COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2296 **Cir. Ct. No. 2009PA7PJ**

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

IN RE THE CONTEMPT PROCEEDING IN RE THE PATERNITY OF G. R. F.:

NATASHA J. HENNING,

PETITIONER-RESPONDENT,

V.

MATTHEW R. FLANNERY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.[1] Matthew Flannery and Natasha Henning share joint legal custody and physical placement of their minor child, G.R.F.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Flannery filed motions alleging that Henning had denied him periods of physical placement with G.R.F. and that Henning had failed to follow a court order regarding physical placement of G.R.F. The circuit court denied Flannery's motions, and Flannery now appeals.

¶2 On appeal, Flannery argues that the circuit court should have found Henning in contempt and granted him additional periods of physical placement and costs and attorneys fees because Henning: (1) intentionally violated a court-ordered placement schedule when she intentionally and unreasonably denied Flannery periods of physical placement with G.R.F.; and (2) "fail[ed] to appear in person" at an August 26, 2013 hearing. For the reasons set forth below, I reject Flannery's arguments and affirm the circuit court's order.

BACKGROUND

¶3 G.R.F. was born in May 2009. In April 2010, the circuit court issued an order regarding legal custody and physical placement of G.R.F., which incorporated a stipulation entered into by Flannery and Henning. Under the stipulation, Flannery and Henning agreed to "50/50 custody and placement" of G.R.F., and agreed to "share placement on an every-other-week basis, alternating each week accordingly." Because Flannery and Henning live approximately 160 miles from one another, they agreed to meet at a location approximately half-way between each of their homes to exchange placement of G.R.F.

¶4 In July 2012, Flannery filed a motion to enforce physical placement, in which he alleged that he "had one or more period[s] of physical placement denied by" Henning and that he "had one or more period[s] of physical placement substantially interfered with by" Henning. This motion was filed pursuant to WIS. STAT. § 767.471(2), which provides in pertinent part:

> WHO MAY FILE. A parent who has been awarded periods of physical placement under s. 767.41 may file a motion under sub. (3) if any of the following applies:
>
> (a) The parent has had one or more periods of physical placement denied by the other parent.
>
> (b) The parent has had one or more periods of physical placement substantially interfered with by the other parent.

WISCONSIN STAT. § 767.471(3) provides in pertinent part:

> MOTION. (a) The motion shall allege facts sufficient to show the following:
>
> 1. The name of the moving party and that the moving party has been awarded periods of physical placement.
>
> 2. The name of the responding party.
>
> 3. That one or more of the criteria in sub. (2) apply.
>
> (b) The motion shall request the imposition of a remedy or any combination of remedies under sub. (5)(b) and (c). This paragraph does not prohibit a court from imposing a remedy under sub. (5)(b) or (c) if the remedy was not requested in the motion.
>
> ….
>
> (e) A motion under this section is a motion for remedial sanction for purposes of s. 785.03(1)(a).

WISCONSIN STAT. § 767.471(5) provides in pertinent part:

> (a) The court shall hold a hearing on the motion no later than 30 days after the motion has been served, unless the time is extended by mutual agreement of the parties ….
>
> (b) If at the conclusion of the hearing the court finds that the responding party has intentionally and unreasonably denied the moving party one or more periods of physical placement or that the responding party has intentionally and unreasonably interfered with one or more of the moving party's periods of physical placement, the court:

> 1. Shall do all of the following:
>
> a. Issue an order granting additional periods of physical placement to replace those denied or interfered with.
>
> b. Award the moving party a reasonable amount for the cost of maintaining an action under this section and for attorney fees.
>
> 2. May do one or more of the following:
>
> ....
>
> b. Find the responding party in contempt of court under ch. 785.
>
> c. Grant an injunction ordering the responding party to strictly comply with the judgment or order relating to the award of physical placement.

As relevant to the issues in this appeal, Flannery's motion asked the circuit court to issue an order: (1) granting Flannery additional periods of physical placement to replace those denied or interfered with; (2) awarding Flannery reasonable costs and attorney fees; (3) finding Henning in contempt; and (4) granting an injunction ordering Henning to strictly comply with the physical placement order.

¶5 The circuit court held a hearing on the motion in August 2012, and later ordered Flannery and Henning to participate in mediation to resolve the motion to enforce physical placement. In January 2013, the mediator assigned to the case informed the court that "mediation was not successful."

¶6 The circuit court held a status conference in January 2013, at which Flannery appeared pro se and Henning did not appear. The court explained to Flannery: "Ms. Henning hasn't appeared so at the very least you [Flannery] would

be entitled to a[n] injunction ordering … strict compliance with the judgment or order ....”[2]

¶7 The circuit court issued the injunction in March 2013, providing that Henning “must strictly comply with the Order entered by the court on April 9, 2010,” and stating that “[f]ailure to comply with this Order is punishable by finding [Henning] in Contempt of Court.”

¶8 In July 2013, Flannery filed the following documents in the circuit court: (1) a petition for appointment of a guardian ad litem; (2) a notice of motion and motion to change physical placement and child support; (3) an affidavit in support of the motion; and (4) an order to show cause for contempt.

¶9 The circuit court held a hearing on these matters on July 25, 2013. At the July 25 hearing, the court granted the petition for appointment of a guardian ad litem, and advised Henning to contact the Office of the State Public Defender “to see if she qualifies for representation on the contempt matter.” The court rescheduled the hearing on the contempt matter for August 26, 2013.[3]

¶10 At the August 26 hearing, Flannery appeared in person and with counsel, and Henning appeared by phone, pro se. Regarding her appearance by phone, Henning explained that her daughter was sick and needed to be taken to the hospital. Flannery’s counsel argued that the circuit court should not allow

[2] The “judgment or order” to which the circuit court referred was the April 9, 2010 order incorporating Flannery and Henning’s stipulation regarding physical placement of G.R.F.

[3] It appears that Flannery’s motion to change placement remained open pending investigation by the guardian ad litem. The motion to change placement is not at issue in this appeal.

Henning to appear by phone because Henning had not received prior approval to do so. In addition, Flannery's counsel argued that "default judgment should be granted to [Flannery] based on" Henning's "failure to appear" in person. The circuit court rescheduled the hearing for August 28, 2013, and instructed Henning "to be here [in court]" and to bring "a report from the doctor" verifying that Henning took her daughter to the doctor. The circuit court did not find Henning in contempt during or following the August 26 hearing.

¶11 At the August 28 hearing, Flannery appeared in person and with counsel, and Henning appeared in person and pro se. The circuit court clarified that the issue before the court was the "motion for contempt based upon allegations of Ms. Henning not allowing Mr. Flannery" periods of placement with G.R.F. Henning submitted "medical information" indicating that, on August 26, Henning took her daughter to the hospital, and her daughter was diagnosed with croup. The circuit court stated that the information provided by Henning was "adequate" and found that Henning "presented an excuse as to why she" appeared by phone for the August 26 hearing.

¶12 The testimony at the August 28 hearing relevant to the issues in this appeal centered on whether Henning intentionally and unreasonably denied Flannery periods of physical placement with G.R.F.[4] At the August 28 hearing, Henning testified that she "never denied" Flannery periods of physical placement

[4] At the August 28 hearing, Flannery's counsel stated that the part of WIS. STAT. § 767.471(2), allowing a parent who has been awarded periods of physical placement to file a motion under § 767.471(3) if "[t]he parent has had one or more periods of physical placement substantially interfered with by the other parent," was "not a part of this case." Accordingly, in the sections that follow, I refer only to those parts of § 767.471 that address whether a parent has intentionally and unreasonably denied the other parent one or more periods of physical placement.

with G.R.F. As to why she was unable to exchange placement with Flannery on various occasions, Henning testified that: (1) she did not have a driver's license; (2) she had very few friends from whom she could get a ride; (3) her family members could not give her a ride because they work "all the time"; and (4) when Flannery called Henning to set up placement, Flannery threatened Henning that he would "punch [her] face in," that he would "make sure [she] wouldn't walk again," and that she "would never see [G.R.F.] again the next time [Flannery] gets her." Henning also testified that "[e]very time [Flannery] called and wanted [G.R.F.]," she told Flannery that he could pick up G.R.F. and she would "pay him for gas."

¶13 Flannery testified that he regularly requested placement of G.R.F., but that he had placement of G.R.F. for only six weeks between November 2012 and the August 28, 2013 hearing, and that during this time Henning asked him to drive the entire distance to pick up G.R.F. "on only two occasions." Flannery testified that Henning told him that he could not have placement of G.R.F. because "[s]he's [Henning] not driving, nobody will give her a ride, she just broke up with her boyfriend, she's going through a hard time, she doesn't want me [Flannery] to have [G.R.F.] because she doesn't like my current girlfriend and she's afraid that I'll never give [G.R.F.] back." The circuit court asked Flannery: "Did [Henning] make any other offers to try and accommodate your seeing [G.R.F.] when [Henning] had this inability to transport [G.R.F.]?" Flannery responded: "Yes. [Henning] has told me several times, several times that her brother will drive [G.R.F.] down, or her cousin or her mom, somebody will drive her, and then when the day comes, something happens, either the car broke down or she lost her cell phone ...."

¶14 At the conclusion of the August 28 hearing, the circuit court found that Henning did not intentionally disobey a court order, and that Henning did not intentionally and unreasonably deny Flannery periods of physical placement with G.R.F. The court therefore denied Flannery's motions, and did not find Henning in contempt or award Flannery relief under WIS. STAT. § 767.471(5)(b).

DISCUSSION

¶15 Flannery argues that the circuit court was required to find Henning in contempt under WIS. STAT. § 785.01(1)(b),[5] because Henning intentionally violated the court-ordered placement schedule and subsequent compliance order when she intentionally and unreasonably denied Flannery one or more periods of physical placement with G.R.F. Incidental to Flannery's request for contempt, Flannery argues that the circuit court was also required to "issue an order granting [Flannery] … additional periods of physical placement and costs and attorney fees associated with bringing this action" under WIS. STAT. § 767.471(5)(b).

¶16 WISCONSIN STAT. § 767.471(5)(b) provides that a court "[m]ay" find the responding party in contempt, and "[s]hall" order additional periods of physical placement and costs and attorney fees, if the court "finds that the responding party has intentionally and unreasonably denied the moving party one or more periods of physical placement." The plain language of § 767.471(5)(b) makes clear that these remedies apply *only if* the circuit court finds that one parent

[5] As noted above, WIS. STAT. § 767.471(5)(b) provides that "[i]f at the conclusion of the hearing the court finds that the responding party has intentionally and unreasonably denied the moving party one or more periods of physical placement," the court may "[f]ind the responding party in contempt of court under ch. 785." WISCONSIN STAT. § 785.01(1) provides: "'Contempt of court' means intentional … [d]isobedience, resistance or obstruction of the authority, process or order of a court."

has "intentionally and unreasonably denied" the other parent "one or more periods of physical placement."

¶17 Flannery fails to address the fact that the circuit court in this case made the factual finding that Henning *did not* intentionally and unreasonably deny Flannery one or more periods of physical placement with G.R.F. in violation of the court-ordered placement schedule and subsequent compliance order. The court stated: "[O]n the basis of the record before me, I don't think the … evidence is that there was intentional and unreasonable denial by Ms. Henning of one or more periods of placement." The court further explained: "[I]f you don't have intentional action where the modus operandi of the denier is to … prevent a person from having their placement … then you don't have a basis for a remedy being sought here under 767.471(5)(b)."

¶18 This court does not overturn a circuit court's factual findings unless they are clearly erroneous. ***Teubel v. Prime Dev., Inc.***, 2002 WI App 26, ¶12, 249 Wis. 2d 743, 641 N.W.2d 461 (WI App 2001). In addition,

> "[W]hen the [circuit court] acts as the finder of fact, and where there is conflicting testimony, the [circuit court] is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact."

Noll v. Dimiceli's, Inc., 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983) (quoted source omitted). Under these standards, this court will not reverse a circuit court's factual findings unless "the evidence supporting a contrary finding … constitute[s] the great weight and clear preponderance of the evidence." ***Sellers v. Sellers***, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996).

¶19 Flannery fails to explain how the circuit court's factual finding that Henning did not intentionally and unreasonably deny him periods of physical placement in violation of a court order is clearly erroneous, or how the evidence supporting a contrary finding "constitute[s] the great weight and clear preponderance of the evidence." ***Id.*** Flannery's argument consists only of assertions disagreeing with the finding of the circuit court. For example, Flannery asserts that, "based upon the facts and the circuit court's own statements, Henning intentionally and unreasonably denied … Flannery's court ordered placement of his minor child." Flannery similarly asserts:

> Especially after the [March 2013] injunction was entered by the court … Henning knew she was to follow the placement schedule, but continued not to do so. Henning not having a valid driver's license or owning a vehicle is not a valid excuse for failing to exchange placement with Flannery and following the court order. Thus, Henning's failure to follow the placement schedule shows intentional disobedience of the court orders.

The circuit court found to the contrary, based on the facts reviewed by the court and the court's weighing of the parties' testimony and credibility. Flannery seeks to relitigate those facts on appeal, but "'where there is conflicting testimony, the [circuit court] is the ultimate arbiter of the credibility of the witnesses,'" and this court accepts the circuit court's findings where "'more than one reasonable inference can be drawn from the credible evidence.'" ***Noll***, 115 Wis. 2d at 644 (quoted source omitted). Accordingly, Flannery's argument that this court should overturn the circuit court's factual finding that Henning did not intentionally and unreasonably deny him periods of physical placement fails.

¶20 Flannery also argues that the circuit court "should have granted Flannery's request and issued an order" finding Henning in contempt "based upon [Henning's] failure to appear in person" at the August 26, 2013 hearing "as is

required in contempt proceedings and by the Order to Show Cause." I understand Flannery to argue that the circuit court was *required* to find Henning in contempt on this basis.

¶21 In support of this argument, Flannery relies on language set forth in form FA-4172V, the standard circuit court form for filing an order to show cause and affidavit for finding of contempt, which states: "*If you do not appear as indicated, the court may hold the hearing without you and grant the request, including issuing an order to have you arrested and committed to the county jail.*" (Alteration in original). Flannery identifies no rule, statute, or case that *required* the circuit court to find Henning in contempt based on her appearance by phone at the August 26 hearing. Alternatively, Flannery argues that the court should have granted his motion for contempt as a default judgment under WIS. STAT. § 806.02(5).[6] However, Flannery identifies no legal authority supporting the entry of a default judgment finding a party in contempt based on the party's appearance by phone. I therefore reject both of Flannery's arguments as unsupported. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (explaining that court of appeals generally will not consider "[a]rguments unsupported by references to legal authority").

CONCLUSION

¶22 For the reasons set forth above, I reject Flannery's arguments and affirm the circuit court's order.

[6] WISCONSIN STAT. § 806.02(5) states: "A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial."

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.