COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 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 Nos. 2015AP2646
2016AP692

Cir. Ct. No. 2008FA930

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

IN RE THE MARRIAGE OF:

KELLY R. ROSE,

PETITIONER-RESPONDENT,

V.

RUSSELL O. ROSE,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 NEUBAUER, C.J. Pursuant to a stipulation entered between the parties modifying their marital settlement agreement (MSA) on placement, the parties agreed to reduce the placement of the children with Russell O. Rose to alternating weekends and to use a special master/referee to resolve any future disputes between the parties involving modification to placement. Russell subsequently moved the circuit court for increased placement and, in connection thereafter, moved for psychological evaluations of the parties and their children. The circuit court denied Russell's motions. Russell then moved to remove the special master, which the court also denied. Russell appeals both orders, and we affirm.

BACKGROUND

¶2 The parties were married in 2001. By judgment of divorce dated November 30, 2009, the parties were divorced. At the time of the divorce, the parties' two children were ages three and six. Pursuant to the parties' MSA, the parties had joint legal custody and equal physical placement.

¶3 On February 19, 2014, Kelly R. Rose moved to modify placement and child support. The parties proceeded with discovery, and trial was scheduled for February 2015.

¶4 On February 4, 2015, however, the parties reached a settlement. The parties stipulated that they would retain joint legal custody, but Kelly would have primary placement of the children, with Russell having alternating weekends. The parties also agreed that "pursuant to [WIS. STAT. §] 805.06" (2013-14),[1] they

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

would use a referee and that "[a]ny dispute between the parties involving modifications to placement shall be referred to the Special Master/Referee." Further, "[i]f the parties cannot agree on a custodial decision, the special master/referee shall have the authority to make such decisions." In addition, the parties agreed that the referee would "be responsible for resolving any day-to-day disputes between the parties. Either party would have the right to bring any issue to the Referee and the Referee will ultimately decide the issue." The parties agreed on who would serve as referee.

¶5 In September 2015, Russell moved to modify the stipulation, alleging a substantial change in circumstances and citing WIS. STAT. § 767.451. He requested an increase in placement. Russell also moved for psychological evaluations of the parties and their children.

¶6 Shortly thereafter, the referee ordered that the children's physical placement with Russell be supervised.

¶7 As a result of that order, Russell moved for a temporary order, arguing that the referee had exceeded the authority granted him under the stipulation.

¶8 Kelly opposed Russell's motions, arguing that he had failed to show, as required by WIS. STAT. § 805.06, that the referee's decision was clearly erroneous.

¶9 The court denied Russell's motions. The court found that the parties' decision to use a referee was "an integral part of [the] Stipulation … and that the Special Master has broad authority, including modification of placement." The parties surrendered the ability to use WIS. STAT. ch. 767 to modify placement

and instead gave that authority to the referee. This was not an improper delegation of the court's authority. Thus, Russell's motion asking the court to modify placement was improper.

¶10 The court also denied Russell's motion for psychological evaluations. The court was satisfied that the parties had "sufficient psychologists involved in the case across the board." It did not matter that Russell wanted forensic psychologists as opposed to treating psychologists. The court was not going to order any additional evaluations, particularly when there was no issue involving the best interest of the children.

¶11 Russell appeals from this order.

¶12 Russell then moved to remove the referee. Russell argued that the referee should be removed because he refused to do any additional work until his bill had been paid in full, he had not timely responded or he had not responded at all to Russell's phone calls and e-mail requests, and he had not filed his report with the clerk of the court as required by WIS. STAT. § 805.06(5)(a).

¶13 The circuit court denied Russell's motion. The court noted that WIS. STAT. § 805.06 was initially adopted to address pretrial or administrative matters of the court, such as accounting, computation, and discovery, but the manner in which the stipulation referenced a referee was postjudgment, particularly to resolve placement disputes between the parties. The stipulation was designed to go outside formal court proceedings so that the issues of custody and placement might be resolved in a simpler fashion. The court thought that while § 805.06 was referenced in the stipulation, because the case was postjudgment, this was "not a pure statutory reference." Rather, when the stipulation was drafted, the court

likely had in mind its equitable powers. In any case, § 805.06 provides a due process framework, which the court would adopt and use.

¶14 In particular, as indicated in WIS. STAT. § 805.06(5), the decision of the referee should be subject to judicial review. Once the parties have received the decision of the referee, any party, within ten days of receipt, can request "review on a de novo basis." It did not matter if the referee failed to file his report; so long as a party timely brought it to the court and asked for review, it would be reviewed. The referee, however, should file all previous orders within five days of the court's oral decision, and the parties would have the right to object to those orders under a clearly erroneous standard. In other words, if an issue had "not been adequately ventilated" as a result of the referee's decision, within five days of the court's oral decision, it would accept "a de novo request or request for de novo hearing." In the future, the referee should file his reports with the court.

¶15 Further, the court concluded, if the referee was not paid, then the court did not expect him to perform his functions. This was a "reasonable" and, indeed, "common sense" position to take, for if the referee was not paid, then the system would fall apart.

¶16 The court concluded that there was no justification for removing the referee.

¶17 Russell appeals from this order as well.

DISCUSSION

Delegation to the Referee

¶18 Russell, pro se, contends that the circuit court lacked the authority to delegate its duty to determine whether physical placement of the children should be modified to the referee; thus, the court, "should have taken the matter over" and determined whether there was a substantial change in circumstances.

¶19 Russell's arguments involve the interpretation and application of statutes, which are questions we review de novo. ***Hefty v. Strickhouser***, 2008 WI 96, ¶27, 312 Wis. 2d 530, 752 N.W.2d 820.

¶20 In their stipulation, the parties agreed to modify physical placement—that Russell would have alternating weekend placement with the children. The court permitted the stipulation and, thus, implicitly concluded that doing so was not contrary to the best interest of the children. WIS. STAT. § 767.461 ("[T]he court shall incorporate the terms of the stipulation into a revised order of physical placement or legal custody unless the court finds that the modification is not in the best interest of the child."). In addition, the parties agreed that "[a]ny dispute between the parties involving modifications to placement shall be referred to the Special Master/Referee." The court also approved of this modification to the MSA, implicitly finding that the agreed-upon process involving a referee was permissible.

¶21 The circuit court, in reviewing the stipulation upon Russell's motion to modify placement and sanctioning the stipulation, relied on a combination of its own equitable power and WIS. STAT. § 805.06. *See* ***Strawser v. Strawser***, 126 Wis. 2d 485, 491, 377 N.W.2d 196 (Ct. App. 1985) (stating that a court may

exercise its equitable powers in matters involving child custody). The circuit court concluded that the parties had properly delegated to the referee the authority to resolve any dispute between them involving modifications to placement, that the referee's decision would be subject to a review by the circuit court, and that the court would undertake such review if one of the parties submitted a request within ten days of receipt of the referee's decision.[2]

¶22 Russell points to no statute or case that prohibited the parties from agreeing to use a referee to resolve future placement disputes. We, too, see nothing in the statutes or case law that prohibits such an agreement and, as discussed below, find support and guidance in applicable and analogous procedures for resolving custody and placement disputes. We see no error or denial of due process by the circuit court.

¶23 In actions affecting the family, *see* WIS. STAT. ch. 767, "[c]ivil procedure generally governs" unless "otherwise provided in" ch. 767. WIS. STAT. § 767.201. Where "an action is pending," "upon a showing that some exceptional condition requires it," a court "may appoint a referee," and "the court … may direct the referee to report only upon particular issues." WIS. STAT. § 805.06(1), (2), (3). Essentially, with the parties' approval, the court appointed a referee to decide any future placement disputes, and §§ 767.201 and 805.06 gave the court the authority to do so.

[2] The court shortened the time period for orders the special master already made.

¶24 The parties agreed "to use a Special Master/Referee pursuant to [WIS. STAT. §] 805.06" without opting out of the procedure for judicial review. Section 805.06(5)(b) provides as follows:

> In an action to be tried without a jury the court shall accept the referee's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instruction.

¶25 This is the procedure the parties agreed to use in the stipulation. Neither party offers an alternative framework to WIS. STAT. § 805.06 for judicial review of the referee's determination.

¶26 Appropriately, neither party contends that the referee does not have to follow the statutory standards for determining whether a change in placement is warranted. Our case law makes clear that, in resolving custody and placement disputes, the safeguards for the children's interest set forth in the statutory standards that permit modification of an order of child custody or placement must be applied. WIS. STAT. § 767.451; *see* ***Herrell v. Herrell***, 144 Wis. 2d 479, 488, 424 N.W.2d 403 (1988) (indicating that the legislature intended for the statutory standards to apply even if the parties agreed otherwise); *see also* ***Stephanie R.N. v. Wendy L.D.***, 174 Wis. 2d 745, 764, 498 N.W.2d 235 (1993); ***Trost v. Trost***, 2000 WI App 222, ¶5, 239 Wis. 2d 1, 619 N.W.2d 105.

¶27 Russell also argues that the stipulation violates public policy. However, he offers little to support his claim that such a stipulation is not in the best interest of the children and, thus, violates public policy. The legislature has

created a mechanism for alternative dispute resolution specifically applicable to modifications of placement, and the legislature has also approved the procedures via the family court commissioner route. This shows that this stipulation does not violate public policy.

¶28 Under WIS. STAT. § 802.12, binding arbitration may be used in "actions affecting the family," including modification of custody and placement, provided certain conditions are met. Specifically, a neutral third person must be given the authority to render a decision that is legally binding, the parties must consent to use binding arbitration, the parties must be able to present evidence and examine witnesses, a contract or a neutral third person must determine the application of the rules of evidence, and the award must be subject to judicial review under WIS. STAT. §§ 788.10 and 788.11. Sec. 802.12(1). When confirmation of the arbitrator's decision is sought, the circuit court may not confirm the arbitrator's award unless, among other things, "the arbitrator certifies that all applicable statutory requirements have been satisfied." Sec. 802.12(3)(e)2. This would include the standards for modification of placement and custody contained in WIS. STAT. § 767.451.

¶29 Similarly, here, the parties agreed to use a referee, who is a neutral third person, to resolve future disputes on modifications to placement. WISCONSIN STAT. § 805.06(3) itself gives the referee the authority to rule on the admissibility of evidence, and § 805.06(4)(b) permits the parties to subpoena witnesses. The parties' stipulation implicitly adopted the standard of review contained in § 805.06(5)(b).

¶30 The circuit court's approval of the use of a referee in this case is also supported by the procedure governing custody and placement disputes before a

family court commissioner. WISCONSIN STAT. § 757.69(1)(p)2. permits a family court commissioner to "[c]onduct hearings and enter judgments in actions for … revision of judgment for … custody, physical placement or visitation." In the course of such a hearing, the family court commissioner is "guided by the provisions of WIS. STAT. ch. 767." ***Nehls v. Nehls***, 2012 WI App 85, ¶12, 343 Wis. 2d 499, 819 N.W.2d 335. In other words, the same statutory standard that the circuit court would ordinarily apply, such as WIS. STAT. § 767.451(1), must be applied by the family court commissioner. A decision of the family court commissioner, upon a motion of any party, is subject to a de novo hearing by the circuit court. Sec. 757.69(8). The request for a de novo hearing, pursuant to the local rules of Waukesha County, must be made within fifteen calendar days of the family court commissioner's oral decision or within fifteen days of the family court commissioner's written decision or order if the decision or order was not given orally. WAUKESHA COUNTY FAMILY COURT DIVISION, LOCAL COURT RULES, Rule 2.3, https://www.waukeshacounty.gov/Courts.aspx?id=34916 (last visited on Dec. 13, 2016).

¶31 We note that unlike the circuit court we do not see anything in WIS. STAT. § 805.06 that limits the use of a referee to pretrial matters. We further note that other jurisdictions likewise permit a referee to decide postjudgment matters involving children. *See* COLO. RULE CIV. PROC. 53 (2016) (governing appointment of master or referee); ***Brown v. Brown***, 422 P.2d 634, 634-35 (Colo. 1967) (noting that by stipulation and pursuant to Rule 53, master heard motion to change custody of children); ***Balabuch v. Balabuch***, 502 N.W.2d 381 (Mich. Ct. App. 1993) (holding that it was not improper for court to delegate decision on request to modify father's child support obligation to friend of the court referee where both parties agreed that referee's decision would be binding).

¶32 To sum up, we see nothing that prohibits parties agreeing to use a referee to resolve any disputes regarding modification of an existing order of custody or placement. Such an agreement is valid provided certain safeguards are in place. The referee must apply the statutory standards that govern modification of an existing order of custody or placement. *See* WIS. STAT. § 767.451; *see also* ***Herrell***, 144 Wis. 2d at 487-88.[3] The circuit court did not deny Russell due process because the stipulation implicitly provided that the referee's determination is subject to review as provided in WIS. STAT. § 805.06(5)(b).[4] Nor did the court err in ruling that a party would be afforded ten days from the date of receipt of the referee's determination to request judicial review.

Interpretation of the Stipulation

¶33 Next, Russell contends, if there was no improper delegation, then the circuit court erred in its interpretation of the stipulation. He argues that the stipulation did not give the special master the authority to reduce placement but only to expand it.

[3] In his reply brief, Russell appears to contend that Kelly is arguing that the parties' stipulation varied the statutory standard for modification, but we see nothing in Kelly's brief suggesting as much.

Russell also argues that the referee modified placement to require that his placement be supervised without engaging in the statutory analysis. *See* WIS. STAT. § 767.451. We cannot tell if this is the case from the record but, in any event, if it was the case, Russell's remedy was to seek judicial review from the circuit court, as it noted. *See* WIS. STAT. § 805.06(5)(b). Indeed, we could not directly review an "order" of the referee. *See* WIS. STAT. § 808.01 ("'Appeal' means a review in an appellate court by appeal … of a[n] … order of a circuit court."); *see also* ***Dane Cty. v. C.M.B.***, 165 Wis. 2d 703, 708, 478 N.W.2d 385 (1992) (stating that a court commissioner's order is not the equivalent of a final order or judgment of the circuit court).

[4] The parties' agreement did not specifically provide for judicial review, but the circuit court was correct to conclude that judicial review was implicitly part of the agreement to use a special master.

¶34 "The interpretation of a stipulation between parties is a question of law, which we review de novo." ***Bray v. Gateway Ins. Co.***, 2010 WI App 22, ¶11, 323 Wis. 2d 421, 779 N.W.2d 695.

¶35 Contrary to Russell's contention, the stipulation, when considered as a whole, is not "reasonably susceptible to more than one interpretation." ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. The stipulation uses broad language. It says that "[*a*]*ny* dispute between the parties involving modifications to placement shall be referred to the Special Master/Referee." (Emphasis added). While the stipulation expressed the "inten[t]" of the parties that Russell's placement be expanded over time, an intention does not always come to fruition, at times because of changed circumstances. In other words, this intent does not undermine the broad language of the stipulation to refer "any dispute … involving modifications to placement" to the special master.

¶36 Since we conclude that the parties delegated the authority to a referee to resolve future disputes on modification of placement, the court did not err in declining to make that determination in place of the referee absent a request for judicial review.

Psychological Evaluations

¶37 The circuit court did not err in denying Russell's request for psychological evaluations of the parties and their children. Russell's request for psychological evaluations was made in connection with his motion to modify placement. The mental health of a party is a factor to consider in deciding whether to modify placement. WIS. STAT. §§ 767.41(5)(am)7., 767.451(5m), 804.10(1).

Since, however, there was no appeal of the referee's placement modification decision pursuant to the stipulated statutory procedure, the issue of psychological evaluations was not appropriately before the circuit court.

¶38 Nevertheless, we note, as Russell mentions, that the referee thought he was powerless to order a psychological forensic evaluation of the children and the parties. We disagree. WISCONSIN STAT. § 805.06(3) gives the referee broad powers to compel discovery. "Subject to the specifications and limitations stated in the order [of reference], the referee has and shall exercise the power to regulate all proceedings in every hearing before the referee and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order." We interpret this broad language to include the power to permit a referee to order a psychological forensic evaluation of the parties and their children.

Removal of Referee

¶39 Russell contends that the circuit court should have removed the referee. Russell does not provide what should be our standard of review, nor does he adequately develop an argument that would form a basis for concluding that the circuit court erred. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). His primary argument is that the referee had not filed his reports. But, the circuit court remedied this complaint by directing the referee to do so. Beyond that, Russell's complaints largely go to the merits of the referee's order, which was not before the circuit court because there was no appeal of the referee's decision pursuant to the stipulated statutory procedure. To the extent he is arguing that the referee was biased, Russell has failed to establish that the circuit court erroneously exercised its discretion in declining to remove the referee. *See*

generally ***Franke v. Franke***, 2004 WI 8, ¶54, 268 Wis. 2d 360, 674 N.W.2d 832; ***Bell v. Neugart***, 2002 WI App 180, ¶28, 256 Wis. 2d 969, 650 N.W.2d 52.

CONCLUSION

¶40 We conclude that it was not improper for the parties, with the approval of the court, to delegate any future disputes on modification of placement to a referee. The stipulation permitted Kelly to seek a reduction in Russell's placement. Since there was no appeal of the referee's decision pursuant to the stipulated statutory procedure before the circuit court, the issue of modifying placement was not appropriately before the circuit court and, therefore, there was no reason to order psychological evaluations. The circuit court did not erroneously exercise its discretion in declining to remove the referee. Accordingly, we affirm both orders.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.