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DISTRICT II

February 13, 2014

To:

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Circuit Court Judge
Ozaukee County Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2012AP106 In re the Paternity of John K. Borowski, III: John K. Borowski v. Valerie Marie Gullickson (L.C. # 2007FA275)

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

John K. Borowski appeals from a postjudgment order denying periods of physical placement with two of his children until he satisfies enumerated conditions. Borowski argues that the trial court erroneously exercised its discretion by prohibiting contact and requiring Borowski to attend individual therapy. He also disputes the trial court's authority to require the payment of certain guardian ad litem (GAL) fees. 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.

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

The action underlying this appeal began in January 2010, when Valerie Gullickson filed a motion seeking sole custody and placement of the ex-couple's two youngest children, A.B. and J.B.[2] The family court commissioner granted Valerie's motion and awarded her sole custody and placement. Borowski requested de novo review and the trial court conducted evidentiary hearings on February 28, March 1, and November 3, 2011. At the final hearing,[3] court-appointed expert Dr. Marc Ackerman testified that based on his evaluation of Borowski, he "is at risk for making hasty and careless judgments." Ackerman opined that though some of Borowski's behavior was manipulative, he did not consider Borowski "a manipulator as much as he is a hysterical over-reactor." Ackerman recommended a seven-step approach to reunification, to commence with family therapy,[4] and testified that Borowski's individual therapy could be done simultaneously with the seven-step program.

David Cipriano, the children's therapist,[5] opined that Borowski had facilitated the alienation of the children from their mother. Cipriano testified that Borowski "significantly influenced" the eldest daughter K.B., who in turn would try "to influence her siblings against

[2] Borowski does not contest the court's order as it pertains to the third and eldest child, K.B.

[3] Despite Borowski's unexcused absence from this third and final hearing, the trial court permitted his attorney to examine the two expert witnesses and to make extensive argument on Borowski's behalf.

[4] The seven steps are: (1) supervised visits with the children in a therapeutic setting (family therapy); (2) supervised visits with a disinterested third party; (3) supervised visits with an interested party; (4) unsupervised monitored visits; (5) loosely monitored visits; (6) unsupervised and unmonitored daytime visits; and (7) unsupervised and unmonitored overnight visits.

[5] Cipriano testified that he is technically the therapist for K.B and J.B., but he also met with A.B. during her siblings' family meetings.

[Gullickson]." According to Cipriano, the two younger children were improving since the commencement of only supervised visits.

The trial court adopted Ackerman's seven-step reunification plan but ordered that Borowski "shall first have individual on-going therapy focusing on the concern about his 'hysterical over-reacting' as it relates to his interactions with the children and being able to positively support the children having a loving relationship with their Mother." The trial court found that Borowski's tendency to be "'hysterically over-reactive' … caused prior negative affects to the children's well-being."

Placement modification decisions are committed to the trial court's discretion and will be sustained on appeal where the decision demonstrates a logical process based on the law and facts of record. ***State v. Alice H.***, 2000 WI App 228, ¶18, 239 Wis. 2d 194, 619 N.W.2d 151. We reject Borowski's claim that the trial court erroneously exercised its discretion by ordering that Borowski engage in individual therapy as a condition precedent to the seven-step plan, and that he have no contact with the two youngest children pursuant to that plan. *See* ***Alice H.***, 239 Wis. 2d 194, ¶33 (in an action affecting the family, a trial court has the statutory authority to impose conditions for regaining placement, including individual or family counseling). Here, the record does not include the March 1, 2011 hearing transcript and in its absence, we must assume that every fact essential to sustain the trial court's decision is supported by the record. ***Haack v. Haack***, 149 Wis. 2d 243, 247, 440 N.W.2d 794 (Ct. App. 1989); ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). Further, the trial court explained each of its findings by reference to the supporting testimonial and documentary

evidence.[6] The trial court was entitled to rely on Cipriano's testimony that Borowski's alienating behavior had harmed the children and was under no duty to accept Ackerman's opinion that supervised family therapy could begin prior to Borowski's established progress in individual therapy. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (the factfinder is the ultimate arbiter of credibility determinations and we defer to its resolution of discrepancies or disputes in the testimony).

Borowski also contends that the trial court exceeded its authority by conditioning his progression through the plan's later steps on the timely payment of GAL fees.[7] Borowski argues that this condition improperly interferes with his right to parent his children. First, there was no objection to this condition at the time it was entered, and we generally decline to consider issues

[6] In contrast, the twenty-three page statement of facts in Borowski's brief contains little citation to the record in violation of WIS. STAT. RULE 809.19(1)(d) and (e), and by Borowski's own admission, relies on facts outside the court record. *See* ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984) (an appellate court may review only matters of record in the circuit court, and cannot consider materials outside that record). Other facts and portions of the appendix are improperly taken from events which occurred after the final de novo hearing and were not considered by the trial court. An intermediate appellate court is an error-correcting court that cannot take time to sift the record for properly-considered facts that might support an appellant's contentions. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

[7] The order states:

> If Mr. Borowski misses any payment to the GAL more than 10 days beyond her bill being sent to him, he would automatically revert back to step two, supervised placement …. To commence back to the steps, he would then need to make an appropriate deposit with the GAL to protect future billing. This provision is necessary, as the GAL's oversight is integral in the success of this plan and for the protection of the minor children's emotional well-being.

The trial court added that this provision would first apply at step three because the family therapist would make the "ultimate decision in Step 1 and 2 with input from Cipriano and [Borowski's] therapist and if she has one, [Gullickson's] therapist."

raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52. Second, Borowski has not established that the GAL fees are presently an obstacle to obtaining placement with his children. The record does not establish that Borowski has completed even the preliminary steps, nor that he failed or was unable to pay the GAL fees such that he lost placement rights. Any decision on this claim would be based on hypothetical or future facts and we decline to address it at this time. *Cf.* ***State v. Armstead***, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998) (claims involving hypothetical or future facts are not ripe for review).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals