COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP566 Cir. Ct. No. 2012FA315

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

IN RE THE FINDING OF CONTEMPT IN
IN RE THE PLACEMENT OF W.N.E. AND K.E.:

STATE OF WISCONSIN,

PETITIONER,

LORI C. ERICKSON,

PETITIONER-APPELLANT,

V.

STEVEN R. COONS,

RESPONDENT-RESPONDENT,

ERIN M. HAHN, GUARDIAN AD LITEM,

RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.[1] This is an ongoing dispute over physical placement of two minor children born in 2003 and 2005, between the children's mother, Lori Erickson, and the children's adjudicated father, Steven Coons.[2] Lori and Steven have both filed multiple motions since 2006 to modify physical placement. In response to the most recent motions, pertinent to this appeal, on June 16, 2015, the circuit court entered a decision and order awarding Steven limited physical placement according to a specific schedule and with certain conditions. Lori denied Steven placement, and after a hearing the circuit court entered an order on October 6, 2015 finding Lori in contempt for violating the June 2015 physical placement order and setting purge conditions. Lori continued to deny Steven placement, and after a hearing the circuit court entered an order on March 11, 2016 finding Lori in contempt for violating the prior placement and contempt orders, sentencing her to ten days in jail, and setting purge conditions. This appeal followed. For the reasons stated below, I affirm.

BACKGROUND

¶2 The physical placement battle between Lori and Steven has been ongoing for over ten years. The undisputed facts and procedural history pertinent to the appeal at this juncture of the battle are as follows.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] I refer to the parties by their first names in this opinion, as they are referred to in the order on appeal.

Start of Physical Placement Case

¶3 Lori gave birth to W.N.E. in March 2003 and to K.E. in April 2005. Steven was adjudicated the father of both children.

¶4 In November 2005, the circuit court entered an order setting primary placement of the children with Lori and setting a schedule for periods of placement with Steven. The court also ordered that the guardian ad litem's appointment was to continue and that her fees were to be paid equally by the parties.[3]

¶5 Since the initial 2005 order, Lori and Steven have had a contentious placement experience that has resulted in numerous motions filed, court hearings held, and orders entered concerning placement and contempt. The three orders reviewed below provide the context for this appeal.

June 2015 Physical Placement Order

¶6 In June 2014, the guardian ad litem filed a motion for a hearing regarding Steven's supervised placement. After a hearing held in the same month, the circuit court issued a temporary order "pending the continued hearing in this matter," making the requested changes in Steven's supervised placement. In April 2015, the guardian ad litem filed her recommendation for unsupervised placement and Lori filed her proposed parenting plan. The court held a hearing on placement in May 2015, and entered an order in June 2015 providing for three hours of unsupervised placement with Steven every other weekend, increasing to five hours

[3] The same guardian ad litem has appeared in this case regarding physical placement of the two children since 2005.

each Sunday or Saturday starting in mid-September 2015. The court also ordered that any expanding of the placement "will depend on the agreement of the parties or on motion to the court." In addition to setting detailed conditions for Steve's placement, the court ordered that Lori immediately notify the guardian ad litem if Lori believed that the children needed counseling for any problem stemming from the placement.

¶7 Lori appealed the June order in July 2015 and voluntarily dismissed that appeal in February 2016. In the meantime, Lori had filed a motion to change the placement terms in the June order, which the circuit court denied.

October 2015 Contempt Order

¶8 In September 2015, the guardian ad litem filed a motion and amended motion to enforce physical placement based on Lori's having denied placement on three occasions in violation of the June order, and Lori filed a motion for reconsideration of the June order. After a hearing, the circuit court entered an order in October 2015 denying Lori's motion, finding Lori in contempt, and setting purge conditions. The court found that, "Lori painted a picture that is totally false ... that Lori was stonewalling Steve as he attempted to determine when the next placement period would occur ... that Lori's motion ... is so weak it is bordering on frivolous."

¶9 The circuit court ordered that, "Before Lori may file any future motion it must be first sent to the Guardian ad Litem and the Guardian ad Litem will indicate whether there is any substance to the motion." The court also ordered that, "Steve shall notify Lori in one e-mail, when possible, what he plans to do with the girls during his placement. Steve is permitted to suggest a few

alternatives, however, his notice should be reasonable." The purge conditions set by the court included that:

> a. Lori shall ensure that the girls have placement every other weekend with Steve.
>
> b. Steve shall be awarded two make-up placements by the end of the year. These placement dates are to be worked out between the parties or with the help of Guardian ad Litem.
>
> c. If one party gives up the right to a weekend placement, future placement shall resume very other weekend.
>
> d. Lori shall be responsible for the entirety of the Guardian ad Litem's fees for the hearing on September 25, 2015.

March 2016 Contempt Order

¶10 In December 2015 and early January 2016, the guardian ad litem filed a motion and amended motion to enforce physical placement, based on Lori's having denied placement and refusal to agree to set up a make-up date. After a hearing, the circuit court entered an order in March 2016, finding Lori in contempt, sentencing her to ten days in jail, and setting purge conditions. The court found "that there was not enough reason for Lori to have denied placement." The purge conditions set by the court included that:

> a. Steve shall be awarded three (3) make-up placements to occur on or before March 20, 2016 ... on a Sunday from 12:00 p.m. to 5:00 p.m. that is not Steve's normal placement days.
>
> b. Lori shall ensure that the girls continue [to] have placement every other Sunday with Steve and shall no longer refuse any placement of the children that is to occur in a reasonable place. If Lori has any objection to a proposed placement location, she shall inform [the Guardian ad Litem, who] shall have the right to agree or disagree with the location selected.

> c. Steve shall be awarded $50 in fees and costs. Lori shall pay $50.00 to Steve within 14 days.
>
> d. Lori shall be responsible for the entirety of the Guardian ad Litem's fees for the hearing on January 15, 2016.

The March 2016 Order also ordered:

> 3. Neither party shall make any unnecessary contacts with the Guardian ad Litem that are not required by previous orders (e.g., if a party needs to clear something with the Guardian ad Litem).
>
> 4. Neither party shall use harassing or inappropriate language with the Guardian ad Litem. If harassing or inappropriate language continues by either party, they may be sentenced to jail time.

¶11 Lori appeals the March 2016 order.

DISCUSSION

¶12 Lori argues that the circuit court erred in four respects: (1) failing to dismiss the motions to enforce physical placement because, according to Lori, the guardian ad litem lacked authority to file them; (2) including terms and purge conditions in the October 2015 and March 2016 orders of contempt that purportedly modified the June 2015 placement order; (3) ordering that Lori reimburse the county for fifty percent of the guardian ad litem's fees when, according to Lori, only Lori was indigent; and (4) denying Lori's request to continue the January contempt hearing purportedly so that she would be unable to obtain counsel to represent her at the hearing. For the reasons below, I reject Lori's arguments and, therefore, affirm.

I. Whether the Guardian ad Litem Properly Filed Motions to Enforce Physical Placement

¶13 Lori argues on appeal that the circuit court "should have dismissed" the guardian ad litem's motions to enforce physical placement for two reasons. First, Lori argues that the guardian ad litem lacked authority to file motions to enforce physical placement, because WIS. STAT. § 767.471(2)[4] authorizes a parent to file a motion to enforce physical placement, and the guardian ad litem here was neither a parent nor authorized by a parent to file the motions to enforce physical placement that led to the contempt order that Lori appeals. Second, Lori argues that the guardian ad litem lacked authority to file the motions to enforce physical placement, because the guardian ad litem's appointment terminated upon entry of the June placement order under WIS. STAT. § 767.407(5),[5] except for a limited role if Lori believed the children required counseling. The guardian ad litem argues in

[4] WISCONSIN STAT. § 767.471(2) provides:

> 2) 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.
>
> (c) The parent has incurred a financial loss or expenses as a result of the other parent's intentional failure to exercise one or more periods of physical placement under an order allocating specific times for the exercise of periods of physical placement.

[5] WISCONSIN STAT. § 767.407(5) provides: "The appointment of a guardian ad litem under sub. (1) terminates upon the entry of the court's final order or upon the termination of any appeal in which the guardian ad litem participates."

response that she acted pursuant to her authority under WIS. STAT. § 767.407(4),[6] and that the circuit court continued her appointment in her full capacity beyond the June placement order.

¶14 The problem with Lori's arguments, which raise factual as well as legal issues, is that she did not raise either of them before the circuit court.[7] Therefore, she has forfeited them on appeal, and I do not consider them. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited, and supporting the proposition that appellate courts generally do not address forfeited issues); ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) ("[W]here the question raised for the first time on appeal involves factual elements not raised by the pleadings or not brought to the attention of the lower court, this court … will not generally decide such questions." (quoted sources omitted)); ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 ("The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for

[6] WISCONSIN STAT. § 767.407(4) provides:

> The guardian ad litem shall be an advocate for the best interests of a minor child as to paternity, legal custody, physical placement, and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child.

[7] In her reply brief, Lori points to evidence in the record that, in at least one instance, she asked that a new guardian ad litem be appointed, and that at the January 2016 hearing the circuit court referenced the parties' harassing communications with the guardian ad litem. However, on neither occasion did Lori challenge the guardian ad litem's authority to file the motions to enforce physical placement.

appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the [issue]; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from 'sandbagging' opposing counsel ....").

II. Whether the Contempt Orders' Terms and Purge Conditions Were Proper

¶15 Lori argues that the terms and purge conditions in the October 2015 and March 2016 contempt orders were not authorized by WIS. STAT. § 767.471 and modified the June 2015 placement order contrary to WIS. STAT. § 767.471(5)(d).[8] The guardian ad litem responds that the purge conditions were remedial sanctions authorized by WIS. STAT. §§ 767.471(5)(b)2. and 785.04(1)(d). I agree with the guardian ad litem.

¶16 WISCONSIN STAT. § 767.471(5)(b)2. provides:

> (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:
>
> ....
>
> 2. May do one or more of the following:
>
> ....
>
> b. Find the responding party in contempt of court under ch. 785.

[8] WISCONSIN STAT. § 767.471(5)(d) provides that a circuit court may not modify an order of legal custody or physical placement "[e]xcept as provided in para. (b) 1.a. and 2.a.," which provide that a court shall order make-up placements and may specify times for the placements.

¶17 Here, the circuit court twice found Lori in contempt, and Lori does not challenge either finding on appeal. Upon a finding of contempt, the court may impose remedial sanctions, which include "[a]n order designed to ensure compliance with a prior order of the court." WIS. STAT. § 785.04(1)(d). The terms and purge conditions in the two contempt orders are quoted in the background section above. By their plain language, the terms and purge conditions in the October contempt order were designed to ensure compliance with the June placement order, and the terms and purge conditions in the March contempt order were designed to ensure compliance with the October and June orders.[9] Lori fails to explain otherwise. Accordingly, her argument fails.

III. Whether the Fee Orders Were Proper

¶18 Lori argues that the circuit court improperly ordered her to reimburse the county for fifty percent of the guardian ad litem's fees. In multiple orders beginning in 2013, the court ordered the county to pay the guardian ad litem's fees, ordered that Lori and Steven were each liable for half of those fees, and ordered Lori and Steven to reimburse the county pursuant to a monthly payment schedule.[10]

¶19 Lori does not challenge the circuit court's authority to hold each party responsible for half of the guardian ad litem's fees under WIS. STAT.

[9] The terms in the two contempt orders providing for Lori to pay Steven's and the guardian ad litem's costs and fees associated with the denied placements and the orders are authorized by WIS. STAT. § 767.471(5)(b)1.b. and (c).

[10] In her reply brief, Lori argues that "there was *never* an 'Original order'" that ordered the county to pay the guardian ad litem's fees and Lori and Steven to each reimburse the county for half those fees. (Alteration in original.) Lori's argument is defeated by the multiple orders in the record, beginning with the order dated April 19, 2013, which ordered precisely that.

§ 767.407(6), which provides, "The court shall order either or both parties to pay all or any part of the compensation of the guardian ad litem." Rather, Lori argues that the circuit court erroneously required the county to pay the fees under the part of the statute that provides, "[i]f both parties are indigent, the court may direct that the county of venue pay the compensation and fees," because only Lori was indigent. Therefore, Lori argues, the court was obligated to order Steven to pay the guardian ad litem's fees in their entirety. *See* ***Olmsted v. Circuit Court for Dane Cnty.***, 2000 WI App 261, ¶¶7-8, 240 Wis. 2d 197, 622 N.W.2d 29 (holding that "when one party is indigent and the other is not, a court's only option is to order the non-indigent party to pay the guardian ad litem's fees").

¶20 Lori argues that the circuit court erroneously found that Steven was indigent, because, according to her, Steven provided inconsistent evidence of his financial situation. Lori points to Steven's Income and Expense Statement showing only a monthly income from salary and wages of $1,088, and his later Financial Disclosure Form showing only monthly disability payments of $1,252. Lori does not explain why the court erred in relying on the later form. She concedes that Steven did receive the disability payments as shown in that form, and she points to no evidence that Steven was employed and earning income since his determination of disability in 2009. The court's finding that Steven was indigent based on the evidence in the record was not clearly erroneous. Accordingly, the court properly ordered that the county pay the guardian ad litem's fees and that Lori and Steven each reimburse the county for half of those fees.

IV. Whether the Circuit Court Properly Denied Lori's Request to Continue the January 2016 Contempt Hearing

¶21 Lori argues that the circuit court "purposely" delayed its response to her request to continue the January 2016 contempt hearing so that she would be unrepresented at that hearing. Lori's argument is baseless.

¶22 The guardian ad litem filed a motion to enforce physical placement on December 22, 2015, and an amended motion on January 6, 2016. Both motions indicated that they would be heard on January 15, 2016. On January 7, 2016, Lori faxed a letter to the circuit court stating that she had applied with "a low cost legal service" to obtain an attorney for the hearing and asked that the hearing be continued to later in January or early February to allow her the necessary time to obtain an attorney to represent her at the hearing. In a letter dated January 13, 2016, the court denied Lori's request, stating, "We can take up at that time whether the matter will be continued. If you do not have an attorney at that time please bring documentary proof that you are attempting to obtain counsel."

¶23 Lori asserts that she did not receive the circuit court's letter until after the January 15, 2016 hearing, and that the circuit court did not reference her request for a continuance. However, it was Lori's burden to raise her request at the hearing, not the court's. The decision to deny or grant a continuance lies within the discretion of the circuit court. ***Allen v. Allen***, 78 Wis. 2d 263, 274-75, 254 N.W.2d 244 (1977). It is axiomatic that the court must be asked to exercise its discretion. ***Shoreline Park Preservation, Inc. v. Wisconsin Department of Administration***, 195 Wis. 2d 750, 773 & n.11, 537 N.W.2d 388 (Ct. App. 1995). The transcript of the January 15 hearing shows that Lori did not mention her request that the hearing be continued; or her January 7 letter, and that she had not yet received a response to the letter; or her efforts to obtain an attorney. Lori

cannot fault the court for failing to address an issue that she did not raise at the hearing. More seriously, Lori provides absolutely no support for her suggestion that the circuit court acted to prevent her from obtaining representation.

¶24 In sum, there is no basis for Lori's argument that the circuit court denied her request for a continuance so that she would be unrepresented by counsel.

CONCLUSION

¶25 For the reasons set forth above, I affirm.

By the Court.—Order affirmed.

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