COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1734 **Cir. Ct. No. 2002PA1448**

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

IN RE THE PATERNITY OF E. A. T.:

STATE OF WISCONSIN,

PETITIONER,

JOANNE W.,

PETITIONER-RESPONDENT,

V.

BRIAN S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Brian S. appeals, *pro se*, the order, entered after a hearing, pursuant to which the circuit court did the following: denied Brian S.'s request for an evidentiary hearing after finding that a process for facilitating a relationship with his minor child, E.T., had previously been established; held that Joanne W. had complied with its orders; concluded that no further actions were needed to foster the relationship between Brian S. and E.T.; and denied Brian S.'s request for quarterly reports regarding E.T.'s progress. Brian S. argues that the circuit court erred when it denied his motion for mediation and that the circuit court failed to adhere to the best interest of the child standard when it made its factual findings. We disagree and affirm.

BACKGROUND

¶2 E.T. was born to Joanne W. on June 27, 1997. Three days later, Brian S. was convicted of first-degree sexual assault of a child, and he has been incarcerated ever since. He has never met E.T.

¶3 Brian S. was adjudicated E.T.'s father when she was five years old. Joanne W. was awarded sole legal custody and primary placement.

¶4 Six and one-half years later, when E.T. was eleven years old, Brian S. sought joint custody and asked that arrangements be made for E.T. to visit him in prison. A family court commissioner denied Brian S.'s motion and he moved for *de novo* review. Brian S. also moved to require Joanne W. to engage in mediation with him regarding E.T.'s physical placement and his contact with her.

¶5 The circuit court denied Brian S.'s motion for mediation, explaining that it did not believe mediation was likely to resolve the issues before it.[1] Brian S. sought reconsideration. In an order appointing a guardian *ad litem* for E.T., the circuit court made clear that it believed an initial session of mediation would cause undue hardship because Joanne W. strongly opposed establishing a relationship between Brian S. and E.T. based, in part, on Brian S.'s conviction for first-degree sexual assault of a child.[2] The circuit court then scheduled a hearing, prior to which Brian S. again requested mediation.

¶6 At the hearing, the circuit court reiterated its conclusion that due to the circumstances of the case, it was unlikely mediation would be successful. Brian S. then proceeded to explain to the circuit court that he was seeking joint custody of E.T. and continuing contact with her through telephone calls and letters. By the end of the hearing, Brian S. had withdrawn his request for joint custody and the circuit court had set forth a process by which Brian S. would begin to establish a relationship with E.T. through letters and, possibly, periodic telephone calls.

¶7 At a follow-up hearing, the guardian *ad litem* reported that E.T. was seeing a therapist to facilitate the process of establishing a relationship with Brian

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[1] In its written order, the circuit court further noted the "inherent difficulties in arranging mediation where one party is incarcerated." This does not, however, appear to have been the driving force behind its decision to deny Brian S.'s motion for mediation.

[2] The circuit court referenced WIS. STAT. § 767.11(8)(b), which was renumbered WIS. STAT. § 767.405(8)(b) by 2005 Wis. Act 443, § 57, effective January 1, 2007. *See* 2005 Wis. Act 443, § 267.

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

S. The guardian *ad litem* relayed that E.T. had said that she would like to be much older before meeting Brian S. and that she did not want to receive telephone calls from him. The guardian *ad litem* informed the circuit court that the therapist recommended keeping the relationship as it was, with letters arriving for E.T. once a month.

¶8 The circuit court ordered E.T. to remain in therapy until she was discharged. The circuit court also addressed a renewed motion for joint custody filed by Brian S. In denying the motion, the circuit court explained that the presumption favoring joint custody was overcome by—among other things—Brian S.'s incarceration and the fact that he did not have a relationship with E.T.

¶9 At a subsequent status hearing, the circuit court heard from the guardian *ad litem* regarding the best interest of E.T. It then entered the final order at issue for purposes of this appeal. The circuit court found that E.T.'s therapist had not recommended any further actions be taken to foster E.T.'s relationship with Brian S. As such, the circuit court did not order therapy to continue. In addition, the circuit court found that Joanne W.'s "disinclination to facilitate a relationship and engage [in] correspondence with [Brian S.] is understandable. Due to the circumstances of this case, requiring her to report quarterly to [Brian S., as he requested,] puts an unreasonable burden on her." It went on to state that the information Brian S. sought would not increase his ability to enhance his relationship with E.T. The circuit court did, however, order Joanne W. to continue forwarding Brian S.'s letters to E.T. and providing Brian S. with report cards and a yearly picture of E.T.

DISCUSSION

A. Denial of request for mediation.[3]

¶10 Brian argues that mediation was mandatory under WIS. STAT. § 767.405(5) and (8). Subsection (5) provides: "MEDIATION REFERRALS. (a) Except as provided in sub. (8)(b), in any action affecting the family… in which it appears that legal custody or physical placement is contested, the court shall refer the parties to the director of family court services for possible mediation of those contested issues." Sec. 767.405(5). Subsection (8)(a) states: "INITIAL SESSION OF MEDIATION REQUIRED. (a) Except as provided in par. (b), in any action affecting the family … in which it appears that legal custody or physical placement is contested, the parties shall attend at least one session with a mediator." Sec. 767.405(8)(a).

¶11 Despite the express references to WIS. STAT. § 767.405(8)(b) in the subsections on which he relies, Brian S. seems to overlook it. Subsection (8)(b) states: "A court may, in its discretion, hold a trial or hearing without requiring attendance at the session under par. (a) if the court finds that attending the session will cause undue hardship." As set forth above, the circuit court expressly made this finding in its order appointing a guardian *ad litem* for E.T., explaining that it believed an initial session of mediation would cause undue hardship because Joanne W. strongly opposed establishing a relationship between Brian S. and E.T.

[3] The guardian *ad litem* contends that the issue of mediation is outside the scope of this appeal. She seems to overlook WIS. STAT. RULE 809.10(4), which provides that "[a]n appeal from a … final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon."

based, in part, on Brian S.'s conviction for first-degree sexual assault of a child. The circuit court acted properly when it denied Brian S.'s motion for mediation.[4]

B. Adherence to the best interest of the child standard.

¶12 Brian S. also argues that the circuit court failed to adhere to the best interest of the child standard when it made the factual findings set forth in its order. Specifically, he claims the circuit court erroneously exercised its discretion when it accepted the therapist's recommendation that no further actions be taken to foster the relationship between Brian S. and E.T. Brian S. also seems to assert that the circuit court erred when it failed to account for what he describes as Joanne W.'s unreasonable refusal to cooperate or communicate with him as evidenced by its denial of his request for quarterly updates from Joanne W. about E.T.'s progress.

¶13 Decisions on placement, including contact, and custody matters are entrusted to the circuit court's discretion. *See* ***Wolfe v. Wolfe***, 2000 WI App 93, ¶17, 234 Wis. 2d 449, 610 N.W.2d 222; ***G.R.S. v. J.R.G.***, 141 Wis. 2d 503, 507, 415 N.W.2d 564 (Ct. App. 1987). "We will sustain an exercise of discretion as long as the court considered the facts of record in light of the proper legal standard and reached a reasoned and reasonable decision." ***Wolfe***, 234 Wis. 2d 449, ¶17. As emphasized by Brian S., the proper legal standard is the best interest of the child. *See* WIS. STAT. § 767.41(5)(am) ("[I]n determining legal custody and

[4] To the extent that Brian S. is arguing that the circuit court should have used an unofficial "process of paternity," we are not persuaded given that he provides no legal authority to support the use of such a process.

periods of physical placement, the court shall consider all facts relevant to the best interest of the child.").

¶14 Here, the circuit court found that Joanne W. complied with its orders by establishing therapy for E.T., forwarding Brian S.'s letters to E.T., and providing Brian S. with report cards and a picture. The circuit court further found that her "disinclination to facilitate a relationship and engage [in] correspondence with [Brian S.] is understandable." Based on Brian S.'s incarceration status, E.T.'s wishes, the therapist and the guardian *ad litem*'s recommendations relating to E.T.'s best interest, the circuit court found that all that was appropriate for Brian S. at this time were report cards and yearly pictures.

¶15 Though Brian S. may have a differing view of what he believes is in E.T.'s best interest, it is not his decision to make. We conclude that the circuit court's approach—which encouraged communication consistent with E.T.'s comfort level and ensured that Joanne W. had complied with its orders—was a reasonable exercise of discretion in E.T.'s best interest.

By the Court.—Order affirmed.

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