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DISTRICT IV

June 8, 2023

To:

Hon. Todd P. Wolf
Circuit Court Judge
Electronic Notice

Kimberly Stimac
Clerk of Circuit Court
Wood County Courthouse
Electronic Notice

Matthew Bentivegna
Electronic Notice

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Victoria Krzykowski
Electronic Notice

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

2022AP1368 Victoria Krzykowski v. Matthew Bentivegna (L.C. # 2016FA159)

Before Fitzpatrick, 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).

Victoria Krzykowski, pro se, appeals an order of the Wood County Circuit Court. The order granted joint legal custody of the parties' children to Krzykowski and the father of the children, Matthew Bentivegna (who is also pro se in this appeal). The order awarded primary physical placement of the parties' two minor children to Bentivegna. For the reasons discussed below, we summarily affirm the order of the circuit court.

Krzykowski and Bentivegna have three children together. Coral, the oldest, is now about 20 years old, and the portions of the order of the circuit court concerning Coral are not appealed

by Krzykowski. The parties have two minor children who we will refer to as "K." and "Z." or "the minor children."

In June 2017, the parties entered into a stipulation concerning, among other things, the legal custody and physical placement of their three children. Based on the stipulation, the circuit court ordered that Bentivegna shall have primary physical placement of K. and Z., and Krzykowski shall have periods of physical placement with the minor children consistent with a detailed schedule drafted by the parties.

In September 2019, Bentivegna filed in the circuit court a motion pursuant to WIS. STAT. § 767.481(2) (2021-22)[1] requesting permission from the court to relocate the minor children from Wood County to Dane County. Krzykowski objected to Bentivegna's request to relocate the minor children and filed a motion requesting that she be awarded sole legal custody and primary physical placement of the minor children.

A trial on those motions was held in August 2021. At the end of the trial, the circuit court did not grant Bentivegna's motion to relocate the children or Krzykowski's request for sole legal custody. The court continued primary physical placement of the minor children with Bentivegna and amended in some respects Krzykowski's physical placement schedule with the minor children. Krzykowski requests that this court reverse the circuit court's order and remand for a new trial on the issues of legal custody and physical placement of K. and Z.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Krzykowski argues, first, that the circuit court erred in not admitting into evidence treatment records of a counselor who met with Krzykowski and Coral. The counselor did not testify at the trial, and neither did a "custodian" of the records. Accordingly, our analysis is governed by the following hearsay exceptions:

> (6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. *A* memorandum, report, *record*, or data compilation, in any form, *of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness*, or by certification that complies with [WIS. STAT. §] 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.
>
> (6m) PATIENT HEALTH CARE RECORDS.
>
> ….
>
> (b) *Authentication witness unnecessary*. *A custodian or other qualified witness required by sub. (6) is unnecessary* if the party who intends to offer patient health care records into evidence at a trial or hearing does one of the following *at least 40 days before the trial* or hearing:
>
> 1. Serves upon all appearing parties an accurate, legible and complete duplicate of the patient health care records for a stated period *certified by the record custodian*.
>
> 2. Notifies all appearing parties that an accurate, legible and complete duplicate of the patient health care records for a stated period *certified by the record custodian* is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

WIS. STAT. § 908.03(6), (6m)(b)1.-2. (emphasis added). The counseling records were filed in the circuit court approximately five months before trial, and counsel for Krzykowski initially proffered the records to the circuit court without supporting testimony. In ruling that the counseling records were not admissible pursuant to the hearsay exceptions already noted, the

circuit court stated: "[The packet of counseling records] in its entirety will not come into evidence. There has been no testimony regarding the accuracy of the report or any testimony from [the counselor] regarding the report, so [the packet of counseling records] will not be received in to evidence at this time." Immediately thereafter, Krzykowski testified that she was provided those records by the counselor, and that she believed those records were true and accurate copies of the counselor's records. The circuit court then ruled: "[Krzykowski] is not a custodian of the records. She has no ability to authenticate the records. It's right in the statute who the individuals are that are allowed to do that. She is not one of them, so I, again, will not receive [the packet of counseling records] into evidence at this time."

As noted, WIS. STAT. § 908.03(6m)(b)1.-2. state that there is an exception to the hearsay rule if patient healthcare records are offered into evidence through a certification from a records custodian. Here, there is no dispute that the records were not certified by a records custodian. In the alternative, § 908.03(6) and (6m)(b) allow patient healthcare records to be admitted into evidence through the testimony of a "qualified witness."[2] We agree with the circuit court that there was insufficient evidence in the record to establish that Krzykowski was a witness qualified by personal knowledge to testify regarding the accuracy and completeness of the contents of the counseling records. Instead, without setting forth a basis for her assertion, Krzykowski testified to her conclusory assertion that she thought that the records were accurate and complete. In sum, Krzykowski has not shown that there was an error of law made by the circuit court or that the circuit court erroneously exercised its discretion in its ruling.

[2] As already discussed, neither the counselor nor the custodian of the records testified at trial.

Second, Krzykowski argues that the circuit court erred in excluding from evidence testimony and exhibits regarding events that occurred prior to June 27, 2017. As noted, the parties entered into a stipulation on June 27, 2017 resolving, among other matters, the issues of legal custody and physical placement of their three children. The circuit court entered an order encompassing the terms of that stipulation. Pertinent to this appeal, the August 2021 trial concerned Krzykowski's motion for a modification of the order on legal custody and physical placement of K. and Z.

Near the beginning of the August 2021 trial, Bentivegna and the guardian ad litem objected to Krzykowski's testimony concerning particular events that occurred prior to the June 2017 stipulation. The basis for the objections was that the issue before the court was whether there had been "a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement" pursuant to WIS. STAT. § 767.451(1)(b)1.b.[3] In ruling on the objections, the circuit court carefully reviewed the terms of the June 2017 stipulation and order. The court then reasoned:

[3] That statute reads in pertinent part:

> **Revision of legal custody and physical placement orders**.… [T]he following provisions are applicable to modifications of legal custody and physical placement orders:
>
> (1) SUBSTANTIAL MODIFICATIONS.
>
> ….
>
> (b) *After 2-year period.*
>
> 1. … [U]pon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a

(continued)

> If I start allowing issues to be relitigated, then there would be no ending to these type of situations. It's not going to be the case, so given that situation I'm only [going to] allow evidence to come in … that occurred since June 27th of 2017 then.

According to Krzykowski, the circuit court erred because the June 2017 stipulation and order was temporary as a portion of the order would be "reviewed in January 2018" and, as a result, it was not an order "affecting legal custody" or "substantially affecting physical placement." This contention fails out of the gate because Krzykowski did not make this argument in the circuit court and has, therefore, forfeited the argument on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727 (it "is essential to the efficient and fair conduct of our adversary system of justice" for the arguments raised on appeal to have previously been made in the circuit court). In addition, in considering the merits of Krzykowski's argument, her contention about the June 2017 stipulation and order is incorrect. Rather, the context and the substance of the stipulation and order establish that it was not a temporary agreement for only approximately four months as Krzykowski now asserts. We agree with the circuit court that the June 2017 stipulation was a "global agreement" and "very detailed." Indeed, the stipulation concerned the specifics of physical placement of the children "[d]uring the school year," during the summer, on holidays, for birthdays of the parties and the children, and for school breaks. The stipulation also set forth which party would claim the

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> parent may spend with his or her child *if the court finds all of the following*:
>
> a. The modification is in the best interest of the child.
>
> b. *There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement*.

WIS. STAT. § 767.451(1)(b)1.a.-b. (emphasis added).

income tax exemption for the children "[b]eginning with the 2017 tax year." Further, the transcript from the June 27, 2017 hearing shows that the purpose of the January 2018 review was solely to confirm that two of the children were, in fact, seeing a therapist as the parties agreed in the stipulation. Accordingly, the order incorporating the June 27, 2017 stipulation was an "order affecting legal custody" and an order "substantially affecting physical placement." *See* WIS. STAT. § 767.451(1)(b)1.b.

With that in mind, we now discuss the circuit court's ruling that barred certain evidence. Krzykowski does not dispute that our review of this issue requires us to determine whether the circuit court erroneously exercised its discretion. "Trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial; we will upset their decisions only where they have erroneously exercised that discretion." ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. We agree with the circuit court that, pursuant to the standards in WIS. STAT. § 767.451(1)(b)1.b., the events prior to the June 2017 stipulation and order were not material to the decision before the court. WISCONSIN STAT. § 904.03 states that, even if it is relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The circuit court was well within its discretion to exclude such evidence as irrelevant and unduly delaying presentation of material issues.

At any rate, there is a separate and sufficient reason to affirm the circuit court. Krzykowski's allegations of abuse by Bentivegna were in evidence and considered by the circuit court in its ruling. Specifically, Krzykowski's expert witness, Dr. Goodnature, testified at trial in detail regarding Bentivegna's online communications with Krzykowski, and Krzykowski's

attorney was allowed to play a recording of Bentivegna yelling at Krzykowski that Krzykowski mistakenly claims on appeal was not entered into evidence. In addition, those allegations from Krzykowski regarding purported abuse by Bentivegna were discussed in Dr. Goodnature's report that was entered into evidence. Moreover, the circuit court took Krzykowski's assertions about those allegations into account in its ruling. As a result, if there was any error on the part of the circuit court in its evidentiary ruling (and we are not concluding that there was such error), then the error was harmless. *See* WIS. STAT. § 805.18(1) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.").[4]

IT IS ORDERED that the order appealed from is summarily affirmed under 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

[4] To the extent Krzykowski has attempted to make other arguments in her briefing in this court, we reject those arguments as undeveloped. ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (stating that this court may decline to consider undeveloped arguments because we "cannot serve as both advocate and judge").