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You are hereby notified that the Court has entered the following opinion and order:

2015AP1725 Roberta Renee Ashby v. Jeffrey Leonard Hahn
(L.C. #2013FA582)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Jeffrey Leonard Hahn appeals from an order granting the motion of his former wife, Roberta Renee Ashby, for sole legal custody on the issue of school choice for the parties' son, C.H. Hahn also appeals from an order denying his motion to reconsider the order granting Ashby sole legal custody on the issue of school choice for C.H. Based on our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We reverse the order granting Ashby sole legal custody on the issue of school choice for C.H. and remand for an evidentiary hearing. We dismiss the appeal from the order denying Hahn's motion to reconsider as academic.

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

Ashby and Hahn were married on March 11, 2000. Two children were born of the marriage: M.H. and C.H. In March 2013, C.H. was diagnosed with a learning disability. At the time of his diagnosis, the parties agreed to keep C.H. enrolled in his current school, Our Redeemer, and that they would provide him with a private tutor who would tutor C.H. during the school day.

On October 20, 2014, the parties were granted a divorce. The judgment of divorce incorporated the parties' marital settlement agreement (MSA). The MSA provided the parties with joint legal custody of the children. In addition, the MSA included a provision regarding school choice, which stated as follows:

> **5. SCHOOL.** The parties agree that at the end of the 2014-15 academic year they will evaluate whether the children shall continue at Our Redeemer. [C.H.] shall be tested and re-evaluated at the end of the 2014/15 academic year to determine the status of his education needs. If either party believes that the children's academic needs would be best met by a change in school and the parties cannot come to an agreement on the issue, either party may request an immediate referral to Mediation on the issue. If Mediation is unsuccessful either party may file a Motion on the school choice issue and the other party shall not challenge the Motion on grounds of no substantial change in circumstances.

At the end of the 2014-15 academic year, C.H. was re-evaluated. The evaluator found that C.H. had made appropriate improvement over the course of the academic year while enrolled at Our Redeemer, that his tutoring program was generally accepted as "the hallmark" for his learning disability, and that he was receiving the tutoring "in an optimal setting … as part of his normal school day" at school. As such, the evaluator recommended that C.H.'s educational plan not be changed.[2]

[2] According to Ashby, as indicated in a later affidavit, the evaluator said that C.H. was at least one and one-half years behind his peers, which is why Ashby would like to change C.H.'s school.

Ashby sought to change C.H.'s school, and the parties mediated the matter, but no agreement was reached.

On August 7, 2015, less than one year after the judgment of divorce had been granted, Ashby moved for "sole legal custody on the issue of school choice." In support of the motion, the only evidence submitted was an affidavit from Ashby stating that she did not believe C.H.'s educational needs were being met at Our Redeemer, and that both personnel at Our Redeemer and the evaluator, whom Hahn had chosen, had come to that conclusion. Ashby requested that a guardian ad litem be appointed, and the matter be set for a hearing. The court set a hearing for August 21, 2015.

Counsel for Hahn requested an adjournment, but the court denied counsel's request. Counsel for both Hahn and Ashby requested clarification on the specifics of the evidentiary hearing, but neither received a response.

On August 14, 2015, the circuit court issued a decision, served via facsimile to counsel, granting Ashby the right to select the school for C.H. In doing so, the court concluded that because Hahn had not submitted any affidavit to contradict what Ashby had alleged, there were "no facts in dispute." As such, the court concluded, it had only to construe the parties' MSA. Contrary to Hahn's contention, the court held, Ashby was not seeking a change in legal custody; rather, she was seeking "nothing more than the privilege given to her in the [MSA] to have tie-breaking authority in the event the [child's] 'academic needs would be best met by a change in school.'"

Hahn immediately made an emergency motion for reconsideration, submitting three affidavits in support of his position that C.H. should not be removed from Our Redeemer. Hahn requested that the court reschedule the hearing for August 21 so that his due process rights and those of the children might not be denied.

Ashby opposed the motion, but, in the alternative, asked that a hearing be held.

The circuit court denied Hahn's motion to reconsider.

The parties agree, and so do we, that the circuit court deprived Hahn of due process when, in the absence of a hearing, it granted Ashby the right to choose C.H.'s school. "Legal custody" is the "right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order." WIS. STAT. § 767.001(2)(a). One such "major decision" is "choice of school." Sec. 767.001(2m). "Joint legal custody" means that "both parties share legal custody and neither party's legal custody rights are superior, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order." Sec. 767.001(1s). The parties' MSA provided them with joint legal custody, which included the right to choose C.H.'s school. Thus, the circuit court erred when it concluded that Ashby was not seeking to change legal custody.[3] A custody determination affects a parent's rights to the care and upbringing of his or her child. ***Guelig v. Guelig***, 2005 WI App 212, ¶33, 287 Wis. 2d 472, 704 N.W.2d 916. A parent has a "fundamental liberty interest in these rights," which triggers due process rights of notice and an opportunity to be heard. ***Id.***, ¶¶32-33. Hahn was denied his due process rights when the circuit

[3] While Ashby concedes that due process requires that a hearing be held on her motion, she argues that she is not seeking "a change in legal custody"; rather, she argues that WIS. STAT. § 767.41(6)(b) empowers the circuit court to confer upon her or Hahn the right to choose C.H.'s school. Section 767.41(6)(b), however, governs the initial custody determination and not, as here, a modification of it. To the extent Ashby is arguing that the MSA gave the circuit court the authority simply to "bestow" the right of school choice upon Ashby or Hahn, we see nothing in the MSA to support such an interpretation—there is no "tie-breaking authority" provided to Ashby in the MSA. ***Greene v. Hahn***, 2004 WI App 214, ¶18, 277 Wis. 2d 473, 689 N.W.2d 657, does not support Ashby's contention because the father there, who initially shared joint legal custody with the mother pursuant to a judgment of divorce, was awarded sole decision-making authority regarding the youngest child's school enrollment years later and only upon a finding that there was a substantial change of circumstances and the modification was in the child's best interests. ***Id.***, ¶¶14, 22-30.

court awarded Ashby sole legal custody on the issue of school choice without affording Hahn an evidentiary hearing. As such, the matter must be remanded for an evidentiary hearing.

The question then is what standard the circuit court should apply on remand. Because Ashby is seeking a modification within two years after the final judgment determining legal custody, the order of legal custody may not be modified unless Ashby "shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of" C.H.[4] WIS. STAT. § 767.451(1)(a). Ashby contends, however, that the parties opted out of the "harmful to the best interest of the child" standard, pointing out that the parties were concerned about the upcoming 2015-16 academic year, which immediately succeeded the parties' divorce in October 2014, and the MSA precludes the party opposing a motion on the issue of school choice from raising that there is no substantial change in circumstances, a reference to the standard applicable for a modification *after* two years have passed since the final judgment. *See* § 767.451(1)(b). Thus, by implication, the parties were opting out of § 767.451(1)(a) "harmful to the best interest of the child" standard, and invoking the § 767.451(1)(b) standard, but only to the extent that the "best interest of the child" standard should alone be considered, and not also the whether there is a "substantial change of circumstances" standard. *See* ***Shulka v. Sikraji***, 2014 WI App 113, ¶24, 358 Wis. 2d 639, 856 N.W.2d 617 (noting that requests for modification under § 767.451(1)(b) involve a "two-step process": first, a consideration of whether there has been a substantial change of circumstances and, second, whether modification would be in the best interest of the child).

Generally speaking, parties may stipulate to conditions that a court could not ordinarily order. *See* ***Lawrence v. Lawrence***, 2004 WI App 170, ¶6, 276 Wis. 2d 403, 687 N.W.2d 748.

[4] We note, however, "that the plain language of [WIS. STAT.] § 767.451(1) … applies to the timing of 'modifications,' not filings." ***Glidewell v. Glidewell***, 2015 WI App 64, ¶11 n.7, 364 Wis. 2d 588, 869 N.W.2d 796; *see* ***Trost v. Trost***, 2000 WI App 222, ¶7, 239 Wis. 2d 1, 619 N.W.2d 105.

However, we see no explicit agreement by the parties to modify the "harmful to the best interest of the child" standard. Moreover, in ***Herrell v. Herrell***, 144 Wis. 2d 479, 488, 424 N.W.2d 403 (1988), our supreme court held that the circuit court applied the wrong standard in modifying the judgment of divorce from joint custody to sole custody to the father by using the standard the parties stipulated to in the judgment of divorce rather than the statutory standard. The parties had agreed in the judgment of divorce that custody would be re-evaluated when the children reached school age in order to meet their needs. ***Id.*** at 484. Not long after the divorce, the court granted the father's petition to modify the judgment of divorce so as to award him sole custody, applying the best interest of the child standard, rather than the necessary to the best interest of the child standard, as required by WIS. STAT. § 767.32(2) (1985-86). ***Herrell***, 144 Wis. 2d at 485-87. Our supreme court held that this was error because "the legislature explicitly prescribed a judicial standard to protect the child," and the protection the statute provides to children, of finality and stability, "would be defeated if we were to allow parents to determine that a lesser showing is adequate grounds for a circuit court to modify a custody award." ***Id.*** at 488; *see* ***Stephanie R.N. v. Wendy L.D.***, 174 Wis. 2d 745, 764, 498 N.W.2d 235 (1993); *see also* ***Trost v. Trost***, 2000 WI App 222, ¶5, 239 Wis. 2d 1, 619 N.W.2d 105 ("[T]he court has no authority to intervene during the two-year 'truce period'" except under extremely limited circumstances.) (citation omitted).

Hahn cited ***Herrell*** for the first time in his reply brief—it was not cited below—thus, the argument that ***Herrell*** precludes parties to a divorce judgment from opting out of WIS. STAT. § 767.451(1)(a) was not fully developed. We have not uncovered any conflicting authority, and

Herrell appears to control.[5] As such, the interpretation Ashby offers of the MSA—that the parties agreed to a lesser standard where only the best interest of the child is considered—is precluded because it was not made explicitly and, in any event, it appears to be unreasonable under ***Herrell***, leaving Hahn's interpretation—that the circuit court must apply the "harmful to the best interest of the child" standard—as the only reasonable interpretation. ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶11, 351 Wis. 2d 123, 839 N.W.2d 425 (noting that a contract must be interpreted to avoid unreasonable results).

Therefore, the order granting Ashby's motion for sole legal custody on the issue of school choice for the parties' son, C.H., is reversed, and the matter is remanded for an evidentiary hearing; the appeal from the order denying Hahn's motion to reconsider is dismissed as academic.

Upon the foregoing reasons,

IT IS ORDERED that the order granting Ashby's motion for sole legal custody on the issue of school choice for the parties' son, C.H., is summarily reversed, and the cause is

[5] WISCONSIN STAT. § 767.32(2) (1985-86) was repealed by 1987 Wis. Act 355, § 44 and replaced with WIS. STAT. § 767.325(1)(a), which, by 2005 Wis. Act 443, § 160, was amended and renumbered as WIS. STAT. § 767.451(1)(a), the statute governing this case. The "necessary to the child's best interest" standard for a modification in custody contained in § 767.32(2) was amended by 1987 Wis. Act 355, § 46 to require that the modification be "necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child." Although the amendment involved some substantive changes, we conclude that ***Herrell v. Herrell***, 144 Wis. 2d 479, 488, 424 N.W.2d 403 (1988) still controls. *See* ***A.J.N. v. W.L.D.***, 167 Wis. 2d 315, 330, 481 N.W.2d 672 (Ct. App. 1992) (noting, among other things, that § 767.325(1)(a) redefined "necessary"), *aff'd* ***Stephanie R.N. v. Wendy L.D.***, 174 Wis. 2d 745, 764, 498 N.W.2d 235 (1993) (agreeing with the court of appeals' conclusion that the legislative history of § 767.32(2) and § 767.325(1)(a) showed "that the legislature intended to provide a 'time-out' or 'truce' period of two years during which the child and the parents can adjust to the new family situation.") (citation omitted).

remanded for an evidentiary hearing; the appeal from the order denying Hahn's motion to reconsider is dismissed as academic. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals