidavit. The GAL did find that the children were doing poorly in school and that neither parent had been very involved. She also noted a possible concern regarding marijuana use at Jeffery's house. As she did at the November 12 hearing before the FCC, the GAL again recommended shared placement.

¶6 Noting that the parties were not prepared to present evidence for de novo review of the temporary placement order, the circuit court declined to make any decision regarding placement. The court stated that "[t]here has to be a complete trial on this case in order for me to … make a determination of whether the evidence is there to change placement, order shared placement, but I can't do that today." Thus, the court declined to revisit the FCC ex parte order and made

no modification to the subsequent FCC temporary order. The court scheduled an evidentiary hearing for de novo review.

¶7 The court heard the matters of custody and physical placement on May 10, 2010; June 23, 2010; October 8, 2010; January 14, 2011; February 11, 2011; and February 23, 2011. On March 23, 2011, the court ordered that it was in the best interests of the children for Jeffery to have primary placement of the children during the school year. Karen was awarded placement every other week from Thursday at 6:00 p.m. through Sunday at 6:00 p.m. During the summer break, the placement schedule would be reversed, giving Karen primary placement and Jeffery alternate placement every other weekend from Thursday at 6:00 p.m. through Sunday at 6:00 p.m. In addition, Karen was ordered to pay $72.50 per week in child support, Jeffery was given sole decision making regarding medical care and treatment for the minor child, Evan, and both parties retained joint decision making regarding medical care and treatment for the minor child, Ryan.

¶8 Karen appeals.

DISCUSSION

¶9 Karen raises several challenges to the circuit court's order modifying the physical placement schedule of the parties' sons. Karen's challenges begin with the ex parte order entered by the FCC in October 2009 and end with the circuit court's final order as to physical placement entered in March 2011. Because the March 2011 circuit court order drives our determination, we begin with Karen's contention that the circuit court's order to modify physical placement was not supported by sufficient evidence. Based on our review of the record, we cannot agree with Karen that the circuit court's decision was unsupported.

I. Sufficient Evidence Exists to Establish a Substantial Change in Circumstances and to Support the Circuit Court's Best Interests Determination.

¶10 WISCONSIN STAT. § 767.451(1) (2009-10)[2] governs substantial modifications to legal custody and physical placement orders after the initial two-year period. The circuit court considers modifications using a two-step process. First, as a threshold matter, whenever a requested modification "'would substantially alter the time a parent may spend with his or her child,' the moving party must show that there has been 'a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.'" ***Greene v. Hahn***, 2004 WI App 214, ¶22, 277 Wis. 2d 473, 689 N.W.2d 657 (citation omitted). As Karen points out, a substantial change of circumstances "requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order." ***Beaupre v. Airriess***, 208 Wis. 2d 238, 246, 560 N.W.2d 285 (Ct. App. 1997) (citation omitted). If the circuit court finds that there has been a substantial change in circumstances, it then moves to the second step: considering whether any modification would be "in the best interest of the child." ***Greene***, 277 Wis. 2d 473, ¶22 (citation omitted).

¶11 When considering the child's best interest, the factors to be considered in modifying legal custody or physical placement are those listed in WIS. STAT. § 767.41(5)(am), subject to § 767.41(5)(bm). WIS. STAT. § 767.451(5m). The circuit court "must presume that continuing 'the current allocation of decision making under a legal custody order' and continuing 'the

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

child's physical placement with the parent with whom the child resides for the greater period of time' are both in the best interest of the child." ***Greene***, 277 Wis. 2d 473, ¶22; § 767.451(1)(b)2.a. & b.

¶12 Whether a party seeking to modify an existing legal custody order or physical placement order has established a substantial change in circumstances is a question of law that we review de novo. ***Greene***, 277 Wis. 2d 473, ¶23. "When doing so, however, we must 'give weight to a trial court's decision' because the determination is 'heavily dependent upon an interpretation and analysis of underlying facts.'" ***Id.*** (citation omitted). With respect to the best interest determination, we consider whether the circuit court has properly considered and weighed the appropriate factors to determine what is in the child's best interest, using the erroneous exercise of discretion standard. ***Id.***, ¶27.[3]

¶13 In addressing the circuit court's decision regarding the substantial change in circumstances, Karen focuses her argument on the circumstances as alleged in the initial order to show cause. However, the temporary placement schedule in the initial order to show cause was no longer in effect after the entry of the November 12 temporary order. Moreover, at the time of the January 22 hearing, Jeffery had raised concerns regarding the boys' school performance and additional information relevant to the boys' best interests had come to light. Karen's argument suggests that the circuit court, prior to conducting the full evidentiary hearing, should have returned the parties to their original, pre-FCC

[3] As noted by the supreme court in ***Landwehr v. Landwehr***, 2006 WI 64, ¶7 n.6, 291 Wis. 2d 49, 715 N.W.2d 180, we defer to the circuit court on matters of custody and placement because the circuit court "has seen the parties, had an opportunity to observe their conduct, and is in much better position to determine where the best interests of the child lie than is an appellate court." (Citation omitted.)

orders status or, in other words, restored primary physical placement to Karen. As discussed below in Section II, the ex parte order was no longer in effect and the consideration of new testimony and evidence was appropriate on de novo review of the temporary order.

¶14 Karen also cites to testimony that detracts from or contradicts the circuit court's ultimate findings, essentially rehashing the evidence that the circuit court did not rely on or accept in reaching its decision. In doing so, she ignores our standard of review. On appeal, we affirm a circuit court's findings of fact unless they are clearly erroneous and defer to the court's credibility determinations. WIS. STAT. § 805.17(2). When more than one reasonable inference can be drawn from the credible evidence, we accept the reasonable inference drawn by the circuit court sitting as fact finder. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶15 In arriving at its decision, the circuit court expressly took notice of the factors set forth in WIS. STAT. § 767.41(5)(am).[4] The circuit court considered

[4] WISCONSIN STAT. § 767.41(5)(am) provides an extensive list of factors to be considered by the circuit court in making a custody and physical placement determination. It provides:

> [T]he court shall consider the following factors in making its determination:
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> 1. The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
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> 2. The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.

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3. The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.

4. The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.

5. The child's adjustment to the home, school, religion and community.

6. The age of the child and the child's developmental and educational needs at different ages.

7. Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.

8. The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

9. The availability of public or private child care services.

10. The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

11. Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

12. Whether there is evidence that a party engaged in abuse, as defined in s. 813.122(1)(a), of the child, as defined in s. 48.02(2).

12m. Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122(1)(a), of the child or any other child or neglected the child or any other child:

a. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12(1)(ag).

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the positions of both parties, the boys' wishes, the GAL's recommendation for shared placement and the psychologist's report which recommended primary placement with Jeffery during the school year, with a reversal in schedule during the summer. As to the wishes of the children, the court recognized the GAL's indication that the boys both expressed a desire to live with their mother. The court noted that both parents wanted primary placement.

¶16 In arriving at its decision, the court focused heavily on the educational needs of the children, noting that their grades had improved since they had been living with Jeffery. The GAL testified that Ryan had been receiving primarily Cs and Ds in fourth and fifth grade and that his grades improved after Jeffery was granted primary placement. For example, Ryan's grade in language improved from an F to a B-. Evan's grades also improved upon the change in placement, although to a lesser extent. The GAL noted a correlation, testifying that the change "occurred after a period of time where the children were being supported more academically and primarily placed with their father[.] Leading up to that, there had been a several year pattern of underachievement …." The court-

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> b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.
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> 13. Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20(1m) or domestic abuse as defined in s. 813.12(1)(am).
>
> 14. Whether either party has or had a significant problem with alcohol or drug abuse.
>
> 15. The reports of appropriate professionals if admitted into evidence.
>
> 16. Such other factors as the court may in each individual case determine to be relevant.

appointed psychologist concluded that Karen had "inefficiencies in running her home as regards to the boys' schoolwork and keeping up with professional appointments" and that Karen's "dependent and passive traits have contributed to the issues at hand with the boys, notably their incomplete or late homework and grades over past years that do not reflect their ability level."

¶17 The court considered a report from Evan's teacher that he exhibited signs of attention deficit hyperactivity disorder (ADHD) and a statement from the court-appointed psychologist that Evan likely meets the diagnostic criteria for ADHD based on teacher and parent reports and will need structure in dealing with it. The court contrasted this to Karen's statement that she did not believe he had ADHD.[5]

¶18 Next, the court noted Karen's lack of involvement in the boys' morning routine and homework and her abdication of that role to her live-in boyfriend, Hansen. The court coupled this with Karen's use of Abby Solheim to transport the children, an individual who had a known criminal history involving drug use. While Karen maintains that she was not aware that Solheim was still using drugs, the testimony of the officer who arrested Solheim on her way to pick up the boys indicated that Solheim was noticeably impaired and had visible track marks on her hands at the time of the arrest. Solheim testified that the officers uncovered heroin and a switchblade in her vehicle as well as Xanax, needles and

[5] It appears from the record that the circuit court mistakenly believed that these teacher observations were made while Karen had primary placement. However, the children were removed from Karen's home in October 2009 but remained in school in Karen's district after Jeffery was granted primary placement under the FCC order. The principal confirmed that Evan did not have any disciplinary referrals last year in the 2008-09 school year but had eight as of April of the 2009-2010 school year.

heroin on her person. The court clearly weighed this incident against Karen. A reasonable inference from the evidence pertaining to Solheim is that Karen, who had seen Abby just prior to her arrest, should have noticed Solheim's condition, but did not.

¶19 The court also considered Karen's restraining order against Jeffery, but noted that it ended in 2007 and there had not since been any contact with the police as to harassment or violence. The court expressly discounted Jeffery's allegation that Karen exposed the boys to criminals and the allegation that Jeffery had a "pot pipe" in his home. While the GAL recommended shared placement, the court seemed to rely most heavily on the report and recommendation of the court-appointed psychologist, and it was entitled to do so. ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976) (the weight of the testimony is a matter peculiarly within the province of the circuit court acting as the finder of fact); *see also* ***Brandt v. Witzling***, 98 Wis. 2d 613, 619, 297 N.W.2d 833 (1980) (a circuit court may properly rely on opinions of expert witnesses in a custody or placement dispute provided that it is not patently unreasonable).

¶20 The court's determination as to the substantial change of circumstances is implicit in its best interests discussion. In examining the parties' history as compared to their current circumstances, the court noted the expiration of the four-year restraining order between Karen and Jeffery, and the lack of any evidence of current harassment or violence between them. The court noted the psychologist's conclusion that Karen and Jeffery have "very different styles" of parenting.[6] In summarizing the evidence and weighing each parent's strengths and

[6] The psychologist's written report states her conclusion:

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weaknesses, the court observed that Karen is "very laid back, doesn't believe that [Evan] has a medical issue, gives up her parenting role to another person, [and] lets a known convicted drug dealer with a heroin or drug habit drive her kids. [Jeffery's] got issues of a prior restraining order, might have some alcohol issues. He's got some anger issues." Citing the boys' academic performance, Ryan's recent interest in marijuana and Evan's possible ADHD, the court reasoned that it was in the best interests of the children "at this time in their life" to have a good deal of structure and discipline.

¶21 The prior physical placement order was entered as part of the 2004 judgment of divorce. The boys were two and five years old at the time and were not in school. Evan was not exhibiting signs of ADHD and, presumably, Karen was not abdicating certain parenting responsibilities to Hansen or Solheim. In ***Greene***, 277 Wis. 2d 473, ¶25, this court acknowledged that "the simple fact that a child grows older does not, in and of itself, create a substantial change of circumstances"; however, we concluded that such a change can be shown when the age change is accompanied by other factors such as adjustment difficulties,

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> As regards to parenting, Jeff and Karen Soronen have very different styles. Mr. Soronen is more rigid and strict in his approach. Ms. Soronen is more laid back and unstructured in her approach. Both have love and concern for the children. Both have good knowledge and awareness of their children's strengths and weaknesses, needs, and challenges. Mr. Soronen's strengths are in his ability to schedule and structure the children's time, especially as regards homework and appointments. His weakness is in his inability to control frustration and anger, especially when working with the boys and their homework.
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> Ms. Soronen's strengths as a parent are also her weaknesses. She is a relaxed, easygoing, and loving parent, who has not imposed enough structure in her children's routines. She admitted she needs to be more firm with the boys.

educational failure, and an inability of the parents to agree on major decisions. Here, we conclude that the evidence was sufficient to establish a substantial change in circumstances and to support the circuit court's discretionary determination as to the best interests of the children.

II. The Circuit Court Applied the Proper Legal Standard and Burden of Proof at the De Novo Hearing.

¶22 We next consider whether the circuit court applied the proper legal standard and imposed the appropriate burden of proof when conducting its de novo review. Karen contends that the circuit court's decision to leave the FCC's ex parte order in place pending the de novo hearing placed her at a procedural disadvantage and impermissibly shifted the burden of proof. Karen's focus is misplaced. The FCC's ex parte order was only in effect from October 6 until November 12 hearing after which the FCC entered the temporary order.[7] Second, the record reflects that upon receiving Karen's request for a de novo hearing of that temporary order, the circuit court informed the parties that it would proceed with a full evidentiary hearing—a new hearing.

¶23 The circuit court's decision is in keeping with our directive in ***Stuligross v. Stuligross***, 2009 WI App 25, ¶11, 316 Wis. 2d 344, 763 N.W.2d 241 (WI App 2008), that "a party who requests a 'hearing de novo' is entitled to a hearing that includes testimony from the parties and their witnesses, rather than simply a review of what occurred before the family court commissioner." (Citing WIS. STAT. § 757.69(8)). The ***Stuligross*** court noted that:

[7] As noted, the children were not removed from Karen's care until she was served on October 16, 2009. We do not have a record of the November 12 proceedings before the FCC.

> The commonly accepted meaning of a de novo hearing is "[a] new hearing of a matter, conducted as if the original hearing had not taken place." BLACK'S LAW DICTIONARY 738 (8th ed. 2004). A de novo hearing requires a fresh look at the issues, including the taking of testimony (unless the parties enter into stipulations as to what the testimony would be). The hearing is literally a new hearing ….

Stuligross, 316 Wis. 2d 344, ¶12. As to Karen's contention that the initial FCC ex parte order resulted in an underlying and improper shifting of the burden of proof, it is clear from the record that the circuit court recognized throughout the proceedings that it was Jeffery's "burden as to change of placement." Further, upon de novo review, we likewise conclude that the facts as found by the circuit court were sufficient to establish that Jeffery met his burden of proof as to a substantial change of circumstances. *See* ***Pero v. Lucas***, 2006 WI App 112, ¶23, 293 Wis. 2d 781, 718 N.W.2d 184.

III. Karen's Additional Challenges are Moot.

¶24 As a final matter, we conclude that Karen's additional challenges are moot. While the FCC's initial order may have set the wheels in motion, it was in place only until the November 12, 2009 hearing after which a temporary placement order was entered by the FCC. It was the November 12 temporary order that was the subject of Karen's request for de novo review. The circuit court conducted a full de novo evidentiary hearing on physical placement over the span of six days before arriving at the placement order that forms the basis for this appeal. While Karen contends that the initial ex parte order tainted the subsequent proceedings, for the reasons set forth above, we disagree. Any question as to the validity or effect of the initial FCC ex parte order is moot. *See* ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶49, 317 Wis. 2d 656, 766 N.W.2d 559 (an issue is moot when its resolution will have no practical effect on the underlying controversy).

CONCLUSION

¶25 We conclude that the circuit court did not err in its de novo review of the FCC's temporary order modifying placement or in its determination that Jeffery had carried his burden of establishing a substantial change in circumstances warranting such modification. We further conclude that Karen's additional challenges stemming from the initial FCC ex parte order are moot. We affirm the circuit court's order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.