COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2704 **Cir. Ct. No. 2013FA64**

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

STATE OF WISCONSIN,

PETITIONER,

BARBARA FLIETNER,

PETITIONER-RESPONDENT,

V.

JOSEPH A. DURAND, JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed*.

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Joseph Durand, Jr., appeals an order determining legal custody and physical placement of his daughter, M.S.D. Durand argues the circuit court erroneously exercised its discretion by requiring M.S.D.'s overnight placement with Durand to be supervised by another adult. He also argues the court violated his right to procedural due process by including certain provisions in its written order that were not contained in its oral ruling. We reject Durand's arguments and affirm.

BACKGROUND

¶2 Durand and Barbara Flietner began living together in October of 2006 or 2007. Their daughter, M.S.D., was born in January 2010. Durand and Flietner continued to live together, with M.S.D., until January 2013.

¶3 In August 2013, Durand petitioned for joint legal custody and equal physical placement of M.S.D. Following a hearing before a family court commissioner, a temporary order regarding physical placement was entered on September 9, 2013. The temporary order granted primary physical placement of M.S.D. to Flietner. Durand was granted periods of physical placement every Wednesday, from 5:00 p.m. to 8:00 p.m., and every other weekend, from 6:00 p.m. on Friday until 6:00 p.m. on Sunday. The temporary order required that M.S.D.'s overnight placement with Durand be supervised by at least one of his parents.[1] The temporary order also required Durand to submit to random drug and

[1] On appeal, the parties dispute whether Durand's parents actually supervised his overnight placement with M.S.D. However, this dispute is not material to our resolution of the issues presented on appeal, and, accordingly, we do not address it further.

alcohol testing conducted by the Park Falls Police Department once every two weeks.

¶4 The circuit court held hearings on Durand's petition for legal custody and physical placement of M.S.D. on May 19 and July 31, 2014. Much of the evidence presented at the hearings focused on Durand's history of drug and alcohol use. Durand, who was forty-six years old at the time of the hearings, conceded he had been addicted to drugs since he was seventeen. He admitted he was hospitalized at Winnebago Mental Health Institute in 2002 as a result of his drug use. He also conceded he was involuntarily committed for drug dependency in 2007, pursuant to a three-party petition. The 2007 commitment was extended for six months in January 2008. Durand further conceded he was arrested in Minnesota in December 2009, about one month before M.S.D.'s birth, because he was "high on cocaine." When asked whether he went into treatment as a result of that arrest, Durand responded, "I don't think I did, no. If I went to treatment every time I relapsed, I would be in treatment quite a bit."

¶5 Flietner testified she was aware of Durand's drug use from the beginning of their relationship, and she had personally observed him using crack cocaine. In 2007, she was one of the signatories to the three-party petition to commit Durand for drug dependency. Flietner testified that, on one occasion, she had to deposit $500 in a mailbox so that Durand's drug dealers would release him from a drug house in Lac du Flambeau. She also described an occasion when she provided Durand's employee, Charles Hawn, with money so that he could obtain Durand's release from a drug house.

¶6 Flietner further testified that, on one occasion in 2008 or 2009, Durand abandoned her in the Twin Cities without money or a car in order to use drugs. She explained:

> [Durand] knew that he couldn't go to the Cities alone because his addictions would kick in. So I went with him almost all the time when he went to the Cities, either I did or some of his coworkers would. And he insisted on washing his truck late at night, and I fought it as hard as I could, because I knew what that meant for me, and he never did show up. So I had to call friends from Park Falls to come and get me.

¶7 Flietner also testified that, on about June 2, 2012, Durand disappeared, and she later found out he was at a bar near Fifield. When Flietner arrived at the bar to retrieve Durand at about 3:00 a.m., he was belligerent and very intoxicated. Later that morning at their residence, Durand, who was still intoxicated, roamed through the house looking for weapons and threatening to harm himself and others. Flietner called 911, and Durand was subsequently arrested and underwent a mental health evaluation. Durand was released a short time later, and the police told Flietner he had promised he was going to check himself into treatment. However, he never did.

¶8 Finally, Flietner described an occasion in January 2013 when Durand had promised to make a birthday dinner for his adult son, Chase, at their home. However, Durand disappeared the night before, with no explanation. When he returned, he acknowledged he had been out drinking.

¶9 Charles Hawn, Durand's former employee, corroborated some of Flietner's testimony. Specifically, he testified the foreman at Durand's scrap yard received a phone call informing him that people were holding Durand in Lac du Flambeau and "money would have to be delivered to them to get [Durand] out."

Hawn and another man then drove to Lac du Flambeau and paid money to retrieve Durand. When Durand was released, he was "very beat up," with broken or cracked ribs.

¶10 Hawn also described an incident in which Durand abandoned Hawn's son, Danny, and Durand's son, Chase, in Eau Claire with no money and no vehicle while they were working on a job. According to Hawn, Chase and Danny could not get in touch with Durand, and someone else had to go to Eau Claire to pick them up. In his testimony, Chase acknowledged that Durand once left him stranded at a motel in Hastings, Minnesota, with no vehicle. He testified he had to call his grandmother to give him a ride home. He did not know where Durand was at the time.

¶11 Hawn further testified that, while he was working for Durand at the scrap yard, Durand would disappear approximately once every three months without any notice about where he was going or when he would be back. On these occasions, it fell to Hawn to "scrape up" payroll for Durand's employees. Durand's mother similarly testified Durand would go on "benders" and disappear when he was using drugs.

¶12 Durand did not dispute his history of drug and alcohol abuse, but he asserted he had not used any illegal drugs since M.S.D.'s birth, aside from marijuana on one occasion. However, other evidence contradicted Durand's claim. For instance, Durand's daughter, S.T., who was sixteen as of the May 19 hearing, testified she was at Flietner's home with Durand and M.S.D. one weekend in the spring of 2013. Durand was preparing food, but he then left the house, telling S.T. he needed to run to town to get something for dinner. S.T. stayed with M.S.D. until Flietner got home. Durand did not return to the house

that night. He called at 8:00 p.m. the following day and told S.T. he was at a hotel. S.T. testified Durand later admitted to her that he had been using drugs all weekend. Durand told her he had "been getting into some stuff that was up there … and that his usage of the local drugs … was beginning to scare him."

¶13 In addition, Flietner testified to a conversation she had with Durand's son, Chase, on Father's Day weekend of 2013. According to Flietner, Chase told her that he had traveled to Park Falls the previous Friday to get Durand out of a drug house and had witnessed Durand using cocaine. In his testimony, Chase stated he did not remember this conversation. However, he admitted telling Hawn in June 2013 that Durand was still using drugs.

¶14 Durand submitted documentation at the May 19 hearing showing that his biweekly drug tests had been negative since July 12, 2013. However, he conceded the tests were not actually random, as required by the temporary order. Instead, Durand had the tests done on Fridays to "make it consistent[.]" Further, S.T. testified she saw a drug test kit in Durand's truck in September 2013. She described the kit as one that "you can buy and test yourself to see … if you have been using drugs or if you are clean enough to see if you can go and get tested and it won't show up if you have been using drugs."

¶15 The circuit court issued an oral ruling at the close of the July 31, 2014 hearing. The court awarded Flietner sole legal custody of M.S.D. However, the court "expand[ed]" Durand's periods of overnight physical placement to "two two-night weekends per month one month[,] followed by … three two-night weekends per month alternating months, all overnight placement to be supervised." The court stated Durand's periods of physical placement on Wednesday nights would continue and would remain unsupervised.

¶16 In support of its ruling, the court noted that, although Flietner had always been M.S.D.'s primary caregiver, there was evidence Durand was "a fine father," was involved in M.S.D.'s life, and M.S.D. would benefit from time with him. The court also noted Flietner "wasn't questioning [Durand's] devotion as a father," and the court did not "question his ability as a father when he is acting as a father and when he is not absent because of drug or alcohol use." However, the court explained that Durand's history of drug and alcohol use was a "big concern." The court further stated there was a "very strong indication in the evidence that that concern has not gone away."

¶17 The court acknowledged that Durand had been passing his required drug tests. However, the court stated that fact did not allay its concerns about Durand's drug use because "the evidence is that [Durand's] drug and alcohol use was episodic. It was not day-to-day ingestion of drugs and alcohol. It was these episodic periods when [Durand] would binge with drugs or alcohol or both." The court also credited S.T.'s testimony that she observed a drug testing kit in Durand's vehicle, which the court surmised "might indicate evidence of [Durand] monitoring his drug and alcohol use so as to not run afoul of drug tests." The court further stated there was "lots of evidence" Durand had continued to use drugs and alcohol "not only since the time of [M.S.D.'s] birth but into fairly recent times, certainly well into the year 2013."

¶18 The court conceded there was no evidence Durand had ever abused drugs or alcohol in the presence of his children.[2] However, the court stated, "[T]hat's not my concern, that he is going to be using drugs or alcohol in [M.S.D.'s] presence. My concern is when he does find himself subject to overwhelming urges to use drugs and alcohol that is his focus rather than anything else[.]" The court explained:

> We heard from Mr. Hawn about how Mr. Durand would disappear for periods of time and it fell to Mr. Hawn to manage the business. We heard quite a few instances of Mr. Durand not being around the home when he lived with Ms. Flietner for periods of time. I heard evidence that at times when there were family events involving the children planned that they didn't happen, inferentially because Mr. Durand was involved in some drug or alcohol use.
>
> Equally disturbing are these instances where Mr. Durand strands people, I presume not due to any ill will or malice, but his focus is then directed to drugs or alcohol and that's what he does. It doesn't matter whether he is in a different city and whether he is stranding someone without a vehicle in a hotel or not. He may not mean to do it, but it's a problem.
>
> Ms. Flietner said, and I agree with her, [M.S.D.] is not old enough to fend for herself. [S.T.] is. Chase is. [M.S.D.] is not, and that's a big concern.
>
> Mr. Durand has been using drugs well into the year 2013 I find based upon the evidence presented, and I don't have the confidence that he can be trusted not to continue to engage in that kind of behavior that he has engaged in for a long time during times when he needs to be responsible for [M.S.D.] … under those circumstances.

[2] Contrary to the court's finding, there was some evidence that Durand used drugs in his children's presence—specifically, Flietner's testimony that Chase told her he observed Durand using cocaine. However, Flietner does not argue on appeal that the court's finding that Durand never used drugs or alcohol in the presence of his children was clearly erroneous. We therefore accept the court's finding as correct for purposes of our review.

¶19 The court subsequently reiterated that it was not concerned Durand was going to abuse M.S.D. or use drugs or alcohol in front of her. Rather, the court was concerned Durand "may not be there for her." The court stated, "[I]f [Durand] disappears, then there needs to be another responsible adult there to take over."

¶20 A written order concerning legal custody and physical placement was entered on October 10, 2014. Durand now appeals, raising two arguments: (1) the circuit court erroneously exercised its discretion by requiring M.S.D.'s overnight placement with him to be supervised; and (2) the court violated his right to procedural due process by including certain provisions in the written order that were not contained in its oral ruling.

DISCUSSION

I. Supervised placement

¶21 "Custody and placement decisions are committed to the [circuit] court's discretion, and we sustain them on appeal when the court exercises its discretion based on the correct law and the facts of record, and employs a logical rationale in arriving at its decision." ***State v. Alice H.***, 2000 WI App 228, ¶18, 239 Wis. 2d 194, 619 N.W.2d 151. Discretionary decisions may involve underlying questions of law and fact. *See* ***Covelli v. Covelli***, 2006 WI App 121, ¶13, 293 Wis. 2d 707, 718 N.W.2d 260. We review any questions of law independently, but we will not disturb the circuit court's factual findings unless they are clearly erroneous. ***Id.***

¶22 When making a physical placement order, a court "shall consider all facts relevant to the best interest of the child." WIS. STAT. § 767.41(5)(am).[3] "A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health." Sec. 767.41(4)(b). However, the court "shall make such provisions as it deems just and reasonable concerning the … physical placement of any minor child of the parties, as provided in [§ 767.41]." Sec. 767.41(1)(b).

¶23 Durand observes that WIS. STAT. § 767.41 mentions supervised physical placement in only two locations: (1) § 767.41(4)(e), which requires electronic communication between a parent and child to be supervised if the parent's physical placement is supervised; and (2) § 767.41(6)(g), which states that, when a court finds a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, the court "shall provide for the safety and well-being of the child and for the safety of the party who was the victim of the battery or abuse" by taking one or more specified actions, including ordering the child's placement with the abusive party to be supervised. Durand asserts, and Flietner does not dispute, that these provisions are inapplicable in the instant case. Because no other provision in § 767.41 expressly refers to supervised placement, Durand argues the circuit court lacked authority to order supervised placement.

¶24 We disagree. Under Durand's interpretation, a court could not impose any restriction on a party's physical placement unless WIS. STAT. § 767.41

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

expressly described the particular restriction. That result would be inconsistent with the "wide discretion" granted to circuit courts with respect to physical placement determinations. *See* ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). Although Durand correctly observes that a circuit court has "no power in awarding placement other than that provided by statute[,]" ***Wolfe v. Wolfe***, 2000 WI App 93, ¶17, 234 Wis. 2d 449, 610 N.W.2d 222, the legislature could not possibly have specified in § 767.41 every restriction on physical placement that a court might reasonably impose. It is therefore absurd to suggest that a court is limited to imposing only those restrictions expressly mentioned in the statute, particularly where the statute grants a court authority to "make such provisions [regarding physical placement] as it deems just and reasonable[.]" *See* § 767.41(1)(b).[4]

¶25 Citing three cases, Durand next argues that, "for a court to properly exercise discretion and impose a supervision restriction on placement, a court must conclude that supervision is necessary due to the substantial risk of serious physical, emotional, or mental harm to the child." *See* ***Alice H.***, 239 Wis. 2d 194; ***Lange v. Lange***, 175 Wis. 2d 373, 502 N.W.2d 143 (Ct. App. 1993); ***Schwantes v. Schwantes***, 121 Wis. 2d 607, 360 N.W.2d 69 (Ct. App. 1984). However, the cases Durand cites do not actually support this proposition.

[4] Our conclusion that WIS. STAT. § 767.41 grants circuit courts broad discretion to order supervised placement does not render § 767.41(6)(g) superfluous. *See* ***State v. Matasek***, 2014 WI 27, ¶12, 353 Wis. 2d 601, 846 N.W.2d 811 ("Statutes are interpreted to give effect to each word and to avoid surplusage."). Section 767.41(6)(g) is not a permissive provision—when a court determines a party has engaged a in pattern or serious incident of interspousal battery or domestic abuse, the court is required to "provide for the safety and well-being of the child and for the safety of the party who was the victim of the battery or abuse" by taking one or more specified actions, including ordering the child's placement with the abusive party to be supervised. Thus, that a court may order supervised placement in other circumstances does not render the specific reference to supervision in § 767.41(6)(g) superfluous.

¶26 In ***Lange***, we affirmed an order that required supervision of a father's periods of physical placement in order to prevent him from imposing his religious views on his children, under circumstances where the mother had sole legal custody and therefore had the right to choose the children's religion. ***Lange***, 175 Wis. 2d at 376-77, 380. Citing WIS. STAT. § 767.24(1), the predecessor to the current WIS. STAT. § 767.41(1)(b), we reasoned a court has authority to "place reasonable restrictions on visitation." ***Lange***, 175 Wis. 2d at 380-81. We further determined the supervision requirement imposed by the circuit court was reasonable, under the circumstances, based on the court's "implicit finding that it [was] necessary in order to protect [the mother's] choice of religion for the children." ***Id.*** at 382. In addition, we noted the restriction was "limited in scope and duration," and that, by the order's express terms, the father "possess[ed] the power to terminate the restriction" by "show[ing] that his visits can occur without him imposing his religious views." ***Id.***

¶27 In ***Alice H.***, the second case cited by Durand, we considered an order that required a mother to comply with certain conditions to regain physical placement of her child. ***Alice H.***, 239 Wis. 2d 194, ¶1. We rejected the father's argument that the conditions were permissible under ***Lange***, stating, "Had the court in this case granted [the mother] physical placement … with restrictions, ***Lange*** would provide the framework for analyzing whether those restrictions were within the court's authority. … ***Lange*** does not address the court's authority to impose *conditions* for resuming placement." ***Alice H.***, 239 Wis. 2d 194, ¶¶27-28 (emphasis added). We explained ***Lange*** held that a court has authority to impose reasonable and just *restrictions* on physical placement. ***Id.***, ¶27. We further observed that reasonableness "was primarily a question of necessity[,] and the record [in ***Lange***] supported the court's implicit finding that [the restriction in that

case] was necessary to protect the custodial parent's choice of religion for her children." ***Id.***

¶28 In ***Schwantes***, the third case cited by Durand, we reversed an order that conditioned a mother's physical placement of her children on the termination of her relationship with her significant other. ***Schwantes***, 121 Wis. 2d at 609-10. We reasoned a court could not condition an award of placement on the termination of a custodial parent's relationship with another "in the absence of a showing that the relationship has a significant adverse [e]ffect upon the children." ***Id.*** at 625-26.

¶29 Neither ***Lange***, ***Alice H.***, nor ***Schwantes*** stands for the proposition that a court may require physical placement to be supervised only if the court concludes supervision is necessary due to a substantial risk of serious physical, emotional, or mental harm to the child. Instead, as with other determinations regarding physical placement, we conclude a court may impose a supervision requirement if it determines doing so is in the child's best interest.[5] *See* WIS. STAT. § 767.41(5)(am).

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[5] Durand asserts the best interest of the child standard does not apply in the instant case based on ***Groh v. Groh***, 110 Wis. 2d 117, 126, 327 N.W.2d 655 (1983), where our supreme court stated, "If the trial court had the power to make any order it pleased so long as the order could somehow be justified by recitation of the rubric 'in the best interests of the children,' the limits the legislature placed on the court's exercise of power in custody matters would be meaningless."

Groh is inapposite for two reasons. First, ***Groh*** involved an order that conditioned a mother's physical placement on her fulfillment of a certain *condition*—specifically, moving to a residence within fifty miles of the father's home. ***Id.*** at 118-19. Conversely, the order in this case awarded physical placement to Durand, subject to a *restriction*. Second, the court's decision in ***Groh*** was based in large part on the fact that the statutes specifically required a custodial parent to obtain permission from the noncustodial parent or the court to move *outside the state*. ***Id.*** at 124-25. The ***Groh*** court concluded this showed a legislative intent to allow moves *inside the state* without approval by the court or the noncustodial parent. ***Id.*** at 125. No comparable expression of legislative intent is applicable here.

¶30 Durand next argues the supervision requirement in this case is contrary to ***Lange*** because it is not limited in duration and scope and because the court did not indicate what Durand could do to terminate the restriction. However, while the ***Lange*** court noted the restriction at issue in that case was limited in scope and duration and contained an express purge condition, the court did not state that, in the absence of those factors, a restriction on physical placement would be per se unreasonable. In many cases, a court simply cannot know, when it imposes a restriction on physical placement, how long the restriction should last in order to serve the child's best interests or precisely what the parent must do in order to terminate the restriction. In any event, a parent who believes a restriction on physical placement is no longer appropriate is free to move the court to modify the placement order, pursuant to WIS. STAT. § 767.451(3).

¶31 Durand further argues the circuit court erroneously exercised its discretion by requiring his overnight placement to be supervised because the evidence does not support a supervision requirement. Durand asserts:

> There was no evidence of recent drug use, there was no evidence of recent abandonment of any individual for a suspected drug binge or evidence that a minor child was ever left alone by Durand; there was no evidence that unsupervised placement put M.S.D. at risk of physical, mental or emotional harm. … The evidence is [Durand] is an active, engaged, devoted, and loving father.

In a related argument, Durand asserts Flietner failed to meet her burden of proof regarding the supervision requirement.

¶32 Durand's arguments regarding the evidence ignore the circuit court's factual findings, which will not be overturned on appeal unless clearly erroneous. *See* ***Covelli***, 293 Wis. 2d 707, ¶13. Although the circuit court found that Durand had been a good father to M.S.D., the court also found that Durand had a long

history of drug and alcohol abuse, which had continued after M.S.D.'s birth, at least into the year 2013. The court did not credit Durand's negative drug tests as evidence that Durand's drug use was no longer a concern, based on Durand's history of "episodic" drug and alcohol use and S.T.'s testimony about observing a drug testing kit in Durand's vehicle. The court further found that, while there was no evidence Durand had ever used drugs in the presence of his children, the evidence showed Durand had a history of abandoning family members and employees in order to satisfy his addictions. The court also noted that M.S.D., who was then only four years old, was not old enough to fend for herself in the event Durand abandoned her during a period of placement. These factual findings are amply supported by the evidence and are not clearly erroneous.[6]

¶33 Based on its factual findings, the circuit court could reasonably conclude it was in M.S.D.'s best interest to require supervision of Durand's overnight placement. The court explained, "[I]f [Durand] disappears, then there needs to be another responsible adult there to take over." The court appropriately exercised its discretion in this regard by applying the correct law to the facts of

[6] Durand faults the circuit court for failing to include written findings of fact in its October 10, 2014 order. He cites WIS. STAT. § 767.41(6)(a), which provides, "If legal custody or physical placement is contested, the court shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child."

However, our supreme court has held that a similar statute, which required a court to explain in writing its reasons for modifying or terminating a legal custody or physical placement order, was satisfied when a circuit court "substantially explained" the reasons for its decision in an oral ruling and then incorporated its oral findings of fact and conclusions of law into its written decision by reference. *See* ***Landwehr v. Landwehr***, 2006 WI 64, ¶34, 291 Wis. 2d 49, 715 N.W.2d 180 (interpreting WIS. STAT. § 767.325(5) (2003-04)). That is precisely what the circuit court did here. ***Landwehr***'s rationale appears equally applicable to WIS. STAT. § 767.41(6)(a), and we therefore conclude the circuit court's failure to include written findings of fact in the October 10, 2014 order does not require reversal.

record and employing a logical rationale to reach a reasonable conclusion. *See* ***Alice H.***, 239 Wis. 2d 194, ¶18.

¶34 Durand also argues it was unreasonable for the circuit court to require that his periods of overnight placement be supervised, given that his three-hour periods of placement on Wednesday evenings are unsupervised. Durand contends, "It is antithetical to conclude supervision is necessary part of the time, but not at other times." We disagree. During her testimony, Flietner explained she believed Durand's overnight placement should be supervised because M.S.D. was only four and would be unable to "help herself" if Durand disappeared. However, Flietner testified she did not object to the Wednesday evening placements being unsupervised, given their shorter length, because M.S.D. "would have to be local and return within a reasonable amount of time." Based on Flietner's testimony, the circuit court could reasonably conclude supervision of the overnight placement, but not the Wednesday evening placement, was in M.S.D.'s best interest. We therefore reject Durand's assertion that the court erroneously exercised its discretion by requiring only the overnight placement to be supervised.

II. Procedural due process

¶35 Durand next argues the circuit court violated his right to procedural due process by including provisions in the December 10, 2014 order that were not

contained in the court's oral ruling.[7] Specifically, Durand complains that the written order: (1) assigned specific weekends to Durand; (2) changed the time of the Wednesday evening placements from 5:00-8:00 p.m., as set forth in the temporary order, to 4:00-7:00 p.m.; (3) adopted a holiday placement schedule; and (4) changed the location of placement exchanges from the Fifield gas station to the Price County Sheriff's Department.

¶36 "The fundamental requirements of procedural due process are notice and an opportunity to be heard." ***Sweet v. Berge***, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983). Both of these requirements are satisfied in the instant case. Following the circuit court's oral ruling, Durand's attorney sent a proposed order to the court on September 24, 2014. Two days later, Durand's attorney sent a second proposed order correcting two errors. Thereafter, Flietner's attorney sent a letter to the court objecting to Durand's proposed order and submitting a different order for the court's review. In the letter, Flietner's attorney noted that Durand's proposed order did not specify which weekends were to be allocated to Durand each month. Counsel explained that his proposed order assigned specific weekends to Durand because, given the parties' past inability to work together, failing to do so would "invite further controversy."

¶37 Flietner's attorney also proposed that the timing of the Wednesday evening placement be changed from 5:00-8:00 p.m. to 4:00-7:00 p.m. Counsel

[7] Flietner argues Durand forfeited this argument by failing to raise it in the circuit court. *See* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810 ("Arguments raised for the first time on appeal are generally deemed forfeited."). We disagree, based on Durand's September 30, 2014 letter to the circuit court, in which he specifically argued the court's written order needed to "reflect what the Court ordered on July 31, 2014 with zero modifications."

noted that M.S.D. had "started school on a full-time basis" and was required to wake at 5:30 a.m. to catch a 7:00-a.m. school bus. Counsel argued that having the Wednesday placement end one hour earlier would give M.S.D. more time to "wind down" in the evening after returning to Flietner's residence, making it easier for her to wake for school the following morning.

¶38 Next, Flietner's attorney noted that Durand's proposed order stated the parties would "discuss holiday placement." Counsel explained that Flietner's proposed order "merely adopted the holiday placement schedule that was first advanced by [Durand] … in the interest of specificity for the purpose [of] avoiding potential points of conflict."

¶39 Finally, Flietner's attorney observed that Durand's proposed order stated exchanges of physical placement would be conducted at the Fifield gas station, which had been the parties' past practice. However, counsel noted that, "because of some continuing conflict between the parties[,]" they had agreed all future exchanges would occur at the Price County Sheriff's Department. Counsel therefore stated he had incorporated that change into the proposed order.

¶40 The court subsequently received a letter from Durand's counsel objecting to the order proposed by Flietner's attorney. Durand's counsel did not dispute any of the factual assertions in the letter from Flietner's attorney, nor did he advance any substantive objections to the modifications Flietner proposed. Instead, he contended the court's written order needed to "reflect what the Court ordered on July 31, 2014 with zero modifications[,]" and any modifications "should be done through stipulation of the parties … or via a motion to modify and proper hearing before the Court." The court adopted Flietner's proposed order over Durand's objection.

¶41 This record shows that, prior to entry of the December 10, 2014 order, the parties circulated proposed orders and advanced arguments regarding the orders in letters to the court. The court rejected Durand's arguments and adopted Flietner's proposed order. Durand therefore had notice of any proposed modifications to the court's oral ruling and an opportunity to be heard regarding the modifications. This procedure did not violate Durand's right to procedural due process. The court's written order was fully consistent with the spirit and intent of its oral ruling and merely clarified several minor details, consistent with Flietner's proposal.

¶42 In a related argument, Durand argues the circuit court erred by sua sponte modifying its oral ruling regarding physical placement. He cites ***Stumpner v. Cutting***, 2010 WI App 65, 324 Wis. 2d 820, 783 N.W.2d 874, for the proposition that a court cannot sua sponte modify a physical placement order. However, contrary to Durand's assertion, the circuit court in this case did not sua sponte modify its previous oral ruling. Rather, the modifications were made at Flietner's request, with notice to Durand. This case is therefore distinguishable from ***Stumpner***, where the circuit court modified a previous placement order without a request by either party and without notice that it planned to do so. *See* ***id.***, ¶¶2-3.

¶43 Lastly, citing WIS. STAT. §§ 767.451 and 767.461, Durand argues a court may modify a physical placement order only upon one party's petition, motion, or order to show cause, or upon a stipulation by both parties. Durand therefore argues Flietner could not request changes to the court's oral ruling by letter. We disagree. Sections 767.451 and 767.461 refer to physical placement "orders." WISCONSIN STAT. § 767.41(6)(a) contemplates that physical placement orders will be entered in writing. Here, the circuit court did not modify a prior

written physical placement order. It merely made minor modifications and clarifications to its previous *oral* ruling. Under these circumstances, a petition, motion, order to show cause, or stipulation was not required.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.