COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2148 **Cir. Ct. No. 2007FA615**

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

IN RE THE PATERNITY OF J. V. L.:

BREA NICOLE DUGAN,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER M. LUKENS,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed.*

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

¶1 SHERMAN, J. Christopher Lukens appeals an order of the circuit court dismissing his motion to modify placement, custody, and child support with respect to his minor daughter, J.L., for failure to prosecute, under WIS. STAT.

§ 805.03 (2011-12),[1] and awarding sole legal custody and primary placement of J.L. to J.L.'s mother, Brea Dugan. Lukens argues alternatively that his conduct, which led to the dismissal of his motion, either was not egregious or was justified. He also argues that the portion of the court's order awarding Dugan sole legal custody and primary placement of J.L. is not supported by the evidence. We conclude that the circuit court properly exercised its discretion in determining that Lukens' conduct was egregious and without a justifiable excuse, and that the court's determination with respect to custody and placement was sufficiently supported by the record. Accordingly, we affirm.

BACKGROUND

¶2 The following undisputed facts are taken from the circuit court record. J.L. was born in November 2006. At the time of J.L.'s birth, her parents, Lukens and Dugan, while not married, were living together. A judgment of paternity was entered in 2007. At that time, the court did not address custody or placement for J.L., and it "held open" the issue of child support in light of Lukens' and Dugan's living arrangement.

¶3 In February 2009, Lukens moved the circuit court for "revision of physical placement, child custody, and child support."[2] Lukens alleged that because he and Dugan were no longer residing together, joint legal custody and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The circuit court had not previously established child support, custody, or placement with respect to J.L., thus Lukens could not seek a "revision" of support, custody, or placement because there was nothing to revise. To the extent that the circuit court construed Lukens' motion as a motion seeking the establishment of support, custody and placement, we will do the same on appeal.

substantially equal periods of physical placement were no longer practical. Lukens requested that primary physical custody and sole legal custody of J.L. be awarded to him. A guardian ad litem (GAL) was appointed for J.L. and the GAL was given interim authority to set a placement schedule for J.L. An interim order setting Lukens' child support obligation was entered by the court and the GAL established a placement schedule, which gave Lukens supervised placement with J.L. three days per week.

¶4 In June 2009, Dugan moved the circuit court for "modification of judgment," seeking an order awarding her sole legal custody of J.L. During the same month, the Family Court Counseling Service (FCCS), to which the case had been referred, recommended that Dugan be awarded sole legal custody and primary physical placement of J.L. with Lukens having supervised visitation one day per week for three hours with the option of exercising supervised Saturday visitation every other week for three hours. Lukens filed an objection with the court to the conclusions contained in the FCCS recommendation.

¶5 In October 2009, the circuit court entered an interim ninety-day order awarding Dugan sole legal custody and primary physical placement of J.L., and awarding Lukens physical placement one day per week for three hours. The interim order also addressed the GAL's unpaid fees, and ordered Lukens to pay the GAL $8,000 within ninety days.

¶6 In January 2010, Dugan moved the court for a revision of Lukens' child support obligation and for contribution to her attorney's fees. In April 2010, the family court commissioner granted Dugan's motion, increasing Lukens' monthly child support obligation from $500 to $704 and ordering him to contribute $300 per month toward Dugan's attorney's fees. Lukens moved the

court for a hearing on the commissioner's order. In the meantime, in March, the GAL notified the court that Lukens had failed to pay $2,000 of the GAL fees that he was ordered to pay in October 2009 and that at that time her unpaid fees totaled $5,768.79. The GAL also notified the court that prior to trial, she would need a $1,000 advance to pay for her witnesses' fees. Following a status conference on the issues of the GAL's fees, the court advised the parties that it would not schedule a trial until the GAL's outstanding fees and a $2,500 advance deposit were paid.

¶7 In April 2010, Lukens retained new counsel. In May, Dugan moved the court for an order finding Lukens in contempt for failing to abide by the April 2010 order increasing his child support obligation and obligating him to contribute toward her attorney's fees. In June, Lukens asked the circuit court to hold a de novo hearing on Dugan's January 2010 motion to increase his child support obligation and contribute to her attorney's fees, and for a stay of the contempt proceeding. The court denied Lukens' request for a stay, but scheduled a de novo hearing on Dugan's motion.

¶8 In June 2010, before the hearing was held on Dugan's January 2010 motion to modify child support, the circuit court found Lukens to be in contempt of the April 2010 order issued by the family court commissioner increasing his support obligation. As a purge condition of his contempt, the circuit court ordered Lukens to deposit an anticipated $6,000 commission check from his employer with his attorney, who would hold the money in trust. Lukens, however, failed to do so and instead deposited the check in his personal bank accounts.

¶9 In August 2010, the circuit court held the de novo hearing on Dugan's motion to modify support. The court found Lukens in "remedial

contempt" for failing to contribute to Dugan's attorney's fees and pay the increased child support, as ordered in the April 2010 order. The court described Lukens' contempt as "the most serious[]" case of contempt it had "ever seen in a family case," and found that Lukens had the ability to pay but intentionally chose not to. The court also found Lukens to be "outrageously" in contempt for failing to deposit his $6,000 commission check with his attorney. The court sentenced Lukens to forty days in jail, which was stayed in the event that Lukens turned over to Dugan's attorney, by September 30, "the entire" proceeds in the checking accounts into which he deposited his commission check.

¶10 On August 23, 2010, the circuit court entered a written contempt order consistent with its findings at the hearing, including the directive that Lukens transfer the entire contents of the specified bank accounts to Dugan's attorney, to be applied to all of Lukens' outstanding legal fee and support obligations. The court also entered an order increasing Lukens' child support obligation. On the date the court entered the order of contempt and child support, Dugan's counsel wrote to the court objecting to the form of the contempt order. The parties then exchanged multiple letters regarding the content of the orders. On September 30, the court entered an order holding that Lukens had purged his contempt.

¶11 In December 2010, the GAL moved for another order of contempt against Lukens, this time on the basis that he had failed to pay her fees, as ordered. The GAL advised the court that Lukens' outstanding balance as of December 1 was $3,451.19. The court granted the GAL's motion and entered a contempt order in February 2011. The court ordered Lukens to make regular monthly payments to the GAL until the balance he owed was paid in full, or spend thirty days in jail. Lukens requested a de novo hearing on the court's contempt order and a hearing

was scheduled for March. However, the day before the hearing, Lukens withdrew his request for a hearing and asked for a scheduling conference so that the case could "move forward to an evidentiary hearing on the merits of [Lukens' February 2009 motion]."

¶12 In March 2011, Dugan moved the court to dismiss Lukens' February 2009 motion to establish placement, support and custody on the grounds that he had failed to prosecute it. Also in March, the GAL notified the court that Lukens had not had any placement with J.L. since August 17, 2010, and, essentially, explained that the lack of visitation was because of Lukens' failure to make payments for a professional supervisor of such placements and that Lukens had appeared to prioritize "litigating financial issues" over pursuing placement time with his child. The GAL stated that Lukens had not responded to her correspondence regarding future placement with J.L. The GAL advised the court that Lukens declined holiday placement with J.L. because he did not agree with the terms proposed by the GAL and that Lukens had refused to participate in J.L.'s therapy despite the GAL's requests that he do so. In response, Lukens asked the court to disregard the GAL's March 2011 correspondence and asked that an evidentiary hearing on his February 2009 motion be set.

¶13 In August 2011, the circuit court granted Dugan's motion to dismiss Lukens' February 2009 motion. The court concluded that Lukens' "failure to pursue, for a two year period, the February 25, 2009 motion to modify placement [was] egregious and without justification." The court concluded that Lukens had "at all material times possessed the means to discharge the various fees, support and costs assessed against him," and that he had "repeatedly and unreasonably failed to exercise specific times of placement pursuant to the interim placement orders of the GAL." The court further concluded that Lukens "had constructive

notice of the possibility of dismissal for failure to prosecute beginning with the court's reluctance to schedule a final hearing" in September 2009 "because [Lukens] had at that point accrued substantial unpaid GAL fees in violation of court order."

¶14 The court also addressed the issues of placement and custody in its August 2011 order. The court determined that the FCCS report, which was prepared in June 2009, and the GAL's consistent recommendation created a "sufficient factual basis to render a final order of custody and placement of [J.L.]" The court determined that awarding sole legal custody of J.L. to Dugan was in J.L.'s best interest and it ordered that Dugan shall have primary physical placement of J.L. with Lukens having supervised visitation one day per week for three hours. Lukens appeals.

DISCUSSION

¶15 Lukens contends that the circuit court erred in dismissing, for failure to prosecute, his February 2009 motion to establish custody, placement and child support for J.L. Lukens also contends that the court's August 2011 order awarding Dugan sole legal custody and primary physical placement of J.L. was not supported by the record. We address Lukens' arguments in turn below.

I. Dismissal of Action

¶16 Lukens contends that the circuit court erroneously exercised its discretion in dismissing, for failure to prosecute, his motion to amend a prior order establishing placement, custody, and support for J.L.

¶17 WISCONSIN STAT. § 805.03 provides in part:

> For failure of any claimant to prosecute … or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.

WISCONSIN STAT. § 804.12(2)(a)3. in turn authorizes the circuit court to render "a judgment by default against the disobedient party."

¶18 Our supreme court has stated that, because of the harshness of the sanction of dismissal of an action, dismissal under WIS. STAT. § 805.03 should be granted "rarely" and only in cases in which the noncomplying party has demonstrated "egregious conduct" without any "'clear and justifiable excuse' for the delay." ***Trispel v. Haefer***, 89 Wis. 2d 725, 732-33, 279 N.W.2d 242 (1979) (quoted source omitted). Ultimately, dismissal of an action under § 805.03 lies within the discretion of the circuit court, and our review is for an erroneous exercise of discretion. *See* ***Theis v. Short***, 2010 WI App 108, ¶6, 328 Wis. 2d 162, 789 N.W.2d 585. "'We will affirm the [circuit] court's exercise of discretion unless it fails to properly apply the law or makes an unreasonable determination under the existing facts and circumstances.'" ***Id.*** (quoted source omitted). Thus, we will sustain a sanction of dismissal so long as there is a reasonable basis for the circuit court's determination that the noncomplying party's conduct was egregious and there was no 'clear and justifiable excuse' for the party's noncompliance. ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶¶20-21, 247 Wis. 2d 501, 634 N.W.2d 553.

¶19 Lukens argues that that his conduct was not egregious and thus did not support dismissal for failure to prosecute under WIS. STAT. § 805.03. We conclude, however, that the facts present an adequate basis to sustain the court's finding that Lukens' failure to pursue his February 2009 motion to modify placement for a two-year period was egregious.

¶20 The circuit court found that during the "nearly two years" following the filing of his February 2009 motion, Lukens had "chosen to litigate virtually everything but custody and placement," and that "at all material times [Lukens] possessed the means to discharge the various fees, support and costs assessed against him." The court further found that Lukens had failed to exercise even a single instance of placement between August 18, 2010 and April 15, 2011.

¶21 Lukens argues that between February 2009, when he filed his motion to modify, and October 2009, he was an active participant in the progression of the action—participating in a March 2009 status conference, agreeing to referral of the case to the FCCS and the appointment of a GAL, stipulating to an interim placement schedule and child support order, paying his fees to and cooperating with the FCCS, participating in a July scheduling conference and submitting his witness list in preparation for a trial in October. Lukens argues that after October 2009, he made "continuous efforts" to comply with the circuit court's October 2009 order pertaining to payment of the outstanding GAL fees between September and January 2011, when he came "into compliance with the [GAL's] request for the payment of her fees."[3] Lukens further argues that following the court's

[3] Lukens does not support this assertion with citations to the record. However, we will assume for the sake of resolving this argument only, that Lukens' claim is true.

September 2009 order, he filed an amended witness list, wrote the judge requesting an evidentiary hearing, and in March 2011, requested that a trial be scheduled. According to Lukens, the record also identifies "more than a dozen events that [he] instigated or participated in from February 25, 2009 to April 13, 2011 to prosecute his motion, not to mention the many other non-recorded actions he took for the same purpose."[4]

¶22 We are not persuaded that his participation in the case and efforts represented meaningful prosecution of his motion. During the approximately fifteen months between October 2009 and January 2011, the matters before the circuit court in this case centered on Lukens' failure to comply with orders obligating him to pay GAL fees, pay increased amounts of child support and attorney's fees to Dugan, and remedy his failure to comply with those orders, including depositing an anticipated commission check in trust with Dugan's attorney. Lukens was aware that the court had declined to schedule a hearing on his February 2009 motion until he paid in full the outstanding GAL fees for which he was held responsible. Lukens claims that he did not have the financial resources to pay the GAL fees. However, the circuit court found on more than one occasion that Lukens had the financial resources to meet the financial obligations ordered by the court, but that Lukens chose not to pay. For example, in August 2010, the court found that Lukens had the ability to pay increased amounts of child support, but had chosen not to do so. And, in December 2010, the court, in response to a motion for contempt brought against Lukens by the GAL for

[4] Lukens does not identify what those "non-recorded actions" might have been and, of course, he could not properly do so. We are constrained by the record on appeal. His assertion that he took non-record actions carries no weight.

Lukens' failure to pay her fees, found that Lukens "had the ability to pay more toward the [GAL] fees" but had not done so. Although Lukens disputes that he had the financial ability to pay the GAL fees, he has not challenged these findings as being clearly erroneous.

¶23 We conclude that the court's warning, in conjunction with the multiple orders of contempt entered against him for his failure to obey court orders relating to GAL fees and child support payments, gave Lukens ample warning that his failure to obey was a proper subject of sanctions. Considering the length of time that passed following the filing of Lukens' February 2009 motion, the opportunities that Lukens had to comply with the circuit court's numerous orders, and the court's earlier attempts to compel compliance through lesser sanctions, we conclude that the circuit court did not erroneously exercise its discretion in finding that Lukens' conduct was egregious.

¶24 Lukens argues that even if his conduct was egregious, he had a justifiable excuse and therefore dismissal of his motion was unjustified. The primary excuse given by Lukens is that he simply did not have the financial ability to discharge the orders the court imposed upon him to pay the GAL fees and was thus placed in a situation in which he was "too poor to see his child" and "too poor to litigate." However, as stated immediately above, the circuit court found on multiple occasions between the October 2009 order and Dugan's filing of her motion to dismiss that Lukens had the ability to pay the GAL fees, the increased child support, and a portion of Dugan's attorney's fees as ordered. Again, Lukens does not claim that those findings were clearly erroneous. There is thus a sufficient reasonable basis in the record to support the court's later finding that Lukens' conduct in failing to pursue any issues relating to the placement of J.L.

was without justification and we thus conclude that the finding was not clearly erroneous. *See* ***Sentry***, 247 Wis. 2d 501, ¶¶20-21.

¶25 In summary, the circuit court had a rational basis for concluding that Lukens' failure to pursue any issue pertaining to the placement of J.L. was egregious and without a "clear and justifiable excuse." Accordingly, we cannot say that the court's decision to dismiss Lukens' motion was an erroneous exercise of the court's discretion.[5]

II. Placement and Custody

¶26 Lukens argues that the record is insufficient to support that portion of the circuit court's August 2011 order awarding Dugan primary physical placement and sole legal custody of J.L. We disagree.

¶27 In its August 2011 order, the circuit court dismissed Lukens' February 2009 motion for failure to prosecute. The circuit court stated that the "FCCS report and the consistent recommendations of the GAL based upon that report, create a sufficient factual basis to render a final order of custody and placement of [J.L.]."

¶28 Lukens correctly argues that communications and recommendations of a GAL are not evidence and cannot be relied upon by the circuit court. *See* ***Hollister v. Hollister***, 173 Wis. 2d 413, 419, 496 N.W.2d 642 (Ct. App. 1992)

[5] Lukens argues that the court was obligated to hold an evidentiary hearing on his motion. However, our determination that the circuit court did not erroneously exercise its discretion in dismissing his motion is dispositive on this issue and, therefore, we do not address this argument. ***Cholvin v. DHFS***, 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (if a decision on one point disposes of the appeal, we will not decide other issue raised).

(observing that the role of the guardian ad litem is not that of a fact finder); ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 774, 498 N.W.2d 235 (1993) (the position and observations of the guardian ad litem are not evidence). However, we are not persuaded by Lukens' additional argument that the FCCS report in this case could not provide a sufficient factual basis for the court's order.

¶29 Lukens asserts that standing alone, the FCCS report cannot provide a sufficient factual basis for a court's decision as to placement and custody. However, Lukens does not develop an argument in support of this assertion, nor does he direct this court to any legal authority supporting it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to address issues that are inadequately briefed and unsupported by citation to authority).

¶30 Lukens also asserts that the FCCS report in this case cannot be used because it was "jointly written and issued by the FCCS counselor and the GAL," and thus "[t]here is no way to determine which portions of the document may be permissible in the record and which must be excluded." Lukens does not direct this court to any legal authority supporting his assertion that the FCCS report cannot form a sufficient factual basis for a court's order pertaining to custody and placement if the GAL joins in writing and issuance of the FCCS report. This court need not consider arguments unsupported by legal authority. *See* ***id.*** That being said, the fact that the preparer of the FCCS report and the GAL jointly prepared and issued the FCCS report in their recommendations does not mean anything more than that they agreed in their recommendations with respect to placement and custody. Accordingly, we reject Lukens' suggestion that an FCCS report may

not form an evidentiary basis if the GAL is in agreement with any or all of the recommendations contained in the FCCS report.

III. Sanctions Under WIS. STAT. § 802.05

¶31 Dugan has moved this court for attorney's fees and costs under WIS. STAT. § 802.05(1) on the grounds that Lukens' appeal was "without any reasonable basis in fact or law and was not supported by proper statutory authority or relevant case law," and Lukens has pursued this appeal in bad faith for the purpose of harassing Dugan.

¶32 The rules for appellate procedure authorize this court to award costs, fees, and attorney fees as a sanction only if we conclude that the appeal was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or the party or the party's attorney "knew, or should have known, that the appeal … [had no] reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c). In order to award attorney fees, we must conclude that the entire appeal is frivolous. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. This court determines whether an appeal is frivolous as a matter of law, considering "'what a reasonable party or attorney knew or should have known under the same or similar circumstances.'" ***Larson v. Burmaster***, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134 (quoted source omitted).

¶33 Applying this standard, we cannot say that Lukens' entire appeal is frivolous. Lukens presented some nonfrivolous arguments that he supported both factually and legally. Accordingly, we deny Dugan's motion.[6]

CONCLUSION

¶34 For the reasons discussed above, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[6] Dugan also seeks an order from this court requiring Lukens to pay the GAL fees "in their entirety." An award of such fees is not part of a sanction under WIS. STAT. § 809.25(3) and is not otherwise properly before this court.