COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP166 **Cir. Ct. No. 2005FA158**

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

IN RE THE MARRIAGE OF:

KENDRA LYNN PAPCKE-PARKS,

PETITIONER-RESPONDENT,

V.

RICHARD NORMAN PARKS,

RESPONDENT-APPELLANT.

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

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Richard Parks appeals the circuit court's order that denied his motion to revise the physical placement of his two children with

Kendra Papcke-Parks. Richard argues that the circuit court erred by (1) converting Kendra's "motion to dismiss" Richard's motion to revise physical placement into a summary judgment motion and misapplying summary judgment standards; (2) granting Kendra's motion and denying Richard's motion without an evidentiary hearing; and (3) awarding Kendra $2,000 in attorney's fees. We affirm.[1]

Background

¶2 Richard and Kendra received a judgment of divorce in 2007, and have two minor children from their marriage: Christopher, born in 1999, and Mitchell, born in 2003. At the time of the divorce, Christopher and Mitchell were both placed primarily with Kendra in Monona, and they attended school there.

¶3 In March 2014, Richard moved to revise placement, requesting that both children be placed primarily with Richard during the school year and enrolled in the Lodi school district where Richard resides. In an August 2014 order, the court modified Christopher's placement significantly so that Christopher was placed primarily with Richard during the school year and enrolled in high school in Lodi the fall of 2014. The August 2014 order left Mitchell's primary placement with Kendra during the school year, with Mitchell starting middle school in Madison the fall of 2014.

¶4 Seven months later, in March 2015, Richard again moved to revise placement. Richard sought sole placement of Christopher and renewed his request

[1] We also affirm a second order that addressed guardian ad litem fees. Richard appealed that order also, but makes no argument regarding guardian ad litem fees. Thus, Richard has abandoned any argument as to that order.

that Mitchell be placed primarily with Richard during the school year and attend school in Lodi.

¶5 In support of his motion, Richard submitted an affidavit containing factual assertions regarding the then-current circumstances. Richard argued that those circumstances, when compared to the circumstances at the time of the August 2014 order, showed a substantial change of circumstances. *See* WIS. STAT. § 767.451(1)(b)1.b. (setting forth the applicable "substantial change of circumstances" standard for revising placement).[2] Kendra responded by filing a "motion to dismiss [Richard's] motion" and an affidavit in which Kendra disputed several of Richard's factual assertions regarding the current circumstances. Richard filed a second affidavit with limited additional factual assertions.

¶6 The circuit court held a hearing during which the parties made arguments based on their respective affidavits. The court did not take testimony. Richard argued that the court should have treated Kendra's motion as a motion to dismiss Richard's motion for failure to state a claim and should have rejected Kendra's motion because Kendra's motion failed to show a failure to state a claim. At the same time, Richard objected to the court's consideration of Kendra's affidavit. Richard also argued that the court was required to consider *Richard's* affidavits and to take the "allegations" in those affidavits as true.

¶7 In the order that followed—the placement order that Richard now appeals—the court granted Kendra's motion, in effect denying Richard's motion to revise placement. The court concluded that Richard failed to show a substantial

[2] All references to the Wisconsin Statutes are to the 2015-16 version. We cite the current version for ease of reference.

change of circumstances. The court relied, in part, on information from the parties' affidavits. Additionally, the court granted Kendra's request for contribution to her attorney's fees, awarding her $2,000 in fees. We reference additional facts as needed below.

Discussion

A. Richard's Summary Judgment Arguments

¶8 Richard argues that the circuit court erred by converting Kendra's motion into a "de facto" summary judgment motion, without sufficient notice, violating his due process rights. Richard further argues, as we understand it, that the court misapplied summary judgment standards in addressing the current circumstances by crediting portions of Kendra's affidavit over Richard's primary affidavit.

¶9 We reject Richard's summary judgment arguments as forfeited. Specifically, we agree with the guardian ad litem's argument here that Richard forfeited these arguments by failing to timely raise them, either at the hearing or in follow-up letter briefing that the circuit court ordered. *See* ***Greene v. Hahn***, 2004 WI App 214, ¶21, 277 Wis. 2d 473, 689 N.W.2d 657 (we generally do not address issues an appellant raises for the first time on appeal). This is not a mere technical failing. By not objecting to the court's consideration of all of the evidentiary information before it, namely, the affidavits of *both* Richard and Kendra, Richard effectively misled the court into thinking that Richard had no objection to the court making a factual assessment of the situation based on evidentiary information in affidavits, something that occurs in family law with some frequency.

¶10 We acknowledge, as noted above, that, before the circuit court, Richard took the position that Kendra's motion should be treated as a motion to dismiss for failure to state a claim. Richard did not, however, go the next step and make the summary judgment arguments he now makes on appeal. At best, as noted, Richard confusingly argued that the circuit court was required to consider evidentiary affidavits, albeit only *Richard's* affidavits, something that is inconsistent with his summary judgment argument on appeal.

¶11 Further, even if Richard's summary judgment arguments were not forfeited, we have difficulty seeing why those arguments should lead to reversal. As to his first summary judgment argument, claiming a lack of due process, Richard baldly asserts that the circuit court's approach "precluded [him] from submitting material relevant to a summary judgment motion." But Richard says nothing about what that additional material might have been. As to his second summary judgment argument, claiming that the court credited Kendra's factual assertions over Richard's factual assertions, our discussion in the next section disposes of that argument. Specifically, as part of that discussion, we conclude that, even if we, unlike the circuit court, take Richard's factual assertions about the current circumstances as true, Richard has not shown a substantial change of circumstances since the prior, August 2014 placement order.

B. Lack of Evidentiary Hearing

¶12 Independent of his summary judgment arguments, Richard argues that "the circuit court erred in granting Kendra's motion to dismiss because Richard's motion stated grounds for relief entitling him to an evidentiary hearing." For the reasons that follow, Richard's arguments on this topic fail to persuade us that an evidentiary hearing was necessary.

¶13 Because the final divorce judgment was issued in 2007, Richard's 2015 motion to revise placement is governed by WIS. STAT. § 767.451(1)(b). That statute provides, in relevant part:

> **767.451 Revision of legal custody and physical placement orders.**...
>
> **(1)** SUBSTANTIAL MODIFICATIONS....
>
> (b) *After 2-year period.* 1. … [U]pon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
>
> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

¶14 We have explained that this statutory language sets up a two-step inquiry. First, the parent seeking to revise placement must show that there has been "'a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.'" ***Greene***, 277 Wis. 2d 473, ¶22 (quoting the statutory language). A substantial change of circumstances "requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order." ***Licary v. Licary***, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992). If there has been a substantial change of circumstances, the court proceeds to the second step in the process and considers whether a modification of placement would be in a child's best interest. ***Greene***, 277 Wis. 2d 473, ¶22. Absent a substantial change of circumstances,

there is no need to proceed to the second step. *See* ***Licary***, 168 Wis. 2d at 694 ("A finding regarding the best interests was unnecessary since no substantial change of circumstances had occurred.").

¶15 Whether a change in circumstances is "substantial" is a question of law that we review de novo. ***Lofthus v. Lofthus***, 2004 WI App 65, ¶17, 270 Wis. 2d 515, 678 N.W.2d 393. Our case law sometimes states that, although review is de novo, we "'give weight'" to the circuit court's determination because that determination is "'heavily dependent upon an interpretation and analysis of underlying facts.'" *See* ***Greene***, 277 Wis. 2d 473, ¶23 (quoting ***Harris v. Harris***, 141 Wis. 2d 569, 574-75, 415 N.W.2d 586 (Ct. App. 1987)). Here, our decision would be the same regardless whether we give weight to the circuit court's determination.

¶16 Richard acknowledges the above legal standards but provides no authority or discussion addressing the specificity with which a movant must allege a substantial change of circumstances under WIS. STAT. § 767.451(1)(b) in order to trigger an evidentiary hearing. Notably, Richard does not argue that a § 767.451(1)(b) placement revision motion, no matter how bare bones, automatically requires such a hearing. For example, Richard does not argue that he would be entitled to an evidentiary hearing based on bald, unsupported allegations that there has been a substantial change of circumstances and that a placement modification is in a child's best interest. Rather, Richard repeats his circuit court argument that Kendra's opposing motion should have been treated as a motion to dismiss Richard's motion for failure to state a claim, and the court should have rejected Kendra's motion as failing to show a failure to state a claim. In making this argument, Richard contends that all of his "allegations," including the factual assertions in his primary affidavit, must be taken as true. Richard does

not explain, however, why it makes sense to apply the failure to state a claim standard to the question of whether a § 767.451(1)(b) placement revision motion includes sufficient factual allegations or assertions to trigger an evidentiary hearing.

¶17 We understand Richard to be arguing that he is entitled to an evidentiary hearing because his factual assertions about the current circumstances, if true, show a substantial change of circumstances when compared to the circumstances at the time of the prior, August 2014 placement order. According to Richard, his motion entitled him to an evidentiary hearing at which he would have had the opportunity to prove his factual assertions about the then-current circumstances.

¶18 For the reasons we now explain, we disagree that Richard's factual assertions about the current circumstances, if true, show a substantial change of circumstances when compared to the circumstances at the time of the most recent order affecting placement, the August 2014 placement order. We therefore also disagree with Richard that he was entitled to an evidentiary hearing.[3]

¶19 We start by again summarizing the August 2014 order as pertinent here. As noted, the August 2014 order modified placement as Richard requested insofar as it changed Christopher's primary placement from being with Kendra in Madison to being with Richard in Lodi during the school year and provided that Christopher would enroll in high school in Lodi the fall of 2014. However, the

[3] There are some minor discrepancies between the factual assertions in Richard's affidavit and the way Richard characterizes those assertions in his briefing. We rely on the assertions as stated in the affidavit.

August 2014 order kept Mitchell's primary placement with Kendra during the school year, with Mitchell starting middle school in Madison the fall of 2014. Under the more specific schedule, the children were placed separately during school weeks, with minimal overlapping evening placement, and placed together on weekends and summers, alternating between homes.

¶20 In the affidavit accompanying his March 2015 motion, Richard asserted a series of several grounds for why the circumstances at that time showed a substantial change of circumstances since the August 2014 placement order seven months earlier. We discuss those grounds in detail below, but make the general observation now that Richard's asserted grounds either show no change, or show changes that the parties and the court would have reasonably expected at the time of the August 2014 order because of the underlying circumstances at the time. Accordingly, we conclude that the grounds asserted in Richard's motion and affidavit, separately or together, do not show a substantial change of circumstances.

1. Conflict Between Mitchell and Kendra and Mitchell's Desire to Attend School in Lodi

¶21 Richard asserted in his affidavit that there was increasing "conflict" between Kendra and Mitchell, leading to police being called, and that Mitchell, almost age 12 at the time Richard filed his motion, was expressing an "authentic desire" to attend school in Lodi. Of all of Richard's assertions, these are most easily rejected as showing no change, as demonstrated by the circuit court's August 2014 order and the guardian ad litem's reports at the time. For example, the August 2014 order acknowledged the existence of conflict between Kendra and *both* children that is similar to the conflict that Richard alleged in his revision motion here. The August 2014 order stated:

> The father believes that conflict at the mother's home with regard to both boys is on the increase and that the mother is slowly abdicating her responsibilities for the children ….
>
> ....
>
> The father had documented, and the mother did not seriously contest, that there had been incidents where police were actually called after arguments erupted at the mother's house.

Similarly, the guardian ad litem's 2014 reports show that Mitchell had already expressed the desire to attend school in Lodi, although there was some question as to the "authenticity" of his desire. Assuming, as Richard asserts, that Mitchell's desire became "authentic" as Mitchell went from age 11 to age 12, this is not a *substantial* change of circumstances.

2. Mitchell's Requests for Placement Changes

¶22 Richard asserted in his affidavit that Kendra was no longer "open to accommodating Mitchell's requests for reasonable changes in his placement schedule as she was in the past." More specifically, Richard asserted that, after the August 2014 placement schedule was put in place, Kendra denied Mitchell's request to stay at Richard's home overnight one additional day per week. We acknowledge that the court's August 2014 order references Kendra's past willingness to accommodate such deviations in Mitchell's placement schedule, and that the 2014 order further reflects the court's belief at the time that Kendra would continue to accommodate such deviations going forward. However, Richard provides no authority, and we know of no authority, supporting the proposition that a parent's insistence on adhering to a placement schedule constitutes a substantial change of circumstances.

3. Kendra's Lack of Placement Time with Christopher and Effect on the Children's Time Together

¶23 Richard's remaining asserted grounds, boiled down, all relate to Kendra's alleged deviation from the placement schedule for Christopher and the alleged effect that has on the amount of time that Christopher and Mitchell spend together. More specifically, Richard asserted that, after the August 2014 order was put in place, Kendra had only "very sporadic placement of Christopher" and that "[t]here have been no overnight placements [with Christopher], only several placements of hours duration." Richard further asserted that this lack of placement was because Christopher "is declining placement" with Kendra and because Kendra "does not pursue the regular placement schedule" with Christopher. As a result, Richard asserted, the children's time together is "very abbreviated," something that is "bothersome" to both boys, and "Christopher is not a resource to Mitchell for schoolwork and other matters."

¶24 We have no doubt that a significant, ongoing deviation from a court-ordered placement schedule is, in many instances, a substantial change of circumstances. Here, however, for the reasons we now explain, we agree with the circuit court, the guardian ad litem, and Kendra that Christopher's minimal placement with Kendra, as alleged by Richard, is not a substantial change of circumstances. In short, we see three closely related factors that support the conclusion that the facts Richard alleges were reasonably predictable.

¶25 First, given the children's respective ages, common sense tells us that their time spent together was likely to decrease significantly going forward regardless of the placement schedule, given different activities, interests, or friends. In fact, the guardian ad litem's 2014 final report shows that the boys already fit into this common-sense pattern. The report stated:

> At this age, it is expected that siblings would have different friends and preferences and spend time apart. Both parties testified that this already occurs as the boys already spend time with different friends and participating in different activities and sports.

Similarly, another guardian ad litem report in 2014 showed that Christopher tended to prefer outdoor activities with his father in Lodi, while Mitchell tended toward indoor activities and had an extensive friend network in Madison.

¶26 Second, by placing the boys primarily in different schools, communities, and homes during the school year, there could be no doubt that the court's August 2014 order set the boys on different paths, despite the court's attempt to retain overlap in their placement. The court in its August 2014 order plainly considered the downsides of separating the boys in this manner, but concluded that there were other overriding factors. These downsides are the ones that Richard tries to capitalize on now in alleging a substantial change of circumstances. For example, Richard's factual assertions include that the boys' lack of time placed together means that Christopher is unavailable to assist Mitchell with homework, and Richard implies that this lack of assistance from Christopher has led to a negative change in Mitchell's school performance.

¶27 Third, although Christopher "declining" placement with Kendra and Kendra not "pursuing" regular placement with Christopher *are* changes since the August 2014 order, those changes are most reasonably viewed as the byproduct of Christopher's increasing age and accompanying independence, not of any change in underlying circumstances. The guardian ad litem's 2014 reports suggest that Christopher already had an increasing tendency to "butt heads" with Kendra and a consistent preference to spend as much time as possible placed with his father in

Lodi. Those reports establish the existence of all of the following circumstances as of August 2014:

- Christopher and Kendra had a tendency to "butt heads" more often than Mitchell and Kendra.
- Christopher, in contrast to Mitchell, "exhibits characteristics and preference for the outdoor activities and general lifestyle enjoyed by his father in Lodi."
- Christopher had a long-standing preference to attend school in Lodi, and an understanding that this would mean residing with Richard in Lodi instead of with Kendra.
- Most of Christopher's activities and friends were in Lodi.
- Kendra was agreeable to honoring then-14-year-old Christopher's preference to attend school in Lodi, believing it was in his best interest.

4. Summary As To Richard's Factual Assertions

¶28 In sum, Richard sought to revise placement seven months after the prior, August 2014 placement order based on alleged changed circumstances that either show no change, or show changes that were reasonably predictable under the August 2014 order and underlying circumstances at the time. Richard's factual assertions, even if true, do not show a substantial change of circumstances, that is, they do not show "that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order." *See* ***Licary***, 168 Wis. 2d at 692. Accordingly, we reject Richard's argument that he was entitled to an evidentiary hearing to prove his factual assertions regarding the current circumstances.

C. Attorney's Fees

¶29 Richard argues that the circuit court erred in awarding Kendra $2,000 in contribution toward her attorney's fees under WIS. STAT. § 767.241(1). "The award of attorney's fees is within the discretion of the trial court and is subject to reversal only upon the trial court's misuse of that discretion." ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996).

¶30 Richard argues that the court erred by failing to make required findings as to (1) Richard's ability to pay, (2) Kendra's need for contribution to her fees, and (3) the reasonableness of the fees. *See* ***id.***; *see also* ***Wagner v. Estate of Sobczak***, 2011 WI App 159, ¶11, 338 Wis. 2d 92, 808 N.W.2d 167.

¶31 Kendra argues that the court made the first two required findings based on Kendra's submissions showing the parties' disparate incomes and that the fees awarded were indisputably reasonable in amount. To Kendra's argument, we add that Kendra's submissions contained records of her attorney's itemized billing.

¶32 Richard does not dispute Kendra's submissions, nor does Richard otherwise reply to Kendra's attorney's fee argument. We thus take the matter as conceded. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). Moreover, the court plainly based its attorney fee decision on Kendra's submissions and, given this undisputed information, we easily conclude that the record supports the court's exercise of discretion.

Conclusion

¶33 For the reasons above, we affirm the circuit court's orders as to placement and fees.

By the Court.—Orders affirmed.

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