COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2283

Cir. Ct. Nos. 2014PA34PJ
2015PA4PJ

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

IN RE THE PATERNITY OF E. N. H.-P. AND E. N. H.:

WILLIE R. PETTENGILL,

PETITIONER-APPELLANT,

V.

NATASHA J. HENNING,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Willie Pettengill, pro se, appeals the denial of a request for change of placement and custody. We affirm.

¶2 The minor child at issue was born to Pettengill and Natasha Henning in 2007. The parties were never married. Henning currently resides in Chippewa County. Pettengill currently resides in Arizona.

¶3 Pursuant to a Lafayette County Circuit court order dated October 24, 2011, "Natasha Henning shall have sole legal custody as to medical, school and extracurricular activity decisions for [the minor child]. The parties shall have joint legal custody concerning all other major decisions." The order further provided Henning with primary physical placement of the child during the school year. Pettengill had primary physical placement during the child's winter, spring and summer breaks from school.

¶4 Pettengill, pro se, petitioned to modify the October 24, 2011 order to award him primary physical placement.[1] Among other things, Pettengill alleged Henning had "substantial instability," as well as a "romantic relationship with a convicted sex offender." After several evidentiary hearings, the circuit court denied the motion to modify the October 24, 2011 order, with one exception: "Natasha Henning may not reside in the same residence as Joshua Kohlbeck. His history of sexual assault, chemical dependency, and criminal activity justify this restriction." The court also denied Pettengill's request to modify custody as to decisions regarding medical, school, and extracurricular activities. Pettengill now appeals.

¶5 Child custody and placement determinations are peculiarly within the sound discretion of the circuit court, because it has seen the parties and had a

[1] The circuit court indicated that the motion was modified to request a change in custody.

first-hand opportunity to observe their conduct. The circuit court is thus in a much better position than an appellate court to determine where the best interests of the child lie. *See* ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 765, 498 N.W.2d 235 (1993). Accordingly, we review the discretionary decision of the circuit court only to determine whether it examined the facts of record, applied a proper legal standard, and reached a reasonable conclusion using a rational process.[2] ***Id.*** at 766. We will not reverse unless there is no reasonable basis for the court's exercise of discretion. ***Id.*** Moreover, our task as the reviewing court is to search the record for reasons to sustain the circuit court's exercise of discretion. *See* ***Hughes v. Hughes***, 223 Wis. 2d 111, 120, 588 N.W.2d 346 (Ct. App. 1998). We do not search for evidence to support findings that the court could have but did not make. *See* ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

¶6 On appeal, Pettengill insists "something smells rotten in the State of Denmark …." Pettengill argues the circuit court "should be reversed for coming to a conclusion which another court would not reach …." Pettengill contends the court failed to consider relevant facts, including the child "lives with a drug-addicted … mother, a child sex offender, cannot make it to school, performs poorly in school, repeatedly shows up sick at the hospital … [and] is the subject of Protective Services reports, often precipitated by Henning's own mother." Pettengill seeks primary physical placement of their child during the school year, with summertime placement to Henning, and sole custody as to decisions regarding the child's medical, school, and extracurricular activities.

[2] Pettengill uses the phrase "abuse of discretion." We have not used that phrase since 1992, when our supreme court changed the terminology in reviewing a circuit court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion." *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

¶7 The record demonstrates the circuit court considered proper factors for revision of custody and physical placement orders after a two-year period. *See* WIS. STAT. § 767.451(1)(b).[3] As to whether modification of custody and placement was in the child's best interest, the record reveals the circuit court considered the proper statutory presumptions that continuing the current allocation of decision making and placement was in the child's best interest. *See* WIS. STAT. § 767.451(1)(b)(2). The court was fully aware of the allegations of Henning's drug abuse and child neglect, among other things. It is apparent the court considered Henning's deficits concerning parenting, but it also considered those of Pettengill. The court stated:

> [Henning] testified the Pettengills once kept [the child] away from her about ten months. This is not refuted. Eventually, she located [the child], and the Lafayette Circuit Court awarded joint custody to [the child's] parents, Mr. Pettengill and Ms. Henning.
>
> Subsequent to that order in October of 2011, Mr. Pettengill sought a contempt order against Ms. Henning for failing to inform him of doctor appointments for [the child]. The Lafayette County Circuit Court denied Mr. Pettengill's motion. More importantly, the Court not only found that Mr. Pettengill had not met his burden for a change in custody and placement, it found that Mr. Pettengill, "used provisions contained within the previous court order regarding notification of medical appointments, notification of change of address, and visits at a 'club' to harass Natasha Henning." The Court further found that, "Natasha Henning is making reasonable efforts to attempt to co-parent with Mr. Pettengill, but Mr. Pettengill is not reciprocating Ms. Henning's efforts." This Court is not convinced that Mr. Pettengill has changed.

[3] References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶8 The circuit court also considered the recommendations of the guardian ad litem,[4] the evidence presented by both parties, and their respective arguments. The court found each parent was capable of satisfactorily raising the child and concluded the child had meaningful placement with Pettengill and his parents under the present placement order.

¶9 The circuit court emphasized two factors that prevented a ruling in Pettengill's favor. First, the court found Henning, "since the last hearing, has put her daughter's welfare above her relationship with Joshua Kohlbeck. Specifically, Ms. Henning will not have Kohlbeck present in her home if that is necessary for her to retain custody of [the child]." Second, the court found Henning "presented credible and convincing testimony that if the court granted the motion, it is more likely than not that she would have difficulty enforcing her parental rights." The court stated it "has serious concerns that [the child] would be denied meaningful placement with her mother should the Court grant Mr. Pettengill's motion."

¶10 The circuit court's factual findings are not clearly erroneous. WIS. STAT. § 805.17(2) The court rationally and reasonably analyzed the facts under the proper legal framework and properly concluded Pettengill failed to overcome the statutory presumptions. We discern no legitimate reason to disturb the court's discretionary decision.

¶11 Although Pettengill takes umbrage with the circuit court's decision, none of the issues he raises justify reversal. At best, he presents reasons why the

[4] The guardian ad litem stated, "What concerned me primarily was Mr. Kohlbeck's presence in the home." She recommended, "the child go with Mr. Pettengill at the present time."

court should have ruled in his favor. However, under our deferential standard of review, appellate courts do not retry cases on appeal. *See* ***Commerce Ins. Co. v. Badger Paint & Hardware Stores, Inc.***, 265 Wis. 174, 182, 60 N.W.2d 742 (1953). Given the difficult and sensitive issues raised, we acknowledge a different judge may have come to a contrary decision. However, that is not a sufficient basis to overturn the court's discretionary decision.

¶12 Pettengill also alleges the circuit court "held a secret, off-the-record 'Phone Conference' on July 22, 2015, six days before trial, wherein the Judge adjourned the trial set for July 28, 2015." He further insists the court intimidated his trial counsel, who later rescinded a motion without Pettengill's permission and withdrew from the case to his prejudice. These arguments are undeveloped, conclusory, and lacking citation to the record on appeal. We shall not consider unsupported arguments nor search for evidence to support a party's argument. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127. In any event, Pettengill's disparaging remarks directed at the circuit court are unwarranted and will not be further addressed.

By the Court.—Order affirmed.

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