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DISTRICT II

September 21, 2022

To:

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Christopher J. Kliesmet
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You are hereby notified that the Court has entered the following opinion and order:

2021AP530

In re the Paternity of S.A.L.: State of Wisconsin v. Christopher J. Kliesmet (L.C. #2011PA6PJ)

Before Neubauer, Grogan and Lazar, 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).

Christopher J. Kliesmet appeals from an order granting sole legal custody and primary physical placement of his minor son to the child's mother, Stephanie Krueger (née Liss). Kliesmet alleges that the circuit court erred in allowing use of a transcript of a recording that he claims was illegally made, in failing to properly assess the weight and credibility of the witnesses at trial, and in relying upon the recommendations of a guardian ad litem he claims did not fulfill her duties under the law. Based upon our review of the briefs submitted on appeal and the record, we conclude at conference that this case is appropriate for summary disposition.

See WIS. STAT. RULE 809.21 (2019-20).¹ We conclude that the circuit court appropriately exercised its discretion in deciding the award of custody and placement. Thus, we affirm.

Kliesmet and Krueger share one minor child, S.A.L., who was born in 2010. The parents were never married to one another. Paternity was adjudicated in 2011 and, pursuant to their agreement, Kliesmet and Krueger were granted joint custody and placement on August 10, 2012. In 2014, when Krueger intended to move to Florida, the parents agreed to modify placement such that Kliesmet would have primary placement and Krueger would have several periods of placement throughout the year. Joint legal custody continued.

Krueger filed the motion giving rise to this appeal on January 16, 2019. She sought primary placement of S.A.L. based on a substantial change of circumstances. In her supporting affidavit, she asserted, among other things, that Kliesmet had had “several contacts with police resulting from his violent and abusive behavior,” and that S.A.L. was “in an unsafe and unstructured environment” with Kliesmet. During the pendency of the motion, primary placement was awarded to Krueger in Florida.

The circuit court held a three-day trial on Krueger’s motion from December 9-11, 2020. Witnesses at trial included Kliesmet, Krueger, Krueger’s husband, Kliesmet’s parents, two social workers, and a psychologist who had performed a court-ordered evaluation of Kliesmet. At the conclusion of the trial, the circuit court made detailed findings regarding the credibility of each witness at trial, noting that the testimony of the Kruegers, Kliesmet’s parents, and each of the professional experts was credible. By contrast, the court found Kliesmet “very evasive in his

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

answers” and that his testimony was not credible. The court stated that Kliesmet appeared unwilling or unable to answer simple questions.

Next, the circuit court discussed the factors in custody and physical placement determinations set forth in WIS. STAT. § 767.41(5) and identified evidence supporting its conclusion as to each factor. For example, with respect to statutory factors relating to the child’s household relationships and adjustment to school and the community, the court cited testimony showing a “high-functioning home with [siblings] that he loves, with a mother and stepfather that care a great deal about him” in Florida as well as “testimony that [S.A.L.] has a stable environment in Florida” and is “well adjusted to his new school.” *See* WIS. STAT. § 767.41(5) and (8). With respect to factors pertaining to substance abuse and mental health, the court had “significant concerns about Mr. Kliesmet’s mental health” and alcohol abuse based on “a mountain of evidence,” including the professional reports in evidence and Kliesmet’s own testimony. In addition, the court found that Kliesmet struggled to interact with others without “vulgarity and conflict,” which negatively affected S.A.L. Among other negative interactions, the court cited a physical altercation between Kliesmet and his father, witnessed by S.A.L., which resulted in police being called and a restraining order being issued against Kliesmet. Ultimately, the court awarded sole legal custody and primary placement of S.A.L. to Krueger, with supervised visitation to Kliesmet.

Modification of an existing custody or placement order is within the discretion of the circuit court. *Hughes v. Hughes*, 223 Wis. 2d 111, 119, 588 N.W.2d 346 (Ct. App. 1998). We give deference to a circuit court’s discretionary decision regarding custody and placement orders. *Landwehr v. Landwehr*, 2006 WI 64, ¶7, 291 Wis. 2d 49, 715 N.W.2d 180. So long as the circuit court applied the correct legal standard to the evidence before it and reached a reasonable

conclusion, we affirm its decision. *Hughes*, 223 Wis. 2d at 119-20. The circuit court’s findings of fact are affirmed unless they are clearly erroneous, and we review the court’s application of the correct legal standard de novo. *Id.*; see also WIS. STAT. § 805.17(2).

Kliesmet does not specifically challenge the circuit court’s factual findings or the court’s consideration of the evidence in light of WIS. STAT. § 767.41(5). Instead, the first issue raised in Kliesmet’s appeal is that the guardian ad litem in the case presented an “illegally made or obtained recording” during “the pretrial” when there was “no ability to object to its use or presentation.” See WIS. STAT. § 885.365. The record shows that both parents recorded conversations between S.A.L. and Kliesmet but that no recording was admitted or used at trial. Stepfather Matthew Krueger did testify regarding his recollection of one recorded exchange between Kliesmet and S.A.L. in which Kliesmet used profanity. But Krueger personally witnessed this exchange, and such testimony from personal recollection of a conversation independent of a recording is admissible under the law. See *State v. Maloney*, 161 Wis. 2d 127, 130-31, 467 N.W.2d 215 (Ct. App. 1991).

At a November 21, 2019, status conference, when the guardian ad litem read a transcript of the same conversation to the judge, Kliesmet indicated that he agreed with it. In any event, there is no evidence that the circuit court relied on the recording or a transcript thereof in reaching the decision now on appeal, much less that it “weighed heavily on the case” as Kliesmet asserts. To the extent the contents of the recording may have formed part of the basis for the court’s finding that Kliesmet’s “vulgarity and inappropriateness” and inability to get along with others could lead to emotional abuse of S.A.L., we cannot conclude this factual finding was clearly erroneous in view of the numerous other instances of Kliesmet’s aggression and profanity in the record, including physical violence against his father, vulgarity directed toward his mother,

and vulgarity in front of his child (witnessed by Kliesmet's mother). Thus, even assuming that recording the conversation at issue constituted a violation of WIS. STAT. § 885.365, the circuit court committed no error warranting reversal of its order.

Kliesmet also asserts that he was “the only honest witness to be considered” and that the other witnesses at trial were acting with improper motives and collusion. It is the function of the circuit court, not this court, to assess the weight and credibility of testimony. *Mullen v. Braatz*, 179 Wis. 2d 749, 756, 508 N.W.2d 446 (Ct. App. 1993). The circuit court made detailed findings on the record regarding the credibility of all of the witnesses at trial, and we will not upset those findings absent evidence that they were clearly erroneous. *See id.* Kliesmet has not provided any such evidence, only bald assertions.

Finally, Kliesmet asserts that the actions of the guardian ad litem were improper or illegal and warrant reversal of the circuit court's order. Our review of the record does not reveal any such inappropriate actions by the guardian ad litem. Contrary to Kliesmet's claim that she testified in violation of WIS. STAT. § 767.407, the trial transcript shows that the guardian ad litem did not provide testimony. She called and cross-examined witnesses, proffered exhibits, and advocated for S.A.L.'s best interests as she saw fit; she fulfilled the statutory role of a guardian ad litem. *See* § 767.407(4); *Haugen v. Haugen*, 82 Wis. 2d 411, 418, 262 N.W.2d 769 (1978). Nor was there any evidence that the guardian ad litem was incompetent or unfit for her role in this matter.

We conclude that Kliesmet fails to show that the circuit court made erroneous factual findings or applied incorrect legal standards. The court's decision to modify S.A.L.'s placement

is supported by rational factual findings appropriately applied to the factors enumerated in WIS. STAT. § 767.41(5). Therefore,

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