COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1336 **Cir. Ct. No. 2003FA697**

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

IN RE THE MARRIAGE OF:

PAULA NELSON-HOOKER,

PETITIONER-RESPONDENT,

V.

FREDERICK C. HOOKER, JR.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed and cause remanded with directions.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Frederick C. Hooker, Jr., *pro se*, appeals from orders modifying his periods of physical placement with his minor children, holding him in contempt of court for failing to comply with prior court orders, and

requiring him to pay $2406.50 in attorney's fees incurred by Paula Nelson-Hooker in pursuit of the contempt finding.[1] We affirm the orders. We also conclude that Hooker's appeal is frivolous and that he must pay the costs and attorney's fees that Nelson-Hooker incurred to respond to his claims in this court. We remand to the circuit court for a determination of the amount of those costs and fees.

BACKGROUND

¶2 Hooker and Nelson-Hooker were divorced on March 31, 2004. The judgment of divorce entered on April 14, 2004, established their rights and responsibilities, including custody and placement of the couple's two children.[2] Litigation, however, continued. In an order dated June 19, 2006, a family court commissioner discussed the post-judgment proceedings:

> [t]here have been at least twelve (12) court hearings on post judgment matters since the divorce (thirty-two if one counts the hearings in the related domestic abuse/felony and misdemeanor cases....)
>
> The immediate question has to be – how can any one family's troubles necessitate so much attention and so many resources with so little progress? The unfortunate answer is that all it apparently takes is one manipulative, bad-intentioned litigant. The common denominator in this series of destructive, ongoing conflicts is Frederick Hooker

[1] The circuit court entered two orders on the same day, one directing Hooker to pay $2406.50 in attorney's fees and the other holding him in contempt and resolving issues related to physical placement of his children. Hooker's notice of appeal refers to an "order" of the circuit court, but the text of the notice of appeal reflects his intent to challenge components of both orders. The notice of appeal brings both orders before this court. *See* ***Rhyner v. Sauk Cnty.***, 118 Wis. 2d 324, 326, 348 N.W.2d 588 (Ct. App. 1984).

[2] At the time of the divorce, Hooker and Nelson-Hooker had one eighteen-month-old son and Nelson-Hooker was pregnant with the couple's second son, later born in August 2004. A circuit court may establish custody and placement of a child before the child's birth. *See* ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 188-89, 502 N.W.2d 156 (Ct. App. 1993). The circuit court did so in this case.

> [J]r.'s unwillingness to do what he is supposed to. He refuses to take his responsibilities as a father and as a litigant seriously. He initiates repetitious and frivolous legal actions pursuing stale and baseless claims as if the legal process were intended for his private recreation.

¶3 We need not describe the three years of disputes and litigation in this matter that followed the court commissioner's remarks and that are reflected in the very substantial record presently before us. We rejoin the parties on June 25, 2009, when the circuit court entered an order entitled "Final Order Modifying Placement."[3] As pertinent here, the order permitted Hooker periods of unsupervised placement one afternoon each week and, commencing in January 2010, overnight placement with the children on alternating weekends from 3:30 p.m. on Friday until 5:00 p.m. on Sunday. The order also directed that "neither party shall physically discipline the children."

¶4 Less than one month after the circuit court entered the June 2009 order, Hooker moved to hold Nelson-Hooker in contempt for violating it. After a hearing, the circuit court entered an order in November 2009 finding Hooker's claims frivolous, declaring that he had overlitigated the case, and requiring him to pay Nelson-Hooker's trial counsel $612.50 in attorney's fees.

¶5 In February 2010, Nelson-Hooker filed the motion that underlies this appeal. She sought to modify physical placement of the children by terminating Hooker's weekend and overnight placement because Hooker left the children home alone during his weekday placement. She also sought to hold Hooker in contempt of court on three grounds: (1) he owed $22,522.24 in delinquent child

[3] The June 25, 2009 order did not disturb the order, in place since 2005, awarding Nelson-Hooker sole legal custody of the children.

support; (2) he had violated the court order of June 2009 barring him from physically disciplining the children; and (3) he had violated the court order of November 2009 requiring him to pay her attorney's fees. The circuit court held a hearing to address her claims.

¶6 Jessica Ramstad, a social worker employed by the Bureau of Milwaukee Child Welfare, testified about investigating allegations that Hooker had mistreated his sons. When she interviewed the boys, they confirmed that Hooker left them home alone during visits and struck them with a belt.

¶7 Hooker was the only other witness who testified at the hearing. He admitted that he gave each child "one slap of the belt" on a single occasion, but he maintained that he did so before the circuit court entered the order forbidding physical discipline. He explained that the punishment was appropriate because the children were taunting him, saying that he could not spank them without going to jail. Hooker also acknowledged leaving the children home alone, although he maintained he did so for only brief periods.

¶8 Hooker then admitted that he "ha[d] not picked up [the] children from school [on] any Fridays in 2010 at 3:30." He claimed that his copy of the June 25, 2009 order, which he did not produce, directs him to meet his children on Fridays at 5:00 p.m. at the Glendale police department. He acknowledged that he had not contacted Nelson-Hooker's attorney or the guardian *ad litem* to resolve any uncertainty about where and when he should meet the children, and instead he had forfeited all of his weekend placement in 2010.

¶9 Hooker next conceded that he owed $22,450.89 in unpaid child support and that he had not paid any of the attorney's fees owed to Nelson-Hooker's trial counsel. He said that he was "in a hole" financially and that he had

hoped to obtain a stay of the November 2009 order requiring him to pay opposing counsel's fees.

¶10 The circuit court reviewed the testimony in detail and made findings that Hooker was "less than credible" and "not reliable." After noting that more than two years had passed since entry of the initial order for physical placement, the circuit court concluded that Nelson-Hooker had established a substantial change in circumstances by showing that Hooker hit his children, left them home alone, and unreasonably failed to exercise any weekend placement. The circuit court determined that modification of the placement order was in the best interests of the children and terminated Hooker's weekend and overnight placement.

¶11 The circuit court also determined that Hooker failed to offer an adequate explanation for neglecting to pay his court-ordered financial obligations. The circuit court therefore found Hooker in contempt of court. Upon that finding, the circuit court ordered Hooker to pay $2406.50 in attorney's fees that Nelson-Hooker incurred pursuing enforcement of the earlier court orders.

¶12 Hooker appeals. He challenges the circuit court's order modifying placement and the order requiring him to pay fees of $2406.50 to Nelson-Hooker's trial counsel.[4]

[4] Hooker's appellate brief does not include any argument challenging the circuit court's determination that Hooker was in contempt of court.

DISCUSSION

¶13 Nelson-Hooker contends that Hooker's appeal is frivolous. *See* WIS. STAT. RULE 809.25(3) (2009-10).[5] Whether an appeal is frivolous is a question of law. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. An appeal is frivolous if "the 'party ... knew, or should have known, that the appeal ... [had no] reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.'" ***Id.*** (citation omitted, one set of ellipses added, brackets in ***Howell***). We apply an objective standard: "what should a reasonable person in the position of this *pro se* litigant know or have known about the facts and the law relating to the arguments presented." ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998). We may require Hooker to pay sanctions for pursuing a frivolous appeal only if we conclude that his entire appeal is frivolous. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1. Before we may conclude that Hooker's entire appeal is frivolous, we must determine that each of his arguments is frivolous. *See* ***id.***, ¶27 With these principles in mind, we turn to Hooker's contentions on appeal.

¶14 We first examine Hooker's challenge to the decision modifying physical placement of the children. Hooker contends that the circuit court erred by applying the wrong statutory standard when considering the issue, and then erred again by wrongly concluding that Nelson-Hooker satisfied that standard.

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶15 The decision to modify an order for physical placement of a child rests in the circuit court's discretion. ***Hughes v. Hughes***, 223 Wis. 2d 111, 119, 588 N.W.2d 346 (Ct. App. 1998). Where, however, a party contends that the circuit court erroneously exercised its discretion by applying an incorrect legal standard, we review that contention *de novo*. ***Id.*** at 120.

¶16 Motions to modify child placement orders are governed by WIS. STAT. § 767.451. *See* ***Stumpner v. Cutting***, 2010 WI App 65, ¶4, 324 Wis. 2d 820, 783 N.W.2d 874. The timing of a motion seeking a substantial modification dictates which of two statutory standards is applicable.[6] A motion for a substantial

[6] WISCONSIN STAT. § 767.451 provides, in pertinent part:

> **(1)** SUBSTANTIAL MODIFICATIONS. (a) *Within 2 years after final judgment*. Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the final judgment determining legal custody or physical placement is entered under s. 767.41, unless a party seeking the modification ... 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:
>
> ....
>
> 2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.
>
> (b) *After 2-year period.* 1. [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.

modification filed within two years of an order entered under WIS. STAT. § 767.41 is governed by § 767.451(1)(a), which describes a higher standard than that used to address a motion seeking a substantial modification filed at other times. *See* § 767.451(1)(a)-(b). Hooker contends that the circuit court should have considered Nelson-Hooker's motion to modify placement under the higher standard described in § 767.451(1)(a). He believes that this standard is applicable because Nelson-Hooker filed her motion in 2010, within two years after the circuit court entered the June 2009 placement modification order. He is wrong.

¶17 WISCONSIN STAT. § 767.451(1) is clear and unambiguous in its application to this case. Section 767.451(1)(a) expressly governs motions seeking child placement modifications within two years of orders "entered under [WIS. STAT. §] 767.41."[7] Placement modification orders, however, are not entered under § 767.41. Rather, placement modification orders are entered under § 767.451. *See* ***Stumpner***, 324 Wis. 2d 820, ¶4. Accordingly, the 2009 placement modification order did not establish the start of a two-year period for purposes of § 767.451(1)(a). Hooker offers his suggestion to the contrary without suggesting any reasonable basis for his position in law or equity. The argument is frivolous. *See* ***Howell***, 282 Wis. 2d 130, ¶9.

¶18 The standard governing modification of child placement applicable here is set forth in WIS. STAT. § 767.451(1)(b). That provision permits modification of a custody or placement order if the circuit court finds that "[t]he

[7] As relevant here, an order determining periods of physical placement is entered under WIS. STAT. § 767.41 when a divorce judgment is rendered. *See* § 767.41(1)(b) (requiring circuit court to enter an order providing for custody and placement of minor children when rendering a judgment of divorce). As stated earlier in this opinion, the circuit court entered a judgment of divorce in this matter on April 14, 2004.

modification is in the best interest of the child" and "[t]here has been a substantial change of circumstances since the entry of the last order affecting" custody or placement. ***Id.*** We turn to Hooker's claim that Nelson-Hooker failed to satisfy this standard.

¶19 Whether Nelson-Hooker established a substantial change in circumstances under WIS. STAT. § 767.451(1)(b) is a question of law that we decide *de novo*. *See* ***Pero v. Lucas***, 2006 WI App 112, ¶23, 293 Wis. 2d 781, 718 N.W.2d 184.[8] When conducting our review, however, "we must 'give weight to a [circuit] court's decision' because the determination is 'heavily dependent upon an interpretation and analysis of underlying facts.'" ***Id.*** (citation and one set of quotation marks omitted).

¶20 Hooker asserts that "nothing in the record or evidence indicated that circumstances had changed substantially" since entry of the June 2009 order. 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). Here, the circuit court found that circumstances changed substantially when Hooker hit his children with a belt,

[8] Several of the cases we discuss in the body of this opinion examine provisions in WIS. STAT. § 767.24 and/or WIS. STAT. § 767.325. In 2005, the legislature renumbered those statutes as WIS. STAT. § 767.41 and WIS. STAT. § 767.451, respectively. *See* 2005 Wis. Act 443, §§ 94-98, 160-63. A note published with the Act provides that "unless expressly noted, this bill makes no substantive changes in the statutory provisions treated by the bill. Substantive changes in the bill are identified in notes to the provisions substantively affected." *See* ***id.***, prefatory note. Accordingly, we do not indicate whether the cases we cite in this opinion discuss the current or the predecessor statutes because such clarification is unnecessary in light of the provisions and propositions at issue.

left them unsupervised during visits, and unreasonably failed to exercise periods of placement.

¶21 Hooker contends that hitting his children did not constitute a substantial change of circumstances because the beatings took place before the circuit court entered the June 2009 order barring physical discipline. The circuit court, however, did not believe Hooker's testimony about the timing of the beatings, finding instead that his testimony "ma[d]e little sense.... He says the children were laughing at him because he was ... prohibited from hitting them; and yet he says this incident took place before the court's order prohibiting hitting." The circuit court was entitled to reject Hooker's illogical assertion that he hit his children because they were taunting him about a prohibition that had not yet been imposed. "Sorting out the conflicts and determining what actually occurred is uniquely the province of the [circuit] court." ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989).

¶22 Hooker next contends that leaving his children alone in his apartment is not a substantial change of circumstances because he did so only for short periods. The circuit court, however, did not consider this factor in a vacuum. Hooker fails to offer any legal reason why flouting a circuit court order barring corporal punishment together with absenting himself from visits while leaving his small children home alone was not a substantial enough change in circumstances as to warrant consideration of a placement modification, particularly when coupled with an additional finding that he unreasonably failed to exercise his weekend placement. Indeed, unreasonable failure to exercise periods of placement alone constitutes grounds to modify a physical placement order at any time. *See* WIS. STAT. § 767.451(2m). Hooker's argument that "nothing" demonstrates a

substantial change of circumstances thus lacks a reasonable basis and is frivolous. *See* ***Howell***, 282 Wis. 2d 130, ¶9.

¶23 Hooker also challenges the circuit court's conclusion that modifying placement based on the substantial change of circumstances shown in this case served the best interests of his children. We affirm a circuit court's discretionary determination to modify placement when the circuit court applies the correct legal standard to the facts of record and reaches a reasonable result. ***Hughes***, 223 Wis. 2d at 120. We search the record for reasons to sustain the circuit court's exercise of discretion. ***Id.***

¶24 The factors that a circuit court must consider when initially establishing physical placement are listed in WIS. STAT. § 767.41(5). In proceedings to modify periods of physical placement, the circuit court must consider those factors in § 767.41(5) that are relevant to the child. *See* WIS. STAT. § 767.451(5m); *see also* ***Landwehr v. Landwehr***, 2006 WI 64, ¶¶3, 31, 291 Wis. 2d 49, 715 N.W.2d 180. We assess the circuit court's conclusion by examining whether the circuit court properly considered and weighed appropriate factors. *See* ***Pero***, 293 Wis. 2d 781, ¶23.

¶25 Here, the circuit court viewed with concern Hooker's decision to leave his young children alone in his apartment. The circuit court emphasized that the building also housed a restaurant, increasing the risk of a fire in the home. This troubled the circuit court because the children were very young and were "left to manipulate a deadbolt" in an apartment without a telephone land line. *See* WIS. STAT. § 767.41(5)(am)6. (court to consider age and developmental needs of children).

¶26 The circuit court explicitly found Ramstad credible and took into account her testimony regarding Hooker's supervision of the children. *See* WIS. STAT. § 767.41(5)(am)15. (court to consider reports of appropriate professionals). Ramstad told the circuit court that the children "knew that they were alone, and that they had no access to means of help." *See* § 767.41(5)(am)5. (court to consider children's adjustment to, *inter alia*, the home and the community). In the circuit court's view, Ramstad's testimony supported the conclusion that leaving the children alone in an apartment contravened their best interests. Relatedly, the circuit court took into account the fears of Nelson-Hooker and the guardian *ad litem* that Hooker's questionable level of supervision posed a risk to the children that would be magnified during any future overnight visits. *See* § 767.41(5)(am)1.-2. (court to consider wishes of parent, and wishes of children as expressed by the guardian *ad litem*).

¶27 The circuit court was disturbed that Hooker hit his children. *See* WIS. STAT. § 767.41(5)(am)3. (court to consider parent's interaction with children). The circuit court did not credit Hooker's testimony that he struck the children because they were taunting him, but the circuit court concluded that this rationale for a beating, even if genuine, was simply inadequate to justify the actions. *See* ***id.***

¶28 Finally, the circuit court considered Hooker's decision to forego all periods of weekend placement in 2010 rather than contact Nelson-Hooker about the meeting time and place for commencing those placement periods. *See* WIS. STAT. § 767.41(5)(am)4. (court to consider amount and quality of time that parent spent with children in the past). The circuit court found that Hooker was "feigning ignorance" of the placement schedule described in the June 2009 placement order, and the circuit court deemed his conduct a "determined lack of cooperation." In

the circuit court's view, Hooker's decision not to make inquiries about his weekend placement and to forfeit it instead was "part of the tussle, part of this tug of war in which [Hooker] has shown a continuing inclination to participate." *See* § 767.41(5)(am)10.-11. (court to consider level of cooperation between the parents and whether each parent can support the other parent's relationship with the children).

¶29 The circuit court found that the evidence was sufficient to overcome any presumption that leaving the placement order unchanged would serve the best interests of Hooker's children. *Cf.* ***Landwehr***, 291 Wis. 2d 49, ¶12 (noting a rebuttable presumption in favor of the status quo in some circumstances when a parent seeks a change in child custody or placement). The circuit court determined that the credible evidence required terminating Hooker's weekend and overnight placement in the best interests of the children.

¶30 Hooker seeks to challenge the circuit court's decision by pointing to his own testimony and arguing that the circuit court erroneously assessed the evidence. We need not summarize his allegations.[9] His approach cannot prevail, because the circuit court did not believe him. "'[I]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the [circuit] court acting as the trier of fact.'" ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736 (citation omitted). We defer to "the superior opportunity of the [circuit] court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." *See* ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). An appeal premised on a

[9] Hooker's description of his testimony includes details that do not appear in the record.

bare request to reweigh witness credibility is frivolous. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998).

¶31 The circuit court thoughtfully and appropriately exercised its discretion in modifying placement, and therefore we may not disturb the decision. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether the circuit court exercised discretion, not whether the circuit court could have exercised discretion differently). Because Hooker's position is nothing more than a request that we reassess the credibility of the witnesses, his challenge to the circuit court's exercise of discretion lacks legal or factual support. His claim is frivolous. *See* ***Lessor***, 221 Wis. 2d at 669.

¶32 Hooker states in his opening brief that this appeal includes "a constitutional challenge [to] the reduction of the boys' placement with their father." Hooker does not discuss or develop this constitutional challenge further, and we will not develop it for him. *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶27, 318 Wis. 2d 488, 770 N.W.2d 727. Because Hooker offers his constitutional claim without including any support or analysis, we conclude that the claim is frivolous. *See* ***Howell***, 282 Wis. 2d 130, ¶9.

¶33 We turn to Hooker's contention that the circuit court erred by awarding Nelson-Hooker her attorney's fees. He first asserts that the circuit court did not give reasons for the award. To the contrary, the circuit court required Hooker to pay opposing counsel's fees because it found Hooker in contempt of court for failing to pay both his child support and the attorney's fees previously ordered. The circuit court may order a party found in contempt of court to pay the attorney's fees incurred by an opposing party who pursued the finding. ***Benn v. Benn***, 230 Wis. 2d 301, 315, 602 N.W.2d 65 (Ct. App. 1999). Accordingly,

Hooker's contention that the circuit court did not give reasons for its decision lacks any legal or factual support. His claim is frivolous. *See* ***Howell***, 282 Wis. 2d 130, ¶9.

¶34 Next, Hooker asserts that the amount of attorney's fees awarded was unreasonable. The assertion is completely conclusory. Indeed, Hooker fails to acknowledge the applicable standard for assessing attorney's fees following a finding of contempt. *See* ***Benn***, 203 Wis. 2d at 315 (stating that, upon a finding of contempt, a circuit court may impose a monetary payment sufficient to compensate a party who suffered loss, including attorney's fees incurred, as a result of the contempt). Instead, he directs our attention to ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 483, 377 N.W.2d 190 (Ct. App. 1985), and ***Thorpe v. Thorpe***, 108 Wis. 2d 189, 198, 321 N.W.2d 237 (1982). Neither case discusses an award of attorney's fees pursuant to a finding of contempt, and no good-faith argument exists that these cases provide any meaningful guidance on that issue. The contention that ***Ondrasek*** and ***Thorpe*** bar the fee award here is frivolous. *See* ***Howell***, 282 Wis. 2d 130, ¶9.

¶35 Hooker suggests in his reply brief that the circuit court failed to make necessary findings about Nelson-Hooker's need for a contribution towards her attorney's fees or about his ability to pay. "[T]here is no requirement that the circuit court make findings in regard to need and ability to pay before exercising

its remedial contempt powers." ***Benn***, 230 Wis. 2d at 315. Hooker's argument to the contrary is frivolous.[10] *See* ***Howell***, 282 Wis. 2d 130, ¶9.

¶36 Each of Hooker's arguments lacks a reasonable basis in law and fact, and Hooker presents no good-faith basis for his positions. We therefore conclude that his entire appeal is frivolous. *See* ***Baumeister***, 277 Wis. 2d 21, ¶27. Although Hooker is self-represented, that status does not confer a license to ignore the legal principles that govern a dispute nor does it permit a litigant to burden this court and the opposing party with meritless arguments. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Accordingly, we affirm the orders he challenges, and we remand this matter to the circuit court with directions to determine the amounts that Hooker must pay in costs and attorney's fees as a sanction for pursuing a frivolous appeal.

By the Court.—Orders affirmed and cause remanded with directions.

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

[10] We normally do not consider issues raised for the first time in a reply brief because the opposing party has no chance to respond. *See* ***Northern States Power Co. v. National Gas Co.***, 2000 WI App 30, ¶21 n.6, 232 Wis. 2d 541, 606 N.W.2d 613. In this case, we chose to consider the argument because it lacks any legal or factual basis and therefore requires no response.