COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2660 **Cir. Ct. No. 2008FA332**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE PLACEMENT OF A. M. K.:

BELVA M. BOWDEN,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

AMY S. KORSLIN,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. Belva Bowden appeals an order of the circuit court requiring her to pay child support to her former partner, Amy Korslin, the biological parent of the child they raised together until their relationship ended. Bowden argues, and Korslin concedes, that the circuit court lacked statutory authority to order Bowden to pay child support. Korslin develops no argument as to why the circuit court had authority to order Bowden to pay child support in light of that concession. We therefore reverse that portion of the circuit court's order requiring Bowden to pay child support and remand to the circuit court with instructions to order the repayment of all child support payments made.

¶2 Korslin cross-appeals an order of the circuit court granting Bowden certain visitation rights. Korslin's primary argument on appeal is that the circuit court failed to properly apply the test for determining whether a non-parent's request for visitation is in a child's best interests as set forth in the United States Supreme Court's decision in ***Troxel v. Granville***, 530 U.S. 57 (2000), and subsequent Wisconsin cases interpreting ***Troxel***. We disagree and affirm that portion of the order granting Bowden visitation rights.

BACKGROUND

¶3 Bowden and Korslin shared a committed relationship for many years. Korslin gave birth to a daughter, A.M.K., in 1998. Bowden and Korslin raised A.M.K. together in the same residence until 2006, when they ended their relationship. Although Bowden is not A.M.K.'s biological parent, A.M.K. views Bowden "like a mom."

¶4 After ending their relationship in 2006, Bowden and Korslin entered into a written agreement, which provided in pertinent part, that they would have equal shared placement of A.M.K. and that they would share A.M.K.'s

"expenses." However, in 2008, Korslin informed Bowden that she would no longer follow the agreement and that Bowden would have visitation rights only every other weekend. Bowden filed a petition in the Wood County Circuit Court for an order establishing equal placement of A.M.K., pursuant to the 2006 written agreement and the court's equitable powers as set forth in ***Holtzman v. Knott***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995).

¶5 Following multiple hearings in which testimony was taken, the circuit court orally ruled that it was in A.M.K.'s best interests for the parties to have a set schedule in which Bowden would have greater visitation[1] rights than what Korslin wished, but not equal placement of A.M.K., as Bowden had requested in her petition. The court granted Bowden visitation every other weekend and one evening every other week during the school year, plus every other week during the summer and on certain holidays.

¶6 After the court made its oral ruling, Korslin requested the court to order Bowden to pay child support. Although the circuit court initially questioned whether it had legal authority to order child support, the court ultimately determined that it had such authority under the "equitable parent doctrine" and the

[1] What the circuit court referred to as "placement" rights, we refer to as "visitation" rights to make clear that the circuit court granted Bowden visitation and not physical placement. *See generally* ***Lubinski v. Lubinski***, 2008 WI App 151, ¶¶7-9, 314 Wis. 2d 395, 761 N.W.2d 676 (explaining the differences between physical placement and visitation). Physical placement generally refers to the allocation of placement between two parents following a determination as to legal custody. *See* ***id.***, ¶7; WIS. STAT. § 767.41 (2011-12). Visitation generally allows a non-parent who has a parent-like relationship with a child to maintain contact with the child when such contact is in the child's best interests, but it does not incorporate the rights associated with legal custody or physical placement. *See* ***Lubinski***, 314 Wis. 2d 395, ¶9; *see also* ***Holtzman v. Knott***, 193 Wis. 2d 649, 681-83, 533 N.W.2d 419 (1995).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

2006 written agreement between the parties, in which they agreed to share A.M.K.'s "expenses." Based on the above, the circuit court ordered that Bowden "pay[] 17% of her gross income as child support" in accordance with administrative guidelines. The circuit court entered Findings of Fact, Conclusions of Law, and Judgment on the Petition reflecting its oral ruling.

¶7 Bowden moved for reconsideration of the court's decision on child support, and Korslin moved for reconsideration of the court's visitation decision. As relevant for purposes of this appeal, the court denied both motions and entered an order reflecting its reasoning. As to Bowden's motion, the court determined that it had authority to order child support, but lowered the child support obligation. As to Korslin's motion, the court denied Korslin's request to reconsider the visitation schedule but granted her request to reconsider and to make modifications to Bowden's authority to travel out of state with A.M.K. Bowden appeals the order as it pertains to child support, and Korslin cross-appeals the order as it pertains to visitation. Additional pertinent facts are discussed below where necessary.

DISCUSSION

A. Child Support

¶8 Bowden takes the position that the circuit court lacked authority to order child support because child support cannot be ordered except as provided under the child support statute, WIS. STAT. § 767.511(1),[2] and nothing in the

[2] WISCONSIN STAT. § 767.511(1)(a) provides in relevant part:

> **(1)** WHEN ORDERED. When the court approves a stipulation for child support under s. 767.34, enters a judgment of

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statute suggests that a court may order a non-parent to pay child support to a parent. In response, Korslin concedes that there is no statutory basis for ordering a non-parent to pay child support to a parent. Nevertheless, Korslin states, in conclusory terms and without a fully developed argument, that, "if the Court is prohibited from ordering child support in this action because of a lack of statutory authority, it is also prohibited from entering a [visitation] order."

¶9 We agree with the parties' apparent stipulation that there is no statutory basis upon which a court may order a non-parent to pay child support to the biological parent. Korslin makes no argument as to why the circuit court had authority to order child support in light of her concession that there is no statutory basis to order Bowden to pay child support.[3] Because Korslin asserts no grounds

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> annulment, divorce, or legal separation, or enters an order or a judgment in a paternity action or in an action under s. 767.001(1)(f) or (j) [child support action and action for periodic family support payments, respectively], 767.501 [action to compel support], or 767.805(3) [action when paternity acknowledged], the court shall do all of the following:
>
> (a) Order either or both parents to pay an amount reasonable or necessary to fulfill a duty to support a child….

[3] As we have noted, the circuit court determined that it had authority to order child support under the equitable parent doctrine. An "equitable parent" is a person who through a judicial determination is able to exercise the rights and responsibilities of a biological parent. *See* ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶32, 270 Wis. 2d 384, 677 N.W.2d 630. We decline to apply that doctrine here because Korslin points to no Wisconsin appellate case in which the equitable parent doctrine has been invoked for the purpose of ordering a non-parent to make child support payments to the biological parent of the child, and Korslin provides no argument as to why we should invoke the doctrine in this case.

The circuit court also determined that it had authority to order child support based on the parties' 2006 written agreement. Although paragraph four of the agreement provides that "the parties shall share all expenses of [A.M.K.]," the agreement nowhere mentions child support. We will not read language into the parties' agreement. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345 ("When the terms of a contract are plain and unambiguous, we will construe the contract as it stands."). Moreover, even if paragraph

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upon which she is entitled to receive child support, we reverse the order of the circuit court as it pertains to child support. We remand to the circuit court to order the repayment of all child support payments made.[4]

B. Visitation

¶10 We understand Korslin's primary argument on appeal to be that the court erroneously exercised its discretion by improperly applying the test for determining whether a non-biological parent's request for visitation is in a child's best interests as established in the United States Supreme Court's decision in ***Troxel***, 530 U.S. at 67-70, and our subsequent decisions in ***Roger D.H. v. Virgnia O.***, 2002 WI App 35, ¶¶18-19, 250 Wis. 2d 747, 641 N.W.2d 440, and ***Martin L. v. Julie R.L.***, 2008 WI App 37, ¶¶11-12, 299 Wis. 2d 768, 731 N.W.2d 288.

¶11 Whether to grant or deny visitation to a non-biological parent is within the discretion of the circuit court. ***Roger D.H.***, 250 Wis. 2d 747, ¶9. We will sustain a discretionary determination as long as the circuit court "examined the relevant facts, applied a proper standard of law, and, utilizing a demonstrated rational process, reached a conclusion that a reasonable judge could reach."

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four could somehow be construed as the circuit court did, the circuit court could not sever paragraph four from the remainder of the agreement and enforce only that paragraph because that would defeat the primary purpose of the contract. *See* ***Dawson v. Goldammer***, 2006 WI App 158, ¶16, 295 Wis. 2d 728, 722 N.W.2d 106 (explaining contract rule of severability). The primary purpose of the contract was to create a custody and placement agreement.

[4] Bowden argues that if we reverse the child support order, we should remand with instructions to the circuit court to order the repayment of all child support payments made. This appears to be a sensible suggestion in the interests of judicial economy. In response, Korslin does not provide any alternative suggestion for how the circuit court should proceed on remand in the event we reverse the order as it pertains to child support. We therefore remand to the circuit court with the instructions that Bowden requests.

Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist., 177 Wis. 2d 523, 529-30, 502 N.W.2d 881 (Ct. App. 1993).

¶12 We begin by noting that the parties generally agree that the court properly exercised its discretion in concluding that it had equitable power to consider whether visitation was in the best interests of A.M.K. under the framework provided in ***Holtzman***. In ***Holtzman***, the non-biological parent in a same-sex relationship that had ended brought a petition in circuit court seeking visitation rights to a child she co-parented. ***Holtzman***, 193 Wis. 2d at 659-62. In that context, the supreme court determined that a court has equitable power to consider whether visitation is in the child's best interests when the petitioner proves first that he or she "has a parent-like relationship with the child," and second that "a significant triggering event justifies state intervention in the child's relationship with [the] biological … parent." ***Id.*** at 694.

¶13 To establish that a "parent-like relationship with the child" exists, the petitioner must prove four elements that we need not repeat here because Korslin states in her response brief that, "Korslin does not dispute that Bowden had a parent-like relationship with [A.M.K.]." ***Id.*** at 694-95. We therefore conclude that the circuit court properly found that Bowden established that she has a parent-like relationship with A.M.K., without our conducting any further analysis on the topic.

¶14 To establish a significant triggering event justifying state intervention, the petitioner must prove that the parent "has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference." ***Id.*** at 695. Korslin's only argument as to this requirement is that

the termination of her relationship with Bowden does not amount to a "significant triggering event" justifying state intervention in her relationship with A.M.K. However, the circuit court determined that a significant triggering event occurred, not when the parties ended their relationship, but "when [Korslin] reduced and ultimately terminated [Bowden's] [visitation] schedule with [A.M.K.]." Because Korslin does not raise any argument that the circuit court erred in reaching that conclusion, we understand Korslin to concede that her decision to reduce Bowden's visitation rights amounted to a significant triggering event justifying state intervention.

¶15 Having concluded that the circuit court properly determined that it had equitable powers to consider whether visitation was in the best interests of A.M.K., we turn to the question of whether visitation by Bowden is in A.M.K.'s best interests. To determine whether visitation was in A.M.K.'s best interests, the circuit court applied the principles set forth in ***Troxel*** and Wisconsin case law interpreting ***Troxel***.

¶16 In ***Troxel***, the United States Supreme Court held that a Washington trial court violated a biological mother's fundamental right to make decisions concerning her children by failing to presume that her decision as to how much visitation her children should have with their paternal grandparents was in the children's best interests. ***Troxel***, 530 U.S. at 66-69. The Supreme Court explained that, if a fit parent's decision becomes subject to judicial review, the court must apply the presumption that the parent's determination is in the best interests of the child. ***Id.*** at 70.

¶17 In ***Roger D.H.***, we interpreted ***Troxel***, in the context of grandparent visitation cases, to require courts to apply a rebuttable presumption that a fit

parent's decisions regarding visitation are in the child's best interests. ***Roger D.H.***, 250 Wis. 2d 747, ¶¶18-19. We stated that a court must give presumptive weight to a fit parent's offer of visitation and may not "bas[e] its decision on 'mere disagreement' with the parent." ***Id.***, ¶19 (quoting ***Troxel***, 530 U.S. at 68-69).

¶18 In ***Martin L.***, we explained how courts are to determine whether visitation is in the best interests of the child in light of the presumption that a fit parent acts in the best interests of the child:

> [T]he court is to tip the scales in the parent's favor by making that parent's offer of visitation the starting point for the analysis and presuming it is in the child's best interests. It is up to the party advocating for nonparental visitation to rebut the presumption by presenting evidence that the offer is not in the child's best interests. The court is then to make its own assessment of the best interests of the child.

Martin L., 299 Wis. 2d 768, ¶12. The court purported to apply that framework here.

¶19 At the outset, we observe that the parties' arguments on appeal assume that the presumption stated in ***Troxel*** applies, not only in cases where a grandparent seeks visitation, but also in cases where a former partner of the biological parent of the child seeks visitation. For that reason, we will assume without deciding that the presumption applies here. *See* ***State ex rel. S.M.D. v. F.D.L.***, 125 Wis. 2d 529, 532, 372 N.W.2d 921 (Ct. App. 1985) (we ordinarily will decline to address an issue not raised by the parties).

¶20 The question remains whether the circuit court properly applied the framework provided under ***Martin L.*** for determining whether visitation is in a child's best interests.

¶21 Korslin does not develop an argument in her brief-in-chief that the circuit court used an incorrect starting point for the analysis. However, Korslin argues, for the first time in her reply brief, that the circuit court incorrectly determined that the starting point for the analysis was Korslin's request not to have a set visitation schedule and to have discretion in determining when visitation may occur. Korslin contends in her reply brief that the circuit court should have used as the starting point Korslin's offer to allow Bowden four overnight visits per month, although not in a "set every other weekend schedule."

¶22 We will not address Korslin's argument that the court used an incorrect starting point for the analysis because "[i]t is a well-established rule that we do not consider arguments raised for the first time in a reply brief." ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Accordingly, we assume that the court correctly determined that the starting point for the analysis was Korslin's request that the circuit court not establish a set visitation schedule and that Korslin have discretion in determining when Bowden may have visitation with A.M.K.

¶23 Korslin next argues that the circuit court erroneously exercised its discretion by failing to give her request not to have a set visitation schedule the presumptive weight to which it is entitled under ***Troxel***. However, the court specifically stated in its oral ruling that it "must give special weight to [the] biological parent's decision[s] by first presuming that those decisions are in the child's best interest." The record establishes that the court began its analysis by presuming that Korslin's request not to have a set visitation schedule was in A.M.K.'s best interests and then considered whether Bowden had presented sufficient evidence to rebut the presumption.

¶24 We also understand Korslin to be challenging the court's findings of fact underlying its determination that Bowden rebutted the presumption. Korslin contends that the court erroneously ignored testimony presented by Bowden's witness, Dr. Michael Nelson, a psychologist who prepared a report regarding A.M.K.'s attachment to Bowden, that A.M.K. had not experienced any academic, social, or behavioral problems since the time that Korslin restricted visitation. According to Korslin, Dr. Nelson's testimony established only that A.M.K. would be negatively impacted if Korslin prevented Bowden from having *any* relationship with A.M.K., and the parties agree that Bowden should continue to have a relationship with A.M.K.

¶25 We uphold the circuit court's findings of fact unless they are clearly erroneous. ***Steinbach v. Green Lake Sanitary Dist.***, 2006 WI 63, ¶10, 291 Wis. 2d 11, 715 N.W.2d 195. We will not reweigh the evidence or reassess a witness' credibility; instead, we search the record for evidence supporting findings the circuit court made, not for findings it could have made but did not. ***Dickman v. Vollmer***, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202.

¶26 Dr. Nelson testified that "children are generally benefited by set [visitation] schedules that allow both parties to be active participants in the child's … daily li[fe]." Dr. Nelson also testified that a break in Bowden's relationship with A.M.K. "would be potentially detrimental" to A.M.K. over time and might cause her to suffer academically, emotionally, and behaviorally. Dr. Nelson read the following excerpt from his report: "Total disruption of [A.M.K.'s] contact with [Bowden] … would be expected to result in … compromised function in later life …. Significantly limiting [A.M.K.'s] contact [with Bowden] would be expect[ed] to result in similar, although lesser, harm."

¶27 Nothing in the court's oral ruling suggests that the circuit court determined that Bowden rebutted the presumption based on facts not supported by evidence in the record. The circuit court accurately summarized Dr. Nelson's testimony and was free to accept portions of Dr. Nelson's testimony while rejecting others. *See* ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996) (finder of fact may accept some portions of expert testimony while rejecting others). Here, the circuit court acknowledged Korslin's arguments as to why Dr. Nelson's testimony did not rebut the presumption, but ultimately determined that Dr. Nelson's testimony weighed in favor of Bowden's position that having a set visitation schedule is in A.M.K.'s best interests. Because the court's findings underlying its determination are supported by evidence in the record, we will not disturb those findings.

¶28 Korslin also argues that the circuit court erroneously exercised its discretion by determining that Bowden rebutted the presumption before hearing Korslin's evidence as to why it was in A.M.K.'s best interests that Bowden not have a set visitation schedule. In an overlapping argument, Korslin argues that the circuit court erroneously exercised its discretion because, after determining that Bowden rebutted the presumption, the court told Korslin that she could present evidence to "re-establish the presumption." According to Korslin, the court erroneously "shifted the burden of proof" to her because her decisions regarding visitation must be presumed to be in the best interests of A.M.K., without her having to offer any proof.

¶29 The framework set forth in ***Martin L.*** suggests that it is only after the circuit court has heard all of the evidence that it is in a position to determine whether the evidence presented by the non-biological parent seeking visitation is sufficient to rebut the presumption. However, our review of the record

demonstrates that the circuit court essentially followed the procedure established in ***Martin L.***, even though the court broke down its analysis into two steps. First, the court considered whether the evidence Bowden presented rebutted the presumption, and second, the court provided Korslin an opportunity to present evidence to reestablish that not setting a visitation schedule was in A.M.K.'s best interests. Thus, the court ultimately considered all of the evidence presented by both parties and determined that Bowden met her burden to rebut the presumption. We therefore reject Korslin's argument that the court improperly applied the framework set forth in ***Martin L.***

¶30 Finally, Korslin argues that the circuit court should have applied the visitation statute, WIS. STAT. § 767.43, to make its own assessment as to what was in A.M.K.'s best interests, instead of applying the criteria set forth under the physical placement statute, WIS. STAT. § 767.41(5). Korslin explains that under WIS. STAT. § 767.43(1), a court may grant a non-parent "reasonable visitation rights" and nothing in that statute permits a court to consider the factors set forth in the physical placement statute to determine what constitutes "reasonable visitation rights."

¶31 Bowden responds by arguing first that Korslin has forfeited her challenge because she did not make the argument in the circuit court, and second that nothing precludes a court from considering the best interest factors set forth in WIS. STAT. § 767.41(5) in making its own assessment. Bowden states that the best interest factors listed under § 767.41(5) apply "not because this case was brought under the family code—it wasn't—but because § 767.41(5) lists generally applicable factors to consider whenever the best interests of a child are at issue."

¶32 Korslin replies that she raised the issue in the circuit court. Specifically, Korslin points out that, at the hearing on the motions for reconsideration, she objected to the order of the court on the ground that it "extended third party visitation rights in [a] manner such as one would get in a divorce action" and "is in excess of what the law currently contemplates under a nonparent … visitation order."

¶33 We observe that Korslin points to no part of the record in which she specifically raised the argument in the circuit court that she now raises on appeal. However, to the extent that Korslin generally raised the argument in the circuit court by questioning the court's authority to enter the order establishing a set visitation schedule, we conclude that the argument lacks merit.

¶34 To the extent that Korslin is arguing that WIS. STAT. § 767.43 is the statute that governs whether Bowden is entitled to visitation, we disagree. In ***Holtzman***, the supreme court held that WIS. STAT. § 767.245(1) (1991-92), renumbered WIS. STAT. § 767.43(1) by 2005 Wis. Act 443, does not provide a basis upon which a non-parent in a dissolved same-sex relationship could seek visitation rights to her former partner's biological child. ***Holtzman***, 193 Wis. 2d at 667. The supreme court explained that the legislature did not intend for the visitation statute to apply in cases where there had been no dissolution of marriage, and in this case, similar to ***Holtzman***, the parties had never been married.

¶35 Moreover, to the extent that Korslin is arguing that the circuit court erred in applying the best interest factors set forth in the physical placement statute, we again disagree. Although the physical placement statute does not govern this case, we are aware of no authority that precludes a court from

considering the best interest factors set forth in that statute as guidance. Indeed, in ***F.R. v. T.B.***, 225 Wis. 2d 628, 640-41, 593 N.W.2d 840 (Ct. App. 1999), we explained that the best interest factors set forth under the physical placement statute provide "the most extensive explanation of what a trial court should consider when determining the 'best interests of the child,'" and therefore, when the term is not otherwise defined, a court may consider those factors in determining what is in the best interests of a child. ***Id.***

¶36 Based on the above, we conclude that the circuit court properly exercised its discretion in granting Bowden a set visitation schedule. The court examined the relevant facts and, based on the legal standard set forth in ***Martin L.***, reasonably concluded that a set visitation schedule was in A.M.K.'s best interests.

CONCLUSION

¶37 We affirm that portion of the order of the circuit court granting Bowden a set visitation schedule, and we reverse that portion of the order of the court requiring Bowden to pay child support. We therefore remand to the circuit court with instructions to order the repayment of all child support payments.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.