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**DISTRICT III**

August 26, 2025

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You are hereby notified that the Court has entered the following opinion and order:

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2021AP1332

Kim L. Stelow v. Antonio M. Smith (L. C. No. 2017PA227PJ)

Before Stark, P.J., Hruz, and Gill, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Antonio Smith, pro se, appeals a post-paternity order granting Kim Stelow sole legal custody and primary physical placement of their daughter, Tina.<sup>1</sup> Smith argues that the circuit

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<sup>1</sup> Pursuant to WIS. STAT. RULE 809.81(8) (2023-24), we use a pseudonym when referring to the child in this matter.

court erroneously exercised its discretion by improperly shifting the burden of proof to Smith when denying him any periods of physical placement with Tina. Smith also claims that the court violated his substantive due process rights by denying him any form of contact with Tina. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Smith's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

Tina was born in November 2015. Prior to her birth, Smith was arrested and charged with first-degree intentional homicide, and he has remained incarcerated since his arrest.<sup>2</sup> In December 2017, Smith was adjudicated as Tina's biological father following a hearing before a circuit court commissioner. At that time, Stelow was awarded sole legal custody and primary physical placement of Tina, and any visits with Smith were left to Stelow's sole discretion. Smith moved the circuit court for de novo review of the commissioner's decision, and his mother, Rhonda Meeks, also petitioned for grandparent visitation rights.<sup>3</sup> In conjunction with Meeks's request for grandparent visitation, Smith sought joint legal custody and periods of physical placement with Tina, to coincide with his mother's requested visitation.

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<sup>2</sup> Smith was ultimately convicted of one count each of first-degree intentional homicide while using a dangerous weapon; first-degree intentional homicide while using a dangerous weapon, as a party to the crime; and conspiracy to commit first-degree intentional homicide while using a dangerous weapon, arising from Milwaukee County Circuit Court Case Nos. 2015CF4868, 2016CF1004, and 2015CF3367. The circuit court imposed two consecutive life sentences plus five years for the homicide charges with the use of a dangerous weapon enhancer, and a consecutive sixty-five year term, which included forty years of initial confinement, for the conspiracy to commit homicide charge. Smith's judgments of conviction, as well as an order denying his postconviction motions, were affirmed on appeal. *See State v. Smith*, Nos. 2023AP1063-CR, 2023AP1064-CR, and 2023AP1065-CR, unpublished slip op. (WI App Jan. 28, 2025).

<sup>3</sup> The decision on Meeks's petition is not before us in this appeal.

A de novo review hearing was held over the course of three days on Smith's motion and Meeks's petition. At the outset, the circuit court proposed to hear Smith's case first, followed by Stelow's response, and then Meeks's request. Stelow, by her counsel, disagreed with this approach, arguing that because Smith had the burden of proof, Stelow should present her case last. Smith countered that the parent who is denying contact with the child has the burden of proving that the contact will endanger the child's physical, mental, or emotional health. Although Stelow conceded that both parties had the burden to prove what was in the best interest of the child, she asserted that because Smith had asked for de novo review of the commissioner's decision, he should explain why his position was in Tina's best interest. The court then directed Smith to proceed with his case.

On the second day of the hearing, Smith again raised the burden of proof issue, asserting he was disadvantaged by having to defend parental rights he already had without allowing him to rebut Stelow's case when she was the party preventing him from contact with Tina. After the circuit court assured Smith that he would have an opportunity "to rebut anything that was brought up during their case," Smith responded that if he was "able to rebut, then it [was] fine." Following the completion of Stelow's case, Smith stated he had no rebuttal, the parties made their closing arguments, and the guardian ad litem (GAL) recommended against either joint legal custody or placement with Smith. The court awarded sole legal custody to Stelow and determined that, under the specific facts and circumstances of this case, granting periods of physical placement to Smith would not be in Tina's best interests and, "to the contrary, would endanger her mental and emotional health." This appeal follows.

On appeal, Smith challenges the circuit court’s decision to deny him any periods of physical placement or contact with Tina.<sup>4</sup> Child placement determinations are committed to the sound discretion of the circuit court. *Gould v. Gould*, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). We will sustain a discretionary decision if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). “Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court’s discretionary decision.” *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. In addition, we affirm the circuit court’s findings of fact unless they are clearly erroneous, WIS. STAT. § 805.17(2), but we independently review any questions of law, *Clark v. Mudge*, 229 Wis. 2d 44, 50, 599 N.W.2d 67 (Ct. App. 1999).

WISCONSIN STAT. § 767.41(1)(b) authorizes circuit courts to make any provisions they deem “just and reasonable” concerning the legal custody and physical placement of minor children, subject only to the limitations imposed by statute. Although joint legal custody is presumed to be in the best interests of a child, *see* WIS. STAT. § 767.41(2)(am), there is no parallel presumption about equal placement, *see Keller v. Keller*, 2002 WI App 161, ¶12, 256 Wis. 2d 401 647 N.W.2d 426. However, a child is entitled to periods of physical placement with both parents unless the court finds that placement with a parent would endanger the child’s physical, mental, or emotional health. Sec. 767.41(4)(b).

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<sup>4</sup> Because Smith fails to raise a developed argument regarding the circuit court’s decision to grant sole legal custody to Stelow, we decline to address that part of the court’s decision and order. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

In determining placement, the circuit court must consider the following factors set forth in WIS. STAT. § 767.41(5)(am):

1. The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
2. The wishes of the child, which may be communicated by the child or through the child's [GAL] or other appropriate professional.
3. The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.
4. Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
5. The interaction and interrelationship of the child with his or her siblings, and any other person who may significantly affect the child's best interest.
6. The interaction and interrelationship of the child with his or her parent or parents and the amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles, and any reasonable lifestyle changes that a parent proposes to make to maximize placement with the child.
7. Whether [a party, a person with whom a parent of the child has a dating relationship, or a person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household] has or had a significant problem with alcohol or drug abuse[.]
8. The child's adjustment to the home, school, religion, and community.
9. The age of the child and the child's developmental and educational needs at different ages.
10. Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household

negatively affects the child's intellectual, physical, or emotional well-being.

11. Whether [a party, a person with whom a parent of the child has a dating relationship, or a person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household] has a criminal record or whether there is evidence that any of [those individuals] has engaged in abuse, as defined in [Wis. STAT. §] 813.122(1)(a), of the child or any other child or neglected the child or any other child[.]

12. Whether there is evidence of interspousal battery ... or domestic abuse[.]

13. The reports of appropriate professionals if admitted into evidence.

14. Any other factor that the court determines to be relevant.

Here, the circuit court discussed each statutory factor, noting, in particular, that Tina, then five years old, had no relationship with Smith, having visited him only once during his incarceration, when she was one year old. The court added that Tina has a strong relationship with Stelow and with her siblings on Stelow's side. The court determined that Smith would introduce instability and uncertainty into Tina's life, as she was not aware of Smith and did not have an established visitation schedule with him. The court emphasized the parties' inability to communicate effectively with each other, noting the deterioration in their relationship. Although the court acknowledged Stelow's concerns that Smith would manipulate Tina or otherwise speak negatively about Stelow, it concluded these concerns were mere speculation.

Emphasizing that Tina was happy and well adjusted to life with Stelow and with Stelow's other children, the circuit court ultimately agreed with the GAL's opinion that periods of physical placement with Smith would be "contrary to [Tina's] best interests" and "would endanger her mental and emotional health." In denying Smith any periods of physical placement, the court highlighted the absence of an established relationship between father and

daughter, Tina's age, her current inability to understand the circumstances surrounding Smith's incarceration, and her lack of familiarity with the prison setting.

On appeal, Smith renews his argument that, by directing him to present his case first, the circuit court improperly shifted the burden of proof to Smith when denying him any periods of physical placement with Tina. We are not persuaded. Citing *Wolfe v. Wolfe*, 2000 WI App 93, ¶19, 234 Wis. 2d 449, 610 N.W.2d 222, Smith contends that Stelow had the burden of proving that contact would endanger Tina because it was Stelow who wanted to deny Smith that contact. Smith further argues that by requiring him to present his evidence first, he was disadvantaged by having to disclose his case up front.

In *Wolfe*, a mother attempting to deny an incarcerated father any contact with their child argued that the circuit court erred by failing to require the father to prove that written contact was in the child's best interest and instead placing the burden on her to prove that contact would endanger the child's physical, mental, or emotional health. See *id.*, ¶¶1-2. Although the *Wolfe* court held that "a parent seeking to deny all contact has the burden of proving that contact would endanger the child's physical, mental or emotional health," see *id.*, ¶19, it did not discuss the order in which the parties presented their respective cases.

Here, the circuit court directed Smith to present his case first because it was Smith who was contesting the court commissioner's decision to allow him periods of physical placement subject to Stelow's discretion. Further, as the court explained to Smith, there is a "distinction between order of presentation as compared to burden of proof, because often you can have intermingled burdens, you can have different various presumptions that are in play regardless of order of presentation." In any event, consistent with *Wolfe*, the court ultimately found that

Stelow met her burden of proving that periods of physical placement with Smith would be contrary to Tina's best interests and would endanger her mental and emotional health.

Smith nevertheless claims that the circuit court violated his substantive due process rights by denying him any form of contact with Tina. According to Smith, he made several requests concerning contact with his daughter, including in-person visits at the prison, video visitation, telephone calls, or communication by mail. Smith complains that although the court acknowledged these requests and evidence concerning them, it did not reference or permit any of these forms of contact in its written decision. Smith emphasizes that the *Wolfe* court permitted written contact between an incarcerated father and his child, despite the father's conviction for conspiring to kill the child's mother. *Id.*, ¶¶1, 3. Smith asserts that, just as the mother in *Wolfe* conceded that written contact would pose no physical threat to her child, written contact would pose no physical threat to Tina. Here however, the court did not focus on any physical threat to Tina but, rather, determined that contact would endanger Tina's mental and emotional health.

Smith also argues that, as in *Wolfe*, any concern about the proposed contact with Tina was based only upon Stelow's testimony, which was tainted by the parties' deteriorated relationship. The circuit court, however, specifically found that Stelow's concerns that Smith would manipulate Tina or otherwise speak negatively about Stelow were merely speculative. To the extent Smith claims that the court erred by failing to set forth any conditions by which Smith could regain periods of physical placement, the court acknowledged that if Smith were successful on appeal from his convictions, or if his incarceration status changed, those would be factors of interest to the court in any postjudgment proceedings.



As noted above, the circuit court properly analyzed the facts in the record under the statutory factors and made reasonable findings. Its conclusion to deny any placement or contact is rational and proper under the law and the facts of this case. Smith had both notice and an opportunity to be heard, and he was heard. That Smith disagrees with the court's decision does not establish an erroneous exercise of discretion, or a violation of his due process rights.

Therefore,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*