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August 4, 2020

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

2018AP2032 Melanie Ann Ulrich v. Robert Bruce McBain
(L. C. No. 2013FA225)

Before Stark, P.J., Hruz and Seidl, JJ.

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).

Robert B. McBain, pro se, appeals from a postdivorce order denying modification of custody and placement. 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 summarily affirm.

On September 13, 2013, McBain and Melanie Ulrich filed a joint petition for divorce. McBain was subsequently charged in connection with a homicide, and he pleaded guilty to second-degree intentional homicide. He was sentenced to fifteen years' initial confinement and ten years' extended supervision. We affirmed the conviction pursuant to a no-merit report. ***State v. McBain***, No. 2015AP1895-CRNM, unpublished op. and order (WI App Oct. 26, 2016).[2]

A final divorce hearing was held on June 13, 2014. Both parties appeared in person along with a guardian ad litem (GAL) appointed to represent the couple's three minor children. The appellate record does not contain a transcript of the hearing.

In its findings of fact and conclusions of law, the circuit court awarded sole legal custody and primary physical placement of the parties' children to Ulrich. An attachment to the divorce judgment also provided that Ulrich was to encourage and allow the children at least weekly to contact their father by letter, phone, or video chat. Ulrich was to work with the jail or prison to accomplish this contact if it could be done at no cost to her. Ulrich was also to allow McBain to call or video chat with the children on certain holidays. The final divorce judgment was not appealed.

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

[2] Additionally, we subsequently affirmed the denial of a WIS. STAT. § 974.06 postconviction motion. *See* ***State v. McBain***, No. 2017AP2179, unpublished op. and order (WI App May 14, 2019).

Several days after the final divorce hearing, McBain's parents filed a petition for grandparent visitation rights. Following a hearing, the circuit court ordered grandparent visitation once per month and telephonic communication each Tuesday evening. The court's order made clear that the remainder of the divorce judgment continued in full force and effect. Again, this order was not appealed from, and there is no transcript of this hearing in the record on appeal.

On November 3, 2014, and April 9, 2015, McBain filed affidavits requesting that Ulrich be found in contempt. McBain claimed Ulrich was not allowing him to have contact with his children. The circuit court held a hearing on each motion and found there were "no grounds to find Ms. Ulrich in contempt." No transcripts for these hearings are in the record on appeal, and these orders were not appealed from.

On June 19, 2015, Ulrich filed a motion to end grandparent visitation, and the grandparents filed a motion requesting that the circuit court find Ulrich in contempt. McBain also filed an affidavit requesting a change of visitation. Following a hearing, the court issued a December 20, 2015 order in which it made a number of findings, including that there had been long-standing discord between the paternal grandparents and Ulrich Also, the court found the minor children had suffered, and continued to suffer due to a variety of causes—including, but not limited to, the incarceration and absence of their father, and the animosity between the parties.

The circuit court also found that one of the children had exhibited a number of mental health issues related to trauma caused by McBain's incarceration and absence, and had been bullied at school. The child had indicated to the court her desire that she not be forced to visit

with her grandparents, and the court found it was not in the child's best interest to force her to participate in grandparent visitation. The court also ordered, however, that the paternal grandparents would continue to have visitation with the other children. The court also ordered that "[Ulrich] has sole custody of all three minor children and she may grant or deny in-person visits with [McBain] at Fox Lake Correctional Facility." The court further ordered that "[e]xcept as modified herein, all the terms and provisions of the Judgment of Divorce between [Ulrich] and [McBain] granted June 13, 2014, and the order [for grandparent visitation] filed December 11, 2014, and all subsequent court orders, if any, shall remain in full force and effect." Once again, no party appealed from this order.

On January 10, 2018, McBain filed a motion for a change in custody and placement. McBain requested that he be granted legal custody of the children, but "only in terms of being notified of issues with the children." His motion contained a number of allegations and complaints, but it was vague in terms of what specific relief he requested. McBain claimed that he was given no notice regarding the hospitalization of one of the children, and he generally complained that Ulrich was interfering with his ability to communicate with the children.

After an August 14, 2018 evidentiary hearing, the circuit court denied McBain's motion "because no substantial change in circumstance was found." The court nonetheless ordered Ulrich to notify McBain of any major medical or psychiatric appointments or hospitalizations of the children, and to provide McBain with the names of the children's treatment providers within seven days of any such occurrence. McBain was also allowed to call the children on their cellphones on weekdays between 4:00 p.m. and 8:00 p.m. Finally, the court ordered McBain to pay seventy-five percent of the GAL fees and Ulrich to pay twenty-five percent. Again, there is no transcript of the motion hearing in the record. An order for payment of the GAL fees was

filed on September 17, 2018, after the GAL filed an affidavit with attached invoices totaling $1272.70.

On September 24, 2018, McBain filed a motion for waiver of the cost of preparing a transcript of the August 14, 2018 hearing. The motion failed to set forth any arguably meritorious claims that McBain intended to pursue on appeal, and it simply stated: "[B]eing indigent [he] can not [sic] afford to have the transcript prepared for this case." McBain also filed an affidavit of indigency that was unsigned and unsworn, as well as a copy of his trust account activity statement from the Fox Lake Correctional Facility. He additionally filed a statement on transcript, indicating that, "All transcripts necessary for this appeal are already on file." In the same document, however, McBain implied that satisfactory arrangement had been made for the filing and service of a transcript for the August 14 hearing. The statement on transcript did not contain a certificate from the court reporter that such arrangements had been made.

On October 2, 2018, the circuit court entered an order without a hearing, denying the motion to waive transcript fees on the grounds that McBain failed to file a sworn affidavit of indigency. The court also stated, "[M]ore importantly, he has not shown that he had an arguably meritorious claim on appeal, as required by ***Girouard v. Jackson Circuit Ct.***, 155 Wis. 2d 148, 454 N.W.2d 792 (1990)."

On October 15, 2018, McBain filed a notice of appeal from the August 14, 2018 order, wherein the circuit court purportedly "denied legal custody and physical placement." The notice of appeal did not seek review of the October 2, 2018 order denying McBain's motion for waiver of transcript fees.

On October 24, 2018, we entered an order striking McBain's statement on transcript. We noted the internal inconsistencies in McBain's statement on transcript, but we also stated that if McBain wanted to "stay the present appeal while he seeks review of the circuit court's denial of his request for waiver of the transcript fee, he must file a notice of appeal seeking review of that decision in the circuit court within twenty days of this order." Moreover, we stated that if McBain timely filed a new notice of appeal, we would further extend the time for his filing of a statement on transcript in his present appeal. If he did not file a statement on transcript or a new notice of appeal within the time set by the order, we stated that the present appeal would proceed without further transcripts and we would assume that any missing transcripts supported the court's findings of fact and discretionary decisions.

McBain did not file a notice of appeal seeking review of the October 2, 2018 order denying his request for waiver of transcript fees. He also failed to submit a renewed request for a waiver of transcript fees setting forth arguably meritorious claims that he intended to pursue on appeal. Instead, McBain filed a new statement on transcript, indicating that, "A transcript is not necessary for the prosecution of this appeal." Thereafter, McBain proceeded on this appeal by filing his initial brief.[3]

McBain's brief on appeal is difficult to understand, his arguments are undeveloped, and he fails to provide citations to the appellate record in support of his arguments. We need not address undeveloped or unsupported arguments. *See* ***M.C.I., Inc. v Elbin***, 146 Wis. 2d 239,

[3] The GAL filed a response brief, and Ulrich filed what we construed as a motion for leave to adopt the GAL's brief as her own, which we granted by an order dated June 20, 2019. We further ordered that McBain's reply brief was due fifteen days from the date of our order, but McBain failed to file a reply brief.

244-45, 430 N.W.2d 366 (Ct. App. 1988). In any event, the lack of transcripts for the relevant hearings is dispositive of McBain's appeal from the denial of his 2018 motion to modify custody and placement.

When, as here, a party seeks to modify the terms of a custody or placement order entered at least two years earlier, WIS. STAT. § 767.451(1)(b) sets forth a two-step process. First, the circuit court is required to determine whether there has been a substantial change in circumstances since the entry of the last order affecting physical placement. If the court finds a substantial change in circumstances has occurred, it then determines whether modification of the terms of a custody or placement order would be in the child's best interest. Under § 767.451(1)(b)2.b., there is a rebuttable presumption that continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the child's best interest.

Here, the circuit court order denying McBain's motion stated it found no substantial change in circumstances. McBain argues that the court erroneously denied his motion to change custody and placement solely because he was incarcerated, and also that the court failed to follow applicable statutory standards during the divorce proceedings. However, when a court, in the exercise of its discretion, has reached conclusions but no transcript has been furnished by which the court's exercise of discretion can be examined, an appellate court is compelled to accept the court's conclusions. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 638, 273 N.W.2d 233 (1979). Stated another way, the appellant must assure a complete record for the issues on review, and missing material is assumed to support the circuit court's decision. ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (1986).

McBain failed to furnish a transcript for the August 14, 2018 hearing on his motion for a change in custody and placement. Moreover, our October 24, 2018 order established a clear procedure for McBain to follow if he wished to seek review of the circuit court's denial of his request for a waiver of the transcript fee. In our order, we also admonished McBain that if he did not follow that procedure within the time set by the order, we would proceed without further transcripts and we would assume that any missing transcripts supported the court's findings of fact and discretionary decisions.

Rather than follow the procedures we outlined, McBain filed a new statement on transcript indicating that, "A transcript is not necessary for the prosecution of this appeal." Under these circumstances, we conclude that McBain forfeited his right to any review of issues regarding the waiver of transcript fees, and he chose instead to proceed on his appeal without a transcript. Again, absent a transcript, we must presume the record supports the circuit court's findings.

In any event, McBain failed to establish that the circuit court was precluded from considering McBain's incarceration in issuing its orders regarding custody and placement. McBain relies on case law providing that a termination of parental rights proceeding may not be based solely upon a party's incarceration. Such reliance is misplaced here, as McBain's parental rights were not terminated; the present appeal involves the denial of a motion to change custody and placement.

Furthermore, we note the circuit court's earlier orders regarding custody and placement contradict McBain's assertion that the court denied him custody and placement based solely on his incarceration. For example, the court's December 30, 2015 order found that the "minor

children have suffered and continue to suffer trauma from a variety of sources, including but not limited to the incarceration of their father, … the absence of their father, … the animosity exhibited between [Ulrich] and [the grandparents], and the animosity exhibited between [Ulrich] and [McBain]." Throughout the proceedings, in issuing its custody and placement orders, the court considered a host of factors that were traumatizing the children, only one of which was McBain's incarceration. We therefore affirm the August 14, 2018 order denying McBain's motion to modify custody and placement.

McBain also argues that the GAL "did not advocate for the children and, therefore, should not be awarded fees for services rendered." We lack jurisdiction to consider this argument. The order for payment of the GAL fees was filed on September 17, 2018. McBain did not timely file a notice of appeal concerning this order. The notice of appeal in the present case was from the August 14, 2018 order, which "denied legal custody and physical placement." Accordingly, McBain has failed to invoke this court's jurisdiction regarding the circuit court's order for payment of the GAL's fees. *See* ***Wainwright v. Wainwright***, 176 Wis. 2d 246, 250, 500 N.W.2d 343 (Ct. App. 1993).

Upon the foregoing,

IT IS ORDERED that the order 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