COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP243 **Cir. Ct. No. 2009FA106**

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

IN RE THE MARRIAGE OF:

JULIE ANN HYNEK,

JOINT-PETITIONER-RESPONDENT,

V.

CHRISTOPHER M. HYNEK,

JOINT-PETITIONER-APPELLANT.

APPEAL from a judgment of the circuit court for Richland County: WILLIAM ANDREW SHARP, Judge. *Affirmed*.

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

¶1 PER CURIAM. Christopher Hynek appeals a judgment entered by the circuit court in this divorce action. He argues on appeal that the circuit court failed to maximize physical placement of the parties' children with each party,

wrongfully granted grandparent visitation, exhibited bias, made various errors with respect to evidentiary issues, ruled against the best interests of the children regarding electronic communication, failed to rule upon domestic abuse issues raised, and failed to properly rule on health care issues. For the reasons set forth below, we affirm the order of the circuit court.

BACKGROUND

¶2 Julie Ann Hynek and Christopher Hynek were married in 1997 and have two minor children. A judgment of divorce was filed on December 26, 2012. That judgment was later vacated. An amended judgment of divorce was entered by the circuit court on September 18, 2013. Christopher now appeals various aspects of the amended judgment.

Physical placement and grandparent visitation

¶3 The arguments regarding physical placement of the children and grandparent visitation have some overlap in Christopher's brief and, therefore, we will address both issues together. The judgment of divorce provides for a two-week physical placement schedule that repeats throughout the summer. Under that schedule, Julie and Christopher each have five days of weekday placement and two days of weekend placement during each two-week period. Christopher asserts that, during the summers, Julie is at work for significant periods of time during the week and, therefore, placement of the children with her during those times is not consistent with "meaningful" physical placement, as required under WIS. STAT. § 767.41(4). He argues that, because Julie's father provides child care during times when Julie is not home, the circuit court granted visitation to the grandfather "dressed up" as placement with Julie. Julie counters that the record shows that the

court considered the appropriate factors for physical placement determinations under WIS. STAT. § 767.41(5). We agree.

¶4 A circuit court has wide discretion when making placement decisions. ***Lofthus v. Lofthus***, 2004 WI App 65, ¶16, 270 Wis. 2d 515, 678 N.W.2d 393. A court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record. ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶38, 338 Wis. 2d 34, 808 N.W.2d 372.

¶5 The record reveals that the circuit court addressed the various statutory factors to be considered in making its placement determination. It discussed the factors from WIS. STAT. § 767.41(5)(am) that were most applicable to the case and incorporated them into its decision, including the children's wishes as communicated through the guardian ad litem and the custody evaluation prepared by psychologist Dr. Marc Wruble, the children's educational needs and their adjustment to their school and community, the parents' difficulty cooperating and communicating with one another, and the availability of child care. Reviewing the court's remarks, we are satisfied that it engaged in a thorough analysis in reaching its placement determination. Consequently, we conclude that it properly exercised its discretion.

¶6 Regarding the issue of grandparent visitation, the record reflects that the circuit court did not order visitation between Julie's father and the children. Rather, the court considered, consistent with WIS. STAT. § 767.41(5)(am)3., the positive interaction and interrelationship of the children with their maternal grandfather. The court then ruled that, when the children were with Julie, she was the one who would decide what to do during that time as far as child care was

concerned. Nothing in the judgment of divorce or the court's oral ruling mandates visitation between the children and their maternal grandfather. Therefore, we reject Christopher's argument that the court improperly granted grandparent visitation.

Judicial bias

¶7 Christopher contends that the circuit court judge exhibited bias, such that he should have recused himself under WIS. STAT. § 757.19(2)(g). However, Christopher did not move the circuit court judge to recuse himself, nor does the record reflect that the judge made any determination as to his ability to act impartially. Accordingly, we are unable to consider this argument on appeal. *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 183, 186, 443 N.W.2d 662 (1989) (the determination of a judge's ability to act impartially is for the judge to make and appellate review is limited to establishing whether the judge made that determination).

Evidentiary issues

¶8 Christopher makes several arguments regarding how the circuit court considered or failed to consider certain evidence. First, he asserts that the court neglected to consider testimony regarding how Julie had alienated their children from him. As noted previously, the court has wide discretion when making placement decisions. ***Lofthus***, 270 Wis. 2d 515, ¶16. It is the function of the trier of fact, and not of an appellate court, to evaluate the weight given to the evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Any weight, or lack thereof, given to the testimony regarding Julie's alleged attempts to alienate the children from Christopher, and the credibility of that testimony, was within the province of the circuit court. Christopher fails to provide us with a

basis to disturb the court's evaluation of the weight and credibility of that testimony on appeal.

¶9 Next, Christopher asserts that the circuit court improperly based its ruling on "audio evidence which was listened to, but not allowed admission as evidence and video that was never presented at the trial." In making this argument, Christopher fails to provide any record citations or to explain, even in the most basic terms, what the audio and video recordings were about and why they mattered. Christopher also asserts that the court "lost" an exhibit. Again, he does not cite any facts in the record or offer any explanation as to why the exhibit matters to his appeal, other than a conclusory statement that the exhibit "easily" could have proved that certain emails introduced by Julie were forged.

¶10 Regarding the audio and video recordings and allegedly misplaced exhibit, Christopher's brief fails to develop coherent arguments that apply relevant legal authority to the facts of record, and instead relies largely on conclusory assertions. This court need not consider arguments that either are unsupported by adequate factual and legal citations or are otherwise undeveloped. *See* ***Dieck v. Unified Sch. Dist. of Antigo***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990) (unsupported factual assertions); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments). While we make some allowances for the failings of parties who, as here, are not represented by counsel, "[w]e cannot serve as both advocate and judge," ***Pettit***, 171 Wis. 2d at 647, and will not scour the record to develop viable, fact-supported legal theories on the appellant's behalf, ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). Here, Christopher has failed to develop legal arguments regarding the recordings and the allegedly lost exhibit or to support those

arguments factually, and we affirm the circuit court on that basis regarding those issues.

Electronic communication

¶11 Christopher argues that the circuit court ruled against the best interests of the children when it declined to mandate Skype visits between the parents and the children. We disagree. The court reasoned, when it initially declined to order a schedule for mandated Skype visits, that it feared the parties would use the order as a weapon against one another, due to the high conflict nature of the divorce. In issuing that order, the court found that it was in the best interests of the children to decrease the resentment the parties feel toward each other. The court revisited the question of setting a Skype schedule at a postjudgment hearing. Julie expressed concerns that Christopher had been in the background during previous Skype visits, making comments about her and to her. Julie submitted that she felt intimidated. In light of the parties' inability to get along, the court again declined to order Skype visits. We are satisfied that the record reflects that the court considered the children's best interests, as required under WIS. STAT. § 767.41(4)(e), and properly exercised its discretion in making its ruling regarding Skype visits.

Domestic abuse

¶12 The circuit court acknowledged at trial and in its oral ruling that the parties had made allegations of domestic abuse against one another. The circuit court stated that the testimony on the issue had engendered a "credibility duel" and that too much time had passed since the alleged incidents for the court to be able to make a determination on the issue. Christopher argues that the court was required by WIS. STAT. § 767.41(6)(f) to make written findings on the domestic

abuse issue. This is a misreading of the law. WISCONSIN STAT. § 767.41(6)(f) states:

> If the court finds under sub. (2)(d) that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), the court shall state in writing whether the presumption against awarding joint or sole legal custody to that party is rebutted and, if so, what evidence rebutted the presumption, and why its findings relating to legal custody and physical placement are in the best interest of the child.

¶13 In this case, the circuit court did not make a finding that a party had engaged in a pattern or serious incident of interspousal battery or domestic abuse. Rather, the court concluded that the record lacked sufficient reliable evidence for it to make a determination on the issue. Since no finding was made that a party had engaged in interspousal battery or domestic abuse, the court was not required to state in writing any findings of the type referenced in WIS. STAT. § 767.41(6)(f).

Health care

¶14 Christopher also argues that the circuit court failed to rule on the issue of health care expenses of the children. This argument is refuted by the record, which reflects that the amended divorce judgment incorporated an arbitration ruling providing that the parties will "split equally any uninsured medical, doctor and dental expenses; excess family health [insurance] premiums for children split equally." The arbitration ruling was accepted by the circuit court. Thus, Christopher's assertion that the issue was never resolved by the court is without merit.

By the Court.—Judgment affirmed.

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