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DISTRICT III

May 3, 2022

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

2021AP1368-FT Annie Levknecht v. Michael J. Kennedy(L. C. No. 2007PA51PJ)

Before Stark, P.J., Hruz and Graham, 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).

Michael J. Kennedy appeals from an order of the circuit court dismissing his amended motion to modify physical placement of the child he shares with Annie Levknecht. Kennedy argues that the court erred by (1) failing to determine his motion on the merits and dismissing the motion without an evidentiary hearing and (2) dismissing the motion without input from the guardian ad litem (GAL). Pursuant to this court's order of August 24, 2021, and a presubmission

conference, the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17(1) (2019-20).[1] Upon review of those memoranda and the record, we affirm the order of the circuit court.

Levknecht and Kennedy share one minor child in common. The parties also share a particularly litigious history as it relates to their child. For the purpose of this appeal, however, the history is relatively straightforward. On September 22, 2020, Kennedy filed a motion to modify physical placement. Kennedy sought primary physical placement of the child due to a violent altercation ten days earlier, wherein the child was accused of battery and strangulation of Levknecht. On October 1, 2020, Levknecht responded with her own motion to modify custody, placement, and child support. The circuit court subsequently appointed a GAL for the child.

On January 5, 2021, the circuit court held a GAL review hearing on the parties' competing motions. During the nontestimonial hearing, the GAL reviewed for the court the parties' placement change requests. The current order was for an "8/6" shared placement arrangement that gave Levknecht eight and Kennedy six overnights with the child during a two-week period.[2] The GAL did not clearly state each party's specific requests. However, he advised the court that there was a suggestion that the parties move to a "week-on/week-off," or equal, placement schedule, or some variation that would allow the child more overnights with Kennedy. According to the GAL, the child was struggling with school attendance and was "having difficulty with his mom in terms of their relationship." The GAL ultimately

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

[2] The current order for placement had been in effect since 2012. The order provides that in week one, Monday, Tuesday, Friday, and Saturday overnights are with Kennedy; Wednesday, Thursday, and Sunday overnights are with Levknecht. In week two, Monday and Tuesday overnights are with Kennedy; Wednesday, Thursday, Friday, Saturday, and Sunday overnights are with Levknecht.

recommended that the current placement order remain in effect not because "it is going well," but because the parties need to "continue to try to work together." The court also heard arguments from the parties, and they ultimately agreed that an evidentiary hearing was unnecessary.

At the conclusion of the hearing, the circuit court decided not to alter the placement schedule and entered an order that all previous orders would remain in effect. The court directed the parties to set a scheduling conference "somewhere between 45 to 60 days from" the hearing date to inform the court "what is going on; if you need something scheduled for an on-the-record conversation or if you guys have some sort of agreement to put the order into final format" and to "figure out what issues, if any do exist, regarding disputes on child support."[3]

On May 25, 2021, Kennedy filed an amended motion, seeking "an order modifying the existing order for physical placement to provide that [Kennedy's] every other Sunday placement be overnight and that the summer vacation schedule mirrors the school year schedule." Kennedy noted that the existing order had been in place since 2012 and that "[t]he proposed modification would not substantially alter the time either parent spends with the minor child." In the affidavit submitted with his motion, Kennedy's only argument as to the reason for the modification was that the child was much older than he was when the original placement order was entered. On May 26, 2021, Levknecht filed a motion to dismiss the amended motion, explaining that the court made a final determination not to modify the current placement schedule in the previous

[3] Levknecht's counsel filed letters with the court on March 2, 2021, and April 26, 2021, stating that the issue of child support was the "sole remaining issue open."

order entered after the January 5, 2021 hearing. According to Levknecht, only the issue of child support was left open in order for the parties to exchange financial information.

On May 27, 2021, the GAL filed correspondence with the circuit court in response to Kennedy's motion, explaining that he had "not gotten any substantial evidence since the time of the last hearing" and that he did not believe he had been "reactivated." The court responded to the GAL's letter on May 28, 2021, stating that based on the pleadings, "no one has specifically requested your appointment be reactivated" and that his "appearance [was] not required."

On June 7, 2021, Kennedy filed correspondence with the circuit court, expressing his belief that his motion was proceeding under WIS. STAT. § 767.451(3) and not § 767.451(1)(b), as "[t]hat particular subsection does not apply unless the motion would 'substantially alter' the time the parent may spend with his or her child." Kennedy also requested that the GAL be reactivated. Levknecht responded four days later, agreeing that § 767.451(3) was applicable but stating that

> this matter was only recently before the court, the [GAL] rendered an opinion, and the [c]ourt did make an order as a result of that opinion. Without any further showing that something drastic has occurred such that it is now in the best interest of the minor to do something different, this motion is frivolous.

Levknecht further asked the court to delay reactivating the GAL. On June 11, 2021, the court sent correspondence to the GAL stating that the court's "thoughts" from the May 28, 2021 letter "remain[ed] [its] thoughts," meaning that the GAL was not reactivated and his appearance at the hearing was not required.

Following a nonevidentiary hearing on June 22, 2021, the circuit court dismissed Kennedy's motion to modify placement. While the court referenced the idea of res judicata, or

claim preclusion,[4] thus indicating that it believed this issue had already been addressed, it specifically explained that nothing had changed since it last considered a change in placement in January 2021. The court entered an order dismissing Kennedy's motion to modify placement on June 30, 2021. This appeal follows.[5]

Whether to modify physical placement is committed to the circuit court's discretion. ***Hughes v. Hughes***, 223 Wis. 2d 111, 119, 588 N.W.2d 346 (Ct. App. 1998). We will affirm a court's discretionary determination if the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *See* ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). "Our task as the reviewing court is to search the record for reasons to sustain the [circuit] court's exercise of discretion." *See* ***Hughes***, 223 Wis. 2d at 120. "However, when the contention is that the [circuit] court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue of law de novo." ***Id.***

[4] *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (adopting the term claim preclusion to replace res judicata).

[5] We note that both Kennedy and Levknecht have failed to comply with our Rules of Appellate Procedure. *See* WIS. STAT. RULE 809.19(1)(d). Neither parties' briefs contain record citations; instead, they cite exclusively to the appendix. Such citations are improper, as an appendix is not the record. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

On appeal, Kennedy argues that the circuit court's dismissal of his amended motion to modify placement on the grounds of claim preclusion was improper.[6] In response, Levknecht asserts that a motion to modify placement must at the very least allege sufficient facts to meet one of the standards under WIS. STAT. § 767.451, and Kennedy's motion failed to do so. We agree that Kennedy's motion and affidavit failed to allege sufficient facts from which the court could conclude that it would be in the child's best interest to make the proposed modification.

WISCONSIN STAT. § 767.451 governs modifications to legal custody and physical placement orders. The parties appear to agree that the motion for modification in this case proceeded under § 767.451(3), which states that "a court may modify an order of physical placement which does not substantially alter the amount of time a parent may spend with his or her child if the court finds that the modification is in the best interest of the child." According to Kennedy, unlike § 767.451(1), there is no time restriction in subsec. (3) as to when issues of custody and placement may be relitigated, nor does the statute require a change in circumstances. Thus, Kennedy contends it was error for the circuit court to dismiss his motion based on there being no "change since the last time the [c]ourt entered the placement order."

While Kennedy is correct, and the circuit court agreed, that a modification under WIS. STAT. § 767.451(3) does not require the same showings as a modification under § 767.451(1),

[6] We question whether the circuit court actually based its decision on the doctrine of claim preclusion, as it did not determine whether any of the elements of claim preclusion had been satisfied in this case. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶18-22, 279 Wis. 2d 520, 694 N.W.2d 879. Instead, the court appears to have merely likened the current situation to the theory behind that doctrine. Regardless, we need not address that issue, as we decide this case on other grounds. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (we need not address all issues raised by the parties if one is dispositive).

Kennedy's motion under subsec. (3) was still required to allege facts from which the court could conclude that the proposed change would be in the child's best interest. Kennedy failed to do so.

During the January 5, 2021 hearing, the parties had addressed the suggestion that they share equal physical placement with their child on a week on/week off schedule. This change would have required that Kennedy have the parties' child overnight on Sunday evenings every other week. Thus, the same issue Kennedy raised in his May 25, 2021 motion was addressed only six months earlier, and the circuit court at that time ordered that the current placement schedule remain in effect.

To the extent Kennedy contends that his amended motion made an entirely new request, the amended motion and affidavit provided no basis for the circuit court to conclude that the modest change sought would be in the child's best interest. Instead, Kennedy's motion simply stated that the child had grown and his age was no longer a factor in having an "8/6" split or a different summer schedule. The child's age was known to all parties when an amendment to the placement schedule was considered six months earlier and denied by the court. Given our deferential review of the court's placement decisions, we cannot conclude that the court erred in finding that Kennedy failed to sufficiently allege a basis for the court to hold an evidentiary hearing and consider his modification request. The court therefore properly exercised its discretion by dismissing Kennedy's amended motion to modify placement.

Kennedy also argues that the circuit court erred in dismissing his amended motion without input from the GAL. While he admits that a motion under WIS. STAT. § 767.451(3) does "not necessarily require the appointment of a" GAL, he claims that the court must make findings

under WIS. STAT. § 767.407(1)(am) if it decides to proceed without the GAL appointment, and the court failed to do so here.

We agree with Levknecht that the WIS. STAT. § 767.407(1)(am)[7] factors have been established in this case.[8] First, Kennedy's motion was filed under WIS. STAT. § 767.451(3). *See* § 767.407(1)(am)1. Second, the motion requested a modification that would not substantially alter the time either parent may spend with the child. *See* § 767.407(1)(am)2. Third, the circuit court received correspondence from the GAL stating that he had received no "substantial evidence since the time of the last hearing," and the court then expressed on two separate

[7] WISCONSIN STAT. § 767.407(1)(am) provides:

> (am) The court is not required to appoint a guardian ad litem under par. (a)2. if all of the following apply:
>
> 1. Legal custody or physical placement is contested in an action to modify legal custody or physical placement under [WIS. STAT. §§] 767.451 or 767.481.
>
> 2. The modification sought would not substantially alter the amount of time that a parent may spend with his or her child.
>
> 3. The court determines any of the following:
>
> a. That the appointment of a guardian ad litem will not assist the court in the determination regarding legal custody or physical placement because the facts or circumstances of the case make the likely determination clear.
>
> b. That a party seeks the appointment of a guardian ad litem solely for a tactical purpose, or for the sole purpose of delay, and not for a purpose that is in the best interest of the child.

[8] We note that the circuit court failed to make express findings under WIS. STAT. § 767.407(1)(am) when it declined to reactivate the GAL. "Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

occasions that input from the GAL at the hearing was not required. Thus, the court implicitly concluded that input from the GAL would not assist the court as the facts or circumstances of the case made its determination clear.[9] *See* § 767.407(1)(am)3.a. Under these circumstances, the court did not err in dismissing Kennedy's amended motion to modify placement without additional input from the GAL.

Upon the foregoing,

IT IS ORDERED that the order of the circuit court is affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals

[9] Kennedy does not respond to this argument in his reply brief; therefore, he fails to dispute Levknecht's position and has conceded the issue. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to argument made in response brief may be taken as concession).