COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2949 **Cir. Ct. No. 1999PA19**

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

IN RE THE PATERNITY OF D. N. S.:

DONNA KIKKERT,

PETITIONER-APPELLANT,

V.

TODD SAUNDERS,

RESPONDENT-RESPONDENT.

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

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

¶1 PER CURIAM. Donna Kikkert, pro se, appeals an order denying modification of custody and physical placement of the parties' daughter. Kikkert contends the circuit court erroneously exercised its discretion in failing to appoint

counsel to represent her, and in finding no substantial change in circumstances. We affirm.

¶2 Kikkert was incarcerated from 2003 to 2008 for interference with child custody, with three years' extended supervision thereafter. Kikkert resided in Rhinelander after her release. In 2004, Todd Saunders was granted primary placement and sole custody of the parties' daughter. The order provided for no periods of physical placement with Kikkert.

¶3 In 2009, the parties entered into a stipulation for supervised placement with Kikkert. This resulted in an order that retained all provisions of the 2004 order not specifically modified by the 2009 order. Shortly after Kikkert's extended supervision ended in 2011, she moved both to modify the custody and placement order, and to have venue changed to Ashland. The circuit court in Ashland determined there was no substantial change in circumstances and denied the motion.

¶4 Kikkert subsequently moved to Lincoln County, where Saunders and the daughter resided. In early 2012, after unsuccessfully attempting to convince Saunders to agree to joint custody and shared placement, she filed a motion for a temporary order to modify custody and placement. Mediation proved unsuccessful, and Kikkert thereafter filed a motion to change custody and placement.

¶5 On February 5, 2013, a court commissioner entered a temporary order.[1] In January 2014, Kikkert filed a motion for appointed counsel, which was

[1] A de novo hearing was held before the circuit court on July 11, 2013. Kikkert represents in her brief that "no transcript was prepared."

denied.[2] A circuit court hearing on the request to modify custody and placement was held on November 14, 2014. The court determined that Kikkert failed to prove a substantial change in circumstances since the entry of the last order in this case and dismissed the motion to modify custody and placement. Kikkert filed a motion for reconsideration, which was denied. Kikkert now appeals.

¶6 Kikkert first contends the circuit court erroneously exercised its discretion by denying her request for a court-appointed attorney. Civil litigants do not have a constitutional right to court-appointed counsel when the litigant will not likely be deprived of personal liberty if unsuccessful in the litigation. *See* ***Piper v. Popp***, 167 Wis. 2d 633, 637, 482 N.W.2d 353 (1992).

¶7 A court may use its inherent discretionary authority to appoint counsel when the appointment is necessary for the orderly and fair presentation of a case.[3] *See* ***Joni B. v. State***, 202 Wis. 2d 1, 11, 549 N.W.2d 411 (1996). We will sustain a circuit court's discretionary decision if it is a decision a reasonable judge could make after considering the relevant facts and law. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

[2] It appears Kikkert filed a subsequent motion for appointment of counsel on July 28, 2014.

[3] A court "should only appoint counsel after concluding either the efficient administration of justice warrants it or that due process considerations outweigh the presumption against such an appointment." ***Joni B. v. State***, 202 Wis. 2d 1, 18, 549 N.W.2d 411 (1996). The court in ***Joni B.*** set forth several nonexhaustive factors it recommended a circuit court consider in determining a request for appointed counsel, including the personal characteristics of the parent and their demonstrated desire to participate in the proceedings, as well as the complexity of the case. ***Id.*** at 19. ***Joni B.*** also stated a circuit court should memorialize its findings and rationale on the record to facilitate appellate review. ***Id.*** at 18.

¶8 Here, the record supports the circuit court's decision to deny Kikkert's request for court-appointed counsel. The court stated:

> [A]s I told you in my written response to your initial motion, it is only in extraordinary circumstances that courts appoint counsel for civil litigants. You have offered your thoughts and the thoughts of others on why it's a good thing for courts to appoint counsel, but as a practical matter, the public treasury would not support it, and I can see no unusual circumstances here that would justify the appointment of counsel. If I were to appoint counsel for you at the public expense, I fear I would then have to appoint counsel for most any other civil litigant at public expense, because I would have no way of distinguishing their circumstance from yours.

¶9 The circuit court also emphasized that Saunders was unrepresented and thus neither party was procedurally advantaged. In addition, the guardian ad litem represented the child's interests. The court also found the legal issues were not overly complex. As the court stated:

> Ultimately whatever decision I arrive at in this case is not going to be based on the form of the pleadings or whether someone was able to make the correct objection or bring a motion in proper form. It's just a question of each side presenting what they believe are relevant circumstances and me weighing those and making a decision.

¶10 Kikkert had ample opportunity to address the court, and her numerous submissions show she was more than capable of making a relatively orderly presentation. The court properly weighed the governmental interest in not burdening taxpayers against the nature of the case and the claimed need for counsel. There is no basis for us to question the court's exercise of discretion in this regard.

¶11 The circuit court also properly exercised its discretion in determining Kikkert failed to demonstrate a substantial change of circumstances since the entry

of the last order in this case. The circuit court concluded the only demonstrated change in circumstances was that Kikkert was no longer on extended supervision, and she resided closer to Saunders.

¶12 Kikkert insists the court erroneously exercised it discretion "by not admitting the evidence of [Todd's] parental alienation, and not considering parental alienation as a substantial change of circumstances[.]" Kikkert contends the court improperly disallowed her request to read excerpts from her "journal of alienating behavior," and refused to accept the journal into evidence. According to Kikkert, the court "decided not to even consider the facts in considering whether the child was being alienated [against Kikkert]." Kikkert argues:

> Todd was strongly encouraged to pursue having the child receive counseling which would have affirmed or negated the presence of alienation; he chose not to. The court did not consider this fact. The court did not consider the fact that irregardless of how Todd and/or the GAL came into possession of Donna's letters written exclusively to the child, such possession was immoral, unethical and illegal, as it's a federal offense to have the mail of another. The court did not consider the fact that Donna presented a document verifying Todd was terminated from Bell Tower based on his temperament of anger and inability to work with others. The court did not consider the fact of Todd's domestic violence. The court did not consider the fact that Donna's missed opportunities to see the child occurred because Todd, as the custodial parent, refused to initiate contact with Donna for the purpose of setting up placement times ….

¶13 Contrary to Kikkert's perception, the court carefully examined the facts presented in this case. Quite simply, the court found Kikkert failed to prove Saunders was engaged in a concerted effort to alienate the child from her. The court stated: "I don't disagree that if you could prove to me that Mr. Saunders was engaged in a concerted effort to alienate your child from you that that might be a

basis for the Court determining a change in circumstances, but you haven't proved that."

¶14 The circuit court indicated it read Kikkert's letters, and listened to her statements as memorialized in her journal. Kikkert also testified concerning an affidavit she provided to the court on August 15, 2014. The court indicated, "you are on the witness stand now and you are under oath, so just give me the information you want to give me. Tell me what it is you want me to know." Among other things, Kikkert testified as follows:

> Attached to the affidavit is the "Post-Separation Power and Control" wheel out of the Duluth project, and one of the spokes on the wheel is – which is a spoke of abuse – says the abusive parent will disrupt the mother's relationships with the children by coercing them to ally with him, degrading her to them, using the children as spies, and isolating children from her.
>
> And in this journal there is, also, an elongated record of comments that the child has made, where she has said things such as, "Mom, you are sick and confused," umm, "Everything is your fault, Mom," "Dad is perfect and incapable of lying," "Mom, you are a crazy person." … [A]nd this is filled with a history of the negative comments about me that she has learned to parrot from the Respondent.

¶15 The circuit court indicated:

> I don't need to read the journal. You have told me that. If someone disputes that, then it might be you will want to point out specific things in the journal, but right now you've given me that evidence. I have got that. I don't need to read the journal.

¶16 Although Kikkert contended that Saunders had "poisoned the well" and turned her daughter against her, the court found, "I have no evidence upon which to base that." The circuit court found that "[m]erely because your daughter makes unkind statements to you and belittling statements and disrespectful

statements is not proof upon which I can base a finding that Mr. Saunders is responsible for that."

¶17 Regarding the letters to her daughter that Kikkert alleged were misappropriated, the court stated:

> You've argued that the fact that either [Todd or the GAL] has copies of letters that you wrote to your daughter -- that must mean that someone got them, I think you said, illegally and immorally and unethically. That they stole them from her I presume is what you mean or that they intercepted them, did something that they didn't have a right to do. But you are free to make that assumption. I am not. I can't base my findings on conjecture or assumption. I can only base it on proof to a preponderance of the evidence, and there is absolutely no evidence as to how they acquired those letters, not that that by itself would constitute a change in circumstances if there were evidence ….

The circuit court did not erroneously exercise its discretion merely because it declined to read Kikkert's journals and did not find her evidence persuasive. The record supports the circuit court's determination that Kikkert failed to prove that Saunders was engaged in a concerted effort to alienate the child from her.

¶18 Kikkert also argues on appeal that Saunders failed to comply with the requirements of WIS. STAT. §§ 767.41(2)(c) and 767.41(5)(am)11. Under § 767.41(2)(c), "the court may not give sole legal custody to a parent who refuses to cooperate with the other parent if the court finds the refusal to be unreasonable." Section 767.41(5)(am)11. provides that in determining custody and placement the court shall consider "[w]hether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to

unreasonably interfere with the child's continuing relationship with the other party."

¶19 These statutory provisions are to be considered by the court in deciding custody and placement. Kikkert argues "the statutes ought to be re-visited by the court" during custody modification hearings "for the purpose of ascertaining whether the custodial parent is encouraging and facilitating frequent and continuing contact between the child and the non-custodial parent to determine whether the custodial parent [is] fit to remain in this role." However, Kikkert's argument is unsupported by citation to legal authority and is conclusory in any event. We shall therefore not consider the argument further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶20 Moreover, regardless of whether these statutes may be applicable in the context of custody modifications, we note the circuit court found "there is no evidence here that I can see upon which I could base a finding that Mr. Saunders was doing something improper, failing to cooperate or communicate with you or communicate with you when what he was refusing to do was to go beyond the court order." Rather, the court found Saunders was merely refusing to permit placement beyond that which the court had ordered. The circuit court's findings are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Because the circuit court properly examined the evidence and applied correct legal standards, we affirm the determination that Kikkert failed to show a substantial change of circumstances.

By the Court.—Order affirmed.

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