COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2585 **Cir. Ct. No. 1999PA480**

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

IN RE THE PATERNITY OF JANNELLE M. KING-RODRIGUEZ:

ELLOY RODRIGUEZ,

PETITIONER-RESPONDENT,

V.

TEMIKA KING,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Temika King appeals from an order modifying placement of her child by awarding Elloy Rodriguez, the child's father, sole legal

custody and primary physical placement and allowing King supervised placement for two hours each Sunday afternoon. King argues that without expert testimony, there was not sufficient proof that her custody of the child was harmful and that the change was based only on circumstances known before the previous change in placement and for the improper purpose of redressing interference with Rodriguez's placement. We affirm the order modifying legal custody and placement.

¶2 As a preliminary matter we consider King's attempt to appeal the circuit court's determination that she engaged in overtrial and requiring her to pay Rodriguez $8855.60, one-half the attorney fees he incurred. We must address whether appellate jurisdiction exists over the attorney fees award. *See* ***Mack v. Joint Sch. Dist. No. 3***, 92 Wis. 2d 476, 484, 285 N.W.2d 604 (1979) (it is the duty of this court, notwithstanding the fact that no party has raised the issue, to take notice of its jurisdiction and dismiss an appeal if taken from a nonappealable order). King's notice of appeal was filed on September 27, 2004. The award of attorney fees was made at a hearing held on January 19, 2005. The September 27, 2004 notice of appeal confers appellate jurisdiction only over the custody and placement issues as finally determined in an order entered on August 27, 2004.[1] *See* ***Campbell v. Campbell***, 2003 WI App 8, ¶¶10-11, 259 Wis. 2d 676, 659 N.W.2d 106 (Ct. App. 2002) (even though the question of payment of attorney

[1] We observe that the provision in the August 27, 2004 order that the circuit court "will consider entering an order requiring [King] to pay child support" might suggest that the order was not final because the issue of child support remained pending. However, the order also provided that "[n]o further hearings are scheduled at this time." Until King released her financial information, as ordered to do so in the August 27, 2004 order, no viable claim for child support was pending. King's obligation to pay child support was not put at issue until a January 5, 2005 letter from Rodriguez's counsel asked the court to address child support at the motion hearing on the claim for attorney fees.

fees is unresolved in a family court matter, the order determining "matters in litigation" is final); ***State v. Jacobus***, 167 Wis. 2d 230, 233, 481 N.W.2d 642 (Ct. App. 1992) (an appeal from a judgment does not embrace an order entered after judgment).

¶3 This court is informed by the clerk of the circuit court that an order was entered on April 4, 2005, for attorney fees. No timely notice of appeal was filed after entry of the order awarding attorney fees. Even WIS. STAT. § 808.04(8) (2003-04)[2] does not operate to confer appellate jurisdiction over the order awarding attorney fees. That section provides that jurisdiction exists if a written order is entered after the filing of the notice of appeal and transmitted with the record because the notice of appeal will be deemed filed the date of entry of the subsequently filed written order. The order awarding attorney fees is not part of the record and § 808.04(8) does not come into operation.[3] Moreover, that section is intended only to cure instances in which a notice of appeal is filed before the entry of the identified final and appealable document. *See* ***Mayek v. Cloverleaf Lakes Sanitary Dist. No. 1***, 2000 WI App 182, ¶¶18-19, 238 Wis. 2d 261, 617 N.W.2d 235. It does not serve to bring matters before the court decided after the notice of appeal was filed or to revive an appeal not timely filed. The attorney fees award is not before us.

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[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] The transcript of the January 19, 2005 hearing and decision on the claim for attorney fees is part of the record. That does not constitute a final order subject to review on appeal. *See* ***Ramsthal Adver. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75, 279 N.W.2d 491 (Ct. App. 1979) (an oral ruling must be reduced to writing for appellate jurisdiction to exist); ***State v. Alston***, 92 Wis. 2d 893, 900, 288 N.W.2d 866 (Ct. App. 1979) (a transcript of the oral ruling is not sufficient).

¶4 King's and Rodriguez's daughter, Jannelle, was born on September 12, 1999. Based on the parties' stipulation, an order of October 20, 1999, provided for joint legal custody and the child's primary physical placement with King. In January and April 2000, orders were entered upon the parties' stipulation that primary physical placement would be with Rodriguez in the state of New York where Rodriguez was serving in the army.

¶5 In March 2001, King moved for sole legal custody and primary physical placement. Upon the parties' stipulation, a June 24, 2002 order was entered modifying Jannelle's primary placement. King was given primary physical placement, with Rodriguez having periods of physical placement for seven weeks during summer vacation and one week at both Christmas and Easter vacation. The parties retained joint legal custody. The stipulation included the parties' agreement that "it constitutes a change of circumstances to return to court if father can document emotional or behavioral changes in mother in regard to her mental state to care for the child."

¶6 By a motion filed on May 13, 2003, Rodriguez sought an order granting him sole legal custody and primary placement of Jannelle.[4] The evidentiary hearing commenced on February 4, 2004, and after hearings on three additional days, concluded on July 21, 2004. The circuit court found that the current custodial conditions with King were physically and emotionally harmful to

[4] A March 14, 2003 petition to maximize Rodriguez's periods of physical placement since his discharge from the army resulted in an order by the family court commissioner that in addition to periods of physical placement provided for in the June 24, 2002 order, Rodriguez was to temporarily have physical placement every other week from Thursday to Saturday. Although Rodriguez sought de novo review of the commissioner's order, the request for de novo review was withdrawn when the motion to modify legal custody and primary physical placement was filed.

Jannelle and that it was in Jannelle's best interest that sole legal custody and primary physical placement be awarded to Rodriguez. King was granted periods of placement until school started, but her placement was suspended on July 22, 2004. She was ultimately granted supervised placement for a two-hour period each Sunday afternoon.

¶7 Whether to modify a placement or custody order is directed to the circuit court's discretion. *See* ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 764, 498 N.W.2d 235 (1993). We affirm that determination when the court examined the facts of record, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion. ***Id.*** at 764, 766. Modification of custody or physical placement is governed by WIS. STAT. § 767.325, which establishes different legal standards depending on when the court addresses the request. Under § 767.325(1)(a), a court may not modify a custody or physical placement order "before 2 years after the initial order" unless the moving party "shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child." The provision is intended to provide a two-year truce period during which the child and the parents can adjust to the new family situation. ***Andrew J.N.***, 174 Wis. 2d at 764. Under § 767.325(1)(b), a court may modify custody or physical placement after the initial two-year period if the court finds that the modification is in the best interest of the child and there has been a substantial change in circumstances since the entry of the last order affecting custody or physical placement.

¶8 King asserts that the modification here must meet the higher standard in WIS. STAT. § 767.325(1)(a). *See* ***Andrew J.N.***, 174 Wis. 2d at 763 (the standard of § 767.325(1)(a) is much higher than the standard of § 767.325(1)(b), a

general best interests standard). The circuit court used § 767.325(1)(a) as its benchmark. We are at a loss as to why § 767.325(1)(a) applies. The initial custody and placement order was entered on October 20, 1999, upon the parties' stipulation. That stipulation and order determined with finality custody and placement. *See* ***Keller v. Keller***, 214 Wis. 2d 32, 37-38, 571 N.W.2d 182 (Ct. App. 1997). The June 24, 2002 modification of physical placement was not an "initial order" and did not start a new two-year truce period.[5] Thus, when Rodriguez filed his motion to modify custody and placement on May 13, 2003, the two-year truce period had expired. The modification could be made upon a showing of a substantial change in circumstances since the June 24, 2002 modification and in the best interest of the child under § 767.325(1)(b).

¶9 It does not matter which standard applies because the circuit court's findings support the modification under either standard. The court found that King behaves inappropriately by calling police, making untruthful claims against Rodriguez in a haphazard, uncaring and cavalier manner, intentionally besmirching Rodriguez, running the child to the doctor on a more frequent than usual basis, and acting violently against her own family members. The court found this behavior harmful to the child. The court also found that there were too many instances of odd and disturbing behavior to which the child should not be exposed. It determined that the child needed regular and meaningful periods of physical placement with both parents and that King acted to undermine the father-daughter relationship. These findings satisfy the standard under WIS. STAT. § 767.325(1)(a), in that they address what made primary placement with King

[5] The parties had already pierced the two-year truce period by modifying physical placement by the orders entered in 2000.

physically and emotionally harmful to the child and why modification was necessary to protect the child.

¶10 King attacks the circuit court's findings on three fronts. She first argues that there was no expert testimony that her current psychiatric condition causes Jannelle emotional or physical harm.[6] She equates this case to ***Andrew J.N.***, 174 Wis. 2d at 772, where the supreme court held that the circuit court's legal conclusion that the mother's mental health condition was emotionally harmful to the best interests of the child was erroneous. In ***Andrew J.N.***, the supreme court indicated that the circuit court was not an expert in mental health and was not qualified to determine the mother's mental health and whether the mother's mental health was emotionally harmful to the best interests of the child. ***Id.*** This case is not, however, like ***Andrew J.N.*** The circuit court did not base the modification on King's psychiatric condition or perceptions about what it meant for the child in the future. There was no legal conclusion based on evidence that only an expert witness could supply. The modification was based on King's actual conduct and the actual consequences of that conduct on Jannelle in terms of adjustment, personal security, parental relationships, and even diet. For example, it was reported that Jannelle experienced bed-wetting and constipation while in King's home and on April 14, 2003, Jannelle indicated to Rodriguez that she wanted to kill herself. "[E]xpert testimony is not required on an issue unless it is beyond the knowledge and experience of the average trier of fact." ***Hughes v.***

[6] We reject King's contention that there was no expert testimony. The testimony of Dr. Malsch, a psychologist, explained the characteristics of King's diagnosed personality disorders. Dr. Malsch explained that the conditions are marked by perceptions of grandiosity, going without sleep for extended periods, risk-taking behavior, episodes of severe depression, mood instability, impulsive behavior, and lack of emotional control, including intense anger.

Hughes, 223 Wis. 2d 111, 128, 588 N.W.2d 346 (Ct. App. 1998). Fact finders are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life. *See* ***De Keuster v. Green Bay & W. R.R. Co.***, 264 Wis. 476, 479, 59 N.W.2d 452 (1953).

¶11 King's second challenge to the finding of inappropriate behavior is that it is mostly based on evidence that existed before the last modification when she was made primary caretaker. It is true that the parties have long known that King has mental health problems. The circuit court cited instances of King's behavior that occurred in the distant past, such as conduct resulting in a 2000 CHIPS[7] petition, criminal complaints in 1998, 1999, and 2001 for violent or disruptive conduct, and odd conduct while pregnant with Jannelle. Although this behavior occurred in the past, it was new to the record in this matter. Indeed, by stipulating to prior modifications of primary physical placement the parties had bypassed creating a record of the reason for the prior modifications. The circuit court could look to evidence it was hearing for the first time. Also, there was evidence of more recent conduct to support the finding that King behaved inappropriately in a manner harmful to the child. In August 2002, Jannelle was taken to the emergency room because of possible ingestion of King's medication. In February and April 2003, King told Jannelle's day care and medical clinic not to give information to Rodriguez. King called the police when Rodriguez came to pick up Jannelle for Easter visitation in 2003. The police had been called several times while the motion for modification was pending. The child had reported that

[7] CHIPS refers to a child in need of protection or services under WIS. STAT. ch. 48.

in approximately May 2004 King waved a knife directly in front of her and her sister's face.

¶12 King's third attack on the circuit court's determination is that Rodriguez was simply trying to redress significant interference with his placement and that modification under WIS. STAT. § 767.325(1)(a) cannot be used for that purpose. *See* ***Andrew J.N.***, 174 Wis. 2d at 768. The circuit court did not rely on the mere fact that King had interfered with Rodriguez's placement. It was the manner in which King did so that was significant to the court. The court found that King's calls to the police and false allegations were harmful to the child. It also found that King not only interfered with placement but also undermined the father-daughter relationship, besmirched Rodriguez to his child, and could not be relied on to communicate as necessary under a joint custody and shared placement arrangement. In short, the circuit court properly exercised its discretion in modifying custody and placement under § 767.325(1)(a).

¶13 King does not specifically argue that the standards of WIS. STAT. § 767.325(1)(b) were not met. At best, her claim that her mental health issues were circumstances known to the parties before the last modification of custody can be construed to challenge whether a substantial change of circumstances was proven. We note that the circuit court did not make findings about whether the circumstances had changed since the June 24, 2002 modification returning primary placement to King. Whether the facts present a substantial change of circumstances is a question of law. ***Keller v. Keller***, 2002 WI App 161, ¶7, 256 Wis. 2d 401, 647 N.W.2d 426. We may therefore determine the question de novo, even if the circuit court did not address it. *See* ***Duhame v. Duhame***, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989).

¶14 One of the most significant changes reflected in the record is that Rodriguez was discharged from the army on February 1, 2003, and moved back to Wisconsin. This meant that Rodriguez was now available to have an active role in Jannelle's life. It also appears that King was making placement transitions increasingly difficult. As the circuit court noted, Jannelle was also getting older and would be entering school. We conclude that there was a substantial change of circumstances.

¶15 The circuit court's decision amply demonstrates why the modification was in Jannelle's best interest. It recognized that Jannelle needs a relationship with both parents and a stable environment for regular school attendance. Rodriguez was the parent most able to meet those needs. The circuit court properly exercised its discretion in determining that the modification was in the child's best interest.

¶16 King asserts that she was denied due process when her right to placement was suspended until such time that she brought a motion to reinstate placement. The claim arises out of the emergency hearing held the day after the circuit court rendered its oral decision awarding Rodriguez sole legal custody and primary placement. At the hearing held on July 22, 2004, Rodriguez reported that King had been arrested the night before just after the court proceeding concluded because she attempted to attack Rodriguez and his sister outside the courthouse. King was not available at the hearing because she was in custody. King's right to weekend placement was suspended until further order of the court. A hearing was already set for August 18, 2004, to work out a placement schedule in light of Jannelle's school schedule.

¶17 King's claim is a nonstarter. She concedes that it was appropriate to suspend her right to placement pending a hearing on the matter. She had an opportunity at the August 18, 2004 hearing to present evidence relevant to her right to placement. Indeed, the circuit court invited King's attorney to "lay your case out for me" and expressed a willingness to conduct an evidentiary hearing on the alleged assault of Rodriguez and his sister, including indicating what witnesses the court would want to hear. When King's attorney indicated he was not prepared to go forward with an evidentiary proceeding, in part because King had been less than forthcoming with information about the allegations and a possible mental commitment proceeding, the court indicated it would further hear the matter if a motion was filed. At the conclusion of the hearing, King's attorney indicated that further consideration would have to wait in order to see what happened with charges relating to the alleged assault and other pending matters and that review would be brought by motion. King cannot complain that no evidentiary hearing was held when she was not ready to present evidence. *See* ***Zindell v. Central Mut. Ins. Co. of Chicago***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (where a party has induced certain action by the circuit court, he or she cannot later complain on appeal). The result of the August 18, 2004 hearing was that supervised placement was put in place. King does not argue that supervised placement was an erroneous exercise of discretion.

By the Court.—Order affirmed.

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