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DISTRICT II

October 9, 2019

To:

Hon. Jason A. Rossell
Circuit Court Judge
Kenosha County Courthouse
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Kenosha, WI 53140

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

2018AP1884 In re the custody and placement of I.M.K. in
In re the marriage of: Kenneth James Kirby
v. Janel Antoinette Kirby (L.C. #2012FA995)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kenneth James Kirby appeals from an order denying his request for sole custody and primary placement during the school year. 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 (2017-18).[1] We affirm the order of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Kenneth and Janel Antoinette Kirby were married on October 9, 2010, and have one child who was born in March 2011. The parties were divorced in 2013 following a contested court trial on the issues of custody and placement of their child. The court awarded Kenneth and Janel joint legal custody and ordered them to cooperate in decisions regarding their minor child. After presiding over the trial, the circuit court noted in its decision that "[i]t is evident that the parties do not effectively communicate about certain issues," but the court did not award sole legal custody to either parent as it concluded (was hopeful) that the "communication difficulties" would not continue.

Unfortunately, Kenneth and Janel continued their uncooperative behavior towards one another, and in September 2016, Kenneth sought a change of primary placement and an order that certain medical treatment not occur with their child. Janel countered with her own motion seeking changes to placement and being granted decision making authority. The circuit court (same judge), following three days of testimony, concluded that it could not award sole custody to either party as a court may not award sole legal custody to a parent who refuses to cooperate with the other parent and the refusal to cooperate is unreasonable. *See* WIS. STAT. § 767.41(2)(c). The court found that both Kenneth's and Janel's refusal to cooperate was unreasonable.[2]

A circuit court's postjudgment modification of custody provisions is a "discretionary determination, which we will not reverse unless the court incorrectly applied the law, misinterpreted or overlooked relevant facts or otherwise failed to reason its way to a decision

[2] The court's frustration with the parents led the court to suggest the option of third-party legal custody, which was not pursued. *See* WIS. STAT. § 767.41(3).

that a reasonable judge could reach."[3] ***Greene v. Hahn***, 2004 WI App 214, ¶9, 277 Wis. 2d 473, 689 N.W.2d 657. A circuit court is empowered under WIS. STAT. § 767.41(6)(b) when making an order of joint legal custody, to "give one party sole power to make specified decisions, while both parties retain equal rights and responsibilities for other decisions." WISCONSIN STAT. § 767.451(1)(b)1. creates a two-step process for a court to follow to determine whether to substantially modify the terms of a custody or placement order entered at least two years earlier. First, there must be a showing that there has been a substantial change of circumstances since the entry of the last order affecting custody or placement. Sec. 767.451(1)(b)1.b.; *see also* ***Greene***, 277 Wis. 2d 473, ¶22. If that showing is made, the court then proceeds to consider whether any modification would be in the best interest of the child. Sec. 767.451(1)(b)1.a.

The circuit court found a substantial change of circumstances as the child was "now school-age." The court maintained joint legal custody, but it imposed a rigid placement schedule aimed at protecting the best interest of the child. The court found that in the years since the court awarded joint custody, both parents "have completely misinterpreted, misapplied the concept of joint custody." Specifically, the court found Kenneth "completely unreasonable in his application of" joint custody and found him "uncooperative because he's been attempting to co-parent."

The record amply supports the court's conclusion that each of the parent's were exercising "a veto on the other party" and that "neither of you can co-parent." The court, having heard testimony in both 2013 and 2018, found that neither parent had forgiven the other and

[3] Addressing postjudgment modification more than two years since initial order. WIS. STAT. § 767.451(1)(b).

neither had "set down their anger for each other; and sadly, it has only affected one person … [their child]." The court found that under WIS. STAT. § 767.41(2)(c), both parents have been and are being uncooperative because they cannot forgive one another and that their refusal to cooperate is unreasonable. The court determined that the party who has placement shall make medical, dental, and educational decisions for the child. The court also set "parameters" on each parent, including rules relating to the use of the "My Family Wizard" program, decision-making regarding extracurricular time, phone calls, drop-offs, and transfers, all with the goal of removing any flexibility between Kenneth and Janel for decision making: "I need to limit the transactions between these parents. Because that's what's harming the child."

Kenneth claims that we must reverse the court's decision as co-parenting is what "joint legal custody" means, arguing that "if joint custody means that prior to a decision being made both parents must agree, then [the court's] decision and order must be reversed." We reject Kenneth's unsupported assertion.

WISCONSIN STAT. § 767.001(1s) defines "joint legal custody" as "the condition under which both parents share legal custody and neither party's legal custody rights are superior, except with respect to specified decisions as set forth by the court…." This, of course, assumes that the parties will reasonably and cooperatively work towards agreement. The court found that the parties were using their joint legal custody as a veto power, which § 767.001(1s) explicitly explains does not exist ("neither party's legal custody rights are superior"). We see no erroneous exercise of discretion in the circuit court's determination that the parties' relationship was precluding cooperation, and as such, it set forth an order that addressed their inability to come to agreement. Kenneth fails to identify any error in the court's order, as § 767.001(1s) expressly allows a court to tailor orders relating to decision-making authority so as to address situations

such as here where both parents are unreasonable in their ability to cooperate regarding their child.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals