COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP210 **Cir. Ct. No. 2010PA9PJ**

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

IN RE THE PATERNITY OF A. J. G. B.:

JOEL D. PORTMANN,

PETITIONER-APPELLANT,

V.

LESLIE A. BODEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Door County: JOHN ZAKOWSKI, Judge. *Affirmed and cause remanded with directions*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Joel Portmann, pro se, appeals an order in this paternity action that decided competing motions for clarification of physical

placement and sanctions for overtrial. He raises a number of arguments regarding issues that do not pertain to the order before us on appeal, and we summarily reject those arguments. We also reject his remaining assertions, which are that there was no final order in this case, and that the circuit court erroneously required him to pay three-fourths of the guardian ad litem's (GAL) fee as a sanction for overtrial. We therefore affirm.

BACKGROUND

¶2 A.J.G.B. was born in October 2009. Portmann filed a paternity petition against Leslie Boden in 2010. He sought an order adjudicating the child's paternity; an order addressing legal custody and placement; costs; and "such further and additional orders as are fair and equitable." Portmann ultimately admitted he is A.J.G.B.'s father.

¶3 Following a bench trial, the circuit court rendered a thorough, fifty-page decision resolving contested issues concerning legal custody, physical placement, and exchange location. The order was entered on October 25, 2013, the same date as a hearing at which both parties requested clarification of the order's placement provisions. Each party also requested an order requiring the other party to pay certain costs due to "overtrial." Portmann filed a notice of appeal from the October 25, 2013 order on December 20, 2013. By order dated January 28, 2014, we dismissed that appeal, case No. 2013AP2821, as untimely.

¶4 On February 4, 2014, the circuit court entered an order clarifying its placement determinations. That order also determined the GAL's $20,000 fee was "reasonable in that it represents the actual time and effort spent by the [GAL] in this case." The court, analyzing the parties' competing overtrial motions, concluded Portmann should be responsible for three-fourths of the GAL fee. The

court also determined that a $4,800 evaluation fee charged by an expert witness should "be borne equally" by both parties. Because Portmann paid the entire evaluation fee, the court ordered Boden's portion of that fee ($2,400) be credited to Portmann's portion of the GAL fee. Accordingly, the circuit court ordered Portmann to pay $12,600, and Boden $7,400, to the Door County Clerk of Courts. Portmann now appeals.

DISCUSSION

¶5 Portmann raises a number of issues, many of which are beyond this court's authority to consider. Specifically, we summarily reject Portmann's arguments that (1) he was deprived of due process; (2) the circuit court erroneously exercised its discretion when awarding joint custody; and (3) the court erroneously exercised its discretion when it qualified Dr. Kenneth Waldron as an expert witness during the bench trial. These matters were not addressed by the circuit court's February 4, 2014 order, which is the only order properly before this court. Those issues are accordingly outside the scope of this appeal.[1]

¶6 Portmann contends "there is not a final order … in this case, and therefore all other points of appeal are mute [sic] until the Appeals court has authority/jurisdiction to hear them." Portmann argues that neither the October 25, 2013 order, nor the February 4, 2014 order, was a "final" order under WIS. STAT. § 808.03(1) because neither resolved the "contested issue of the child's last

[1] In any event, Portmann's due process arguments are devoid of any authority and we would reject them for that reason. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). We further note that Portmann's brief uses the term "abuse of discretion." Our supreme court abandoned the use of that terminology in 1992. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

name."[2] However, Portmann's petition did not raise the issue of the child's last name. Nor did Portmann, prior to the court's February 4, 2014 order, move or otherwise sufficiently advance the issue of the child's last name such that it was necessary for the court to resolve the matter in that order.[3] That the order did not address an issue Portmann failed to sufficiently advance did not render the order nonfinal.

¶7 Portmann also argues the October 25, 2013 and February 4, 2014 orders were nonfinal orders because they do not comply with ***Wambolt v. West Bend Mutual Insurance Co.***, 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670. Insofar as the October 25, 2013 order is concerned, that argument is foreclosed by our January 28, 2014 order. As for the February 4, 2014 order, ***Wambolt***, which required "a statement on the face of a document that it is final for purposes of appeal," ***id.***, ¶4, anticipated that some documents would not comply with this requirement, ***id.***, ¶46. Rather than holding that such documents are nonfinal or otherwise insufficient to support an appeal, the supreme court stated that

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

[3] The only record citation Portmann provides with respect to this argument is to a transcript of a January 25, 2011 proceeding before a court commissioner. Portmann's counsel raised the issue of the child's last name, to which the court commissioner replied, "[Y]ou should both understand that if you can agree upon a last name then that's fine. If you cannot agree on a last name for the child the Court's authority is limited to hyphenating your two last names. I can't pick and choose."

Although Portmann suggests he raised the issue of the child's last name at other points in the litigation, he fails to provide any further record citations for this assertion. Indeed, we note that Portmann's briefs repeatedly fail to comply with the rules governing appellate briefs, including a recurring failure to include record citations. *See* WIS. STAT. RULE 809.19(1)(d), (1)(e), (4)(b). We recognize Portmann is not represented by appellate counsel, but we nonetheless admonish him that future violations of the rules of appellate procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

"appellate courts should liberally construe ambiguities to preserve the right of appeal." ***Id.***, ¶46. Thus, the absence of the ***Wambolt*** statement on the face of the February 4, 2014 order does not compel the conclusion that it was nonfinal.

¶8 Portmann next argues that "no order specifically states why each decision is in the best interest of the minor child, as required." *See* WIS. STAT. § 767.41(6)(a). To the contrary, the circuit court extensively analyzed the case using this standard in both its October 25, 2013 and February 4, 2014 orders. Any argument that the circuit court applied an incorrect legal standard, or inadequately explained its reasoning, as to the February 4, 2014 order under review is meritless.

¶9 In his last argument regarding the finality of the circuit court's February 4, 2014 order, Portmann asserts the order was nonfinal because it did not comply with WIS. STAT. § 767.41(8). That statute provides that a "judgment which determines the legal custody or physical placement rights of any person to a minor child shall include notification of the contents of [WIS. STAT. § 948.31]."[4] However, Portmann does not cite any authority for the proposition that noncompliance with § 767.41(8) renders the order at issue nonfinal, nor does his argument otherwise convince us of this proposition. Instead, we remand this action to the circuit court with directions that the circuit court shall enter an order directing the clerk of courts to attach the notice required under § 767.41(8) to the February 4, 2014 order.

¶10 Portmann also challenges the circuit court's determination that overtrial occurred. He contends the circuit court erred "in failing to assign costs to

[4] WISCONSIN STAT. § 948.31 specifies certain criminal penalties for interference with custodial rights.

the respondent for violating the child and the appellant[']s rights under WIS. STAT. § 767.24(4)(b)." No such statute presently exists, or did exist at the time Portmann filed the paternity petition in 2010. The statute Portmann cites was apparently renumbered in 2005. *See* 2005 Wis. Act 443, § 97. In any event, Portmann does not develop any cognizable legal argument regarding the application of the statute he cites, or the current statute, WIS. STAT. § 767.41(4)(b), and we therefore do not address his argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Neither statute provides any basis to challenge the circuit court's overtrial decision.

¶11 Portmann also argues the circuit court erroneously exercised its discretion when it required him to pay three-fourths of the GAL's $20,000 fee as a sanction for overtrial. "Overtrial is a doctrine developed in family law cases that may be invoked when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees." ***Zhang v. Yu***, 2001 WI App 267, ¶13, 248 Wis. 2d 913, 637 N.W.2d 754. Whether excessive litigation occurred is a question of historic fact to be determined by the circuit court, but whether the facts as found by the court constitute overtrial is a question of law. ***Id.***, ¶11. The decision to award fees as a sanction for overtrial is reviewed for an erroneous exercise of discretion. ***Id.***, ¶12.

¶12 Here, Portmann appears only to argue that Boden also caused excessive litigation and should therefore be penalized for overtrial. The circuit court assessed the conduct of both parties and concluded both were to blame for the protracted litigation. However, the court determined that Portmann "was more responsible for its length." Although the court could not find that Portmann's filings were "frivolous" or intended for "harassment," the court wrote that "it is clear there were additional expenses as a result of his conduct during the

litigation." The circuit court specifically observed that Portmann failed to notify the GAL and Boden's counsel of a cancelled deposition, deposed his own witnesses, and filed an "exceedingly large number of interrogatories for a child placement case." We conclude these findings sufficiently establish overtrial. "A party's approach to litigation is unreasonable if it results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time." ***Id.***, ¶13.

¶13 In his reply brief, Portmann for the first time raises the issue of the reasonableness of the GAL's fee. We typically do not address issues raised for the first time in a reply brief. ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396, *review denied*, 2015 WI 47, 862 N.W.2d 898. In any event, it appears the GAL's fee, which the court found reasonable, actually exceeded $20,000, but the court capped the fee at that amount. Portmann contends the GAL "was derelict in his duties and did not adequately represent the best interest of the minor child." The circuit court specifically found to the contrary, and its October 25, 2013 decision strongly suggested that the GAL was perhaps the *only* party primarily concerned with A.J.G.B. *See* ***Goberville v. Goverville***, 2005 WI App 58, ¶6, 280 Wis. 2d 405, 694 N.W.2d 503 (findings of fact related to the child's best interests will not be set aside unless they are clearly erroneous). Furthermore, Portmann fails to make any argument regarding what specific time spent or work performed by the GAL during his representation of A.J.G.B. was improper, especially in light of how the parties litigated this action.

¶14 To the extent Portmann wishes to assert other challenges to the circuit court's exercise of discretion, we deem these arguments undeveloped and decline to address them. *See* ***Pettit***, 171 Wis. 2d at 646. Although we afford pro se litigants a certain amount of leeway in making their arguments, *see*

Rutherford v. LIRC, 2008 WI App 66, ¶27, 309 Wis. 2d 498, 752 N.W.2d 897, Portmann has not come close to establishing that the circuit court has erroneously exercised its discretion in any way in this matter. The circuit court, which thoroughly considered all issues before it, is to be commended on its able handling of all matters in this difficult and protracted litigation.

By the Court.—Order affirmed and cause remanded with directions.

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