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DISTRICT IV

September 20, 2013

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

2011AP1733

Heather Nicole Stuebinger v. Jered John Butler (L.C. # 2008FA88)

Before Lundsten, Higginbotham and Sherman, JJ.

Jered Butler appeals a series of child placement and child support decisions that culminated in a final order finding him in contempt. Respondent Heather Stuebinger, the mother of the parties' son, moves for an award of attorney fees on the ground that the appeal is frivolous. After reviewing 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 circuit court in all respects and grant Stuebinger’s motion for attorney fees.

As a threshold matter, we note that although Butler raises numerous complaints about the circuit court proceedings, he fails to develop any coherent arguments applying relevant authority to the facts of record to identify reversible legal errors. We could decline to address any of the issues on appeal based upon the inadequacies of the appellant’s brief alone. *See generally* WIS. STAT. RULE 809.19(1)(d) and (e) (setting forth the requirements for briefs); ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (regarding unsupported arguments); and ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (regarding undeveloped arguments). However, because we also have a motion for attorney fees before us, we will briefly explain why the entire appeal is frivolous.

Butler’s principal mistake is a failure to understand the standard of review and this court’s role in reviewing lower court proceedings for legal error. Because the circuit court is in the best position to observe witness demeanor and gauge the persuasiveness of testimony, it is the “ultimate arbiter” for credibility determinations when acting as a fact finder, and we will defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2) (“due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses”). In addition, this court shall not set aside any finding of facts made by the circuit court unless they are “clearly erroneous.” WIS. STAT.

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

§ 805.17(2). A factual finding is not clearly erroneous unless—after accepting all credibility determinations made and reasonable inferences drawn by the fact finder—the great weight and preponderance of the evidence support a contrary finding. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

Butler's entire argument regarding the modification of physical placement is based upon the premise that Stuebinger provided false testimony against him—particularly regarding domestic abuse, and that the circuit court should have accorded more weight to the testimony of other witnesses in Butler's favor. However, the circuit court's acceptance of Stuebinger's testimony and rejection of other testimony is a question of credibility that is simply not reviewable by this court. Butler has made no showing—or even provided any argument—that the circuit court applied the wrong legal standard when making its determinations that there had been a substantial change in circumstances and that additional placement with Stuebinger would be in the best interests of the child.

Similarly, Butler's claim that his child support is too high is not based upon an argument that the circuit court failed to apply the relevant guidelines. Rather, Butler challenges the court's factual finding as to the amount of his income. That factual finding, however, was based upon Butler's own stipulation at the time of trial, and is therefore not clearly erroneous. Butler argues both that the stipulation was inaccurate and that his income has since been reduced, but the court was not deciding a new motion for modification of support. Rather, it was deciding an issue that had been held open at the time of a prior decision, based upon the facts as they then existed. Nothing in the court's order precludes Butler from filing a motion to modify support going forward based upon his reduced income.

Finally, Butler challenges the circuit court's finding that he was in contempt based upon his failure to pay child support and his portion of medical insurance and medical bills. He argues that he could not be found to have intentionally disobeyed the court's orders because he did not have sufficient income to satisfy them. However, the court made a factual finding that Butler had made only one child support payment since 2008, and that payment was to purge a prior contempt order. Butler's failure to make periodic payments of any amount plainly supports a finding that his conduct was intentional, and not merely due to an inability to pay the full amount.

Because Butler has failed to raise any issue on appeal based upon an alleged error of law, and has instead merely challenged credibility determinations and factual findings and asked this court to reweigh the testimony and evidence, we conclude that his appeal is wholly frivolous.

IT IS ORDERED that the circuit court orders regarding child placement, child support and contempt are summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Stuebinger's motion for attorney fees on appeal is granted, and the matter is remanded to the circuit court for a determination of the reasonable amount of those fees.

Diane M. Fremgen
Clerk of Court of Appeals