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DISTRICT IV

March 3, 2022

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

2021AP25 In re the Paternity of B.H.: Michael S. Gritzmacher v. Jennifer L. Hofmeister (L.C. # 2015PA110PJ)

Before Kloppenburg, Graham, and Nashold, 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).

Jennifer Hofmeister and Bryant Hofmeister, by separate counsel, appeal a final post-adjudication order in this paternity matter concerning B.H., a child shared by Jennifer Hofmeister and Michael Gritzmacher.[1] 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

[1] Because the appellants share a surname, this opinion will refer to the appellants by their first names for clarity.

(2019-20).[2] We summarily affirm. We further conclude that Jennifer's appeal is not frivolous, but that Bryant's appeal is frivolous. We therefore deny Gritzmacher's motion for costs and fees under WIS. STAT. RULE 809.25(3) as to Jennifer and grant the motion as to Bryant.

The procedural history of this paternity action is somewhat involved. Jennifer and Bryant were married shortly before Jennifer gave birth to B.H. on March 6, 2014. On August 11, 2015, Gritzmacher initiated this paternity action to establish that he is B.H.'s father.

In December 2015, at a time when Bryant had not been made a party to Gritzmacher's paternity action, a court commissioner ordered genetic testing, and the testing established that Gritzmacher is B.H.'s father. Bryant was made a party in the action, and he and Jennifer argued that it had not been in the child's best interest to order genetic testing. The circuit court then conducted a best interest hearing and determined that genetic testing was in the child's best interest.

On April 26, 2017, the court entered an order, which we refer to as the paternity order. The paternity order adjudicated Gritzmacher the father of B.H. and dismissed Bryant from the action. Bryant appealed the paternity order, and we affirmed. ***M.S.G. v. J.L.H.***, No. 2017AP1098, unpublished slip op. (WI App July 19, 2018). Bryant filed a petition for review, which was denied by our supreme court.

Following Bryant's unsuccessful appeal, the circuit court conducted post-adjudication proceedings. Pursuant to a local rule, the circuit court appointed a Custody and Assessment

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Team to make recommendations for a parenting plan. Ultimately, the court entered a post-adjudication order, which resolved disputed issues related to custody, placement, and child support.

Jennifer's Appeal

Jennifer argues that her due process and equal protection rights were violated when the circuit court ordered genetic testing before Bryant was made a party to this case, despite the statutory marital presumption that Bryant was the father, and before a best interest hearing was conducted. However, we resolved those same challenges to the circuit court's paternity adjudication when Bryant previously appealed the paternity order. *See* ***M.S.G.***, No. 2017AP1098. We explained in our opinion that we assumed, without deciding, that Bryant had shown that his rights were violated by the failure to name or join him as a party prior to the order for genetic testing. ***Id.***, ¶17. We concluded, however, that the circuit court provided a sufficient remedy by joining Bryant as a party and giving him an opportunity to participate in the court's review of the order for testing. ***Id.***, ¶¶18-23. We also concluded that the circuit court properly applied the best interest factors. ***Id.***, ¶¶24-31. We therefore affirmed the paternity order, and our supreme court denied review.

Jennifer's attempt to distinguish her current challenges to the paternity determination on the basis that this is her first appeal in this matter is unavailing. While Jennifer did not participate in the prior appeal, it remains that we have already rejected the challenges to the paternity determination that Jennifer attempts to assert here. We will not revisit challenges to the circuit court's paternity determination that were resolved by prior appeal in this matter. *See* ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989) ("[A]

decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.").

Jennifer also argues that her due process and equal protection rights were violated when the circuit court followed a local rule for appointing a Custody and Assessment Team (CAT), including a guardian ad litem (GAL) as a member of the team, to make a recommendation for a parenting plan in post-adjudication proceedings. Jennifer argues that the GAL's involvement in the CAT created a conflict and was contrary to statutes and case law. Jennifer argues that the GAL in a family matter must act as an advocate, not as a factfinder or a consultant for the court, and may not be called as a witness or cross-examined. *See* WIS. STAT. § 767.407; ***Goberville v. Goberville***, 2005 WI App 58, ¶¶11-12, 280 Wis. 2d 405, 694 N.W.2d 503; ***Hollister v. Hollister***, 173 Wis. 2d 413, 419, 496 N.W2d 642 (Ct App. 1992). Jennifer contends that, as a member of the CAT, the GAL impermissibly became a potential fact witness. Jennifer also argues that there is no evidence that the GAL is qualified to serve on the CAT.

However, Jennifer does not assert that any of the circuit court's post-adjudication decisions were based in any way on the work of the CAT or any report it filed in this case. Therefore, even if we were to assume (without deciding) that the GAL's participation in the CAT was an error, Jennifer has not made an argument showing that any post-adjudication order should be reversed. *See* ***Dilger v. Metropolitan Prop. & Cas. Ins. Co.***, 2015 WI App 54, ¶25, 364 Wis. 2d 410, 868 N.W.2d 177 ("To reverse, we must find that there is a 'reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.'" (quoted source omitted)). Because Jennifer fails to develop this argument, we decline to address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we do not address insufficiently developed arguments).

Bryant's Appeal

Bryant advances substantially similar arguments as Jennifer regarding the circuit court's post-adjudication appointment of the CAT. Bryant's arguments, as with Jennifer's, do not include any assertion that the CAT process contributed in any way to the circuit court's decisions.

More importantly, however, "[a] right to appeal from a judgment or order … is confined to parties aggrieved in some appreciable manner by the court action." ***Tierney v. Lacenski***, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983). In this case, the court has entered a final order, which has been affirmed on appeal, that adjudicated Gritzmacher as the child's father. Therefore, Bryant has no paternal rights that are implicated by the post-adjudication decisions about custody, placement, and child support. In his appellate briefing, Bryant provides no explanation as to how he believes he was aggrieved by the circuit court's determination of these disputed post-adjudication issues between Jennifer and Gritzmacher, who are the child's parents.[3] Because the circuit court's post-adjudication decisions were limited to disputes between Jennifer and Gritzmacher, Bryant may not challenge those decisions in this appeal.

[3] Bryant asserts, in conclusory fashion, that he may pursue this appeal despite the prior paternity order dismissing him from this action because the circuit court allowed him "to appear and behave as a party [during the post-adjudication proceedings] and thus statutorily can appeal decisions that are adverse to him." However, Bryant does not cite any legal authority or develop any argument that he was "aggrieved in some appreciable manner" by the post-adjudication orders resolving disputes between Jennifer and Gritzmacher. *See* ***Tierney v. Lacenski***, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983).

Frivolous Appeals

Gritzmacher moves for sanctions against both Jennifer and Bryant for pursuing frivolous appeals. He argues that counsel for both parties knew, or should have known, that an appeal was without a reasonable basis in law or equity and could not be supported by a good faith argument for a modification of existing law. *See* WIS. STAT. RULE 809.25(3)(c)2. He contends that the arguments related to the paternity determination have already been resolved, and that the arguments related to the CAT and GAL are based on mere dissatisfaction with the outcome in the circuit court and lack a basis in fact or law. Jennifer and Bryant oppose the motion.

To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous. ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14. We look to what a reasonable party or attorney knew or should have known under the same or similar circumstances. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621.

We conclude that Jennifer's appeal is not frivolous in its entirety. We agree with Gritzmacher that Jennifer's arguments related to issues decided by the earlier appeal in this matter are frivolous. However, Jennifer's arguments related to the CAT and GAL, while insufficiently developed to establish that Jennifer is entitled to relief, appear at least reasonably based on the facts and law.

We also conclude, however, that Bryant's entire appeal is frivolous. The only arguments raised in Bryant's brief are based on post-adjudication proceedings, which resolved issues between Jennifer and Gritzmacher. As stated above, Bryant does not provide any legal basis for him to pursue those arguments. Bryant's counsel knew or should have known that this appeal

was without any reasonable basis in law or equity. A reasonable attorney under the circumstances would have known that Bryant could not pursue issues between Jennifer and Gritzmacher, and would have known that, to pursue an appeal on Bryant's behalf, the attorney would need to make a good faith argument as to why Bryant could argue those issues on appeal.

For these reasons, we grant the motion for sanctions as to Bryant's appeal, and we remand the case to the circuit court to determine the costs, fees and reasonable attorney fees incurred by Gritzmacher in defending against Bryant's appeal. We direct the circuit court to assess these amounts against Bryant's appellate counsel, rather than against Bryant personally.

Therefore,

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1), and the cause is remanded to the circuit court to determine the amount of costs and reasonable attorney fees to be awarded to the respondent and assessed against Bryant's appellate counsel pursuant to WIS. STAT. RULE 809.25(3).

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

Sheila T. Reiff
Clerk of Court of Appeals