OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

February 18, 2016

To:

Hon. Michael R. Fitzpatrick
Circuit Court Judge
51 S. Main Street
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Gary L. Heiber
Rock Co. Child Support Agency
51 S. Main Street
Janesville, WI 53545-3951

Jennifer L. Nash
Nash Law Office
58 South Main Street
Janesville, WI 53545-3950

Lisa M. Schultz
Collins & Henderson LLP
P.O. Box 777
Beloit, WI 53512-0777

Daniel A. Creed
P.O. Box 539
Footville, WI 53537-0539

Angela M. Dongarra
510 Johnson Street
Janesville, WI 53548

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

2014AP457 Angela M. Dongarra and State of Wisconsin v. Daniel A. Creed (L.C. # 2007FA391)

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

Daniel Creed, pro se, appeals an order denying modification of custody and physical placement. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.[1] We summarily affirm.

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

Daniel Creed and Angela Dongarra divorced in North Carolina in 2003, and since that time have been engaged in an ongoing dispute over custody and placement. As concerns the present matter, Creed moved for modification of physical placement on March 14, 2013. On August 29 and 30 and October 11, 2013, a three-day trial was held. The circuit court issued an oral ruling on December 17, 2013, denying modification of physical placement and legal custody.[2] A written order was filed on January 14, 2014, and Creed appealed.

Creed sought temporary relief in this court that appeared related to issues in his pending appeal, and we directed Creed to first seek relief in the circuit court unless impractical to do so. We subsequently received from the circuit court a copy of "Order From Hearing of December 15, 2014," concerning custody and physical placement. In accordance with an agreement of the parties, the circuit court issued a temporary order giving Creed sole legal custody and sole physical placement of the parties' daughter pending the next circuit court hearing scheduled for March 31, 2015.

This appeal was placed on hold while the circuit court held the March 31, 2015 hearing, and we were subsequently provided with post-hearing updates. On April 15, 2015, the current guardian ad litem (GAL) advised this court that it was her opinion that the appeal was moot because the circuit court, in essence, granted Creed everything he was seeking. The GAL explained that all but the legal custody issue had been settled at the March 15 hearing by agreement of the parties and the circuit court's order, which continued joint custody pursuant to the December 17, 2013 oral ruling. Nevertheless, the GAL contended:

[2] The record is unclear as to how custody arose as an issue for trial.

> It is my opinion that this appellate issue has been addressed by the circuit court and need not be addressed by the Court of Appeals. At the March 31st hearing the parties each agreed that [the daughter] should continue in counseling and they agreed on the specific counselor. From the Appellant's brief, that would be the only "legal custody" issue raised on appeal, and it is now a non-issue. The Appellant raised other concerns about the mother's actions, but I do not believe that they were actual "legal custody" issues. Additionally, the mother will not be exercising any placement unless both parents are in agreement. In effect, giving great authority to the father to control any and all contact the mother will have with [their daughter]. A remand to the circuit court would not be necessary because the father has, in essence, everything he was seeking.

Creed disagreed that the appeal was moot because the circuit court allegedly did not grant his request for sole legal custody at the March 31 hearing, and failed to make factual findings that Creed contended were required.

We concluded that, without a transcript of the March 31, 2015 hearing, we could not determine to what extent, if any, the appeal was moot. We concluded that, at a minimum, it was apparent that the issues for appeal were greatly narrowed based upon the circuit court's order granting Creed part of the relief he was seeking in this appeal. By order dated June 24, 2015, we directed Creed to make arrangements for the production of the transcript if he wished to proceed with this appeal, to file a supplemental statement on transcript, and to file a supplemental brief addressing only those issues that were preserved both in the initial briefs to this court and in the subsequent modification process in the circuit court.

Creed filed a supplemental brief, but the GAL advised this court that she had not been served with the supplemental brief. There was no response by Creed to the GAL's notification of lack of service, or a request for clarification as to the issues on the narrowed appeal. We therefore questioned whether Creed properly served his supplemental brief. By order dated

November 17, 2015, we provided Creed an opportunity to correct the omissions before striking his brief as a sanction for non-service.

In that order, we also noted that, with respect to the scope of his appeal, Creed's supplemental brief acknowledged that physical placement had been resolved in his favor. However, Creed maintained his claim that the circuit court erroneously denied his request for sole custody, made a series of erroneous factual findings, and erroneously exercised its discretion by failing to make other necessary findings and legal determinations primarily related to the best interests of the child. Creed also requested that we find Dongarra responsible for all fees and costs on appeal. Because fees owed to both current and former GALs could be an issue, we concluded that both GALs should be treated as respondents, and therefore ordered the caption amended. We further ordered Creed to serve his supplemental brief on any parties not already served and certify that he served Dongarra, the State, and the GALs. We advised that, if Creed failed to provide the certification, this court would strike his brief and dismiss the appeal as moot based on the circuit court's modification of the order that is the subject of the appeal. We further ordered an opportunity for respondents to decide whether to submit additional briefs. We have now received notification from the respondents that they do not intend to file additional briefs.

We turn to the issue of physical placement. At the March 31, 2015 hearing, the court adopted an agreement of the parties, entered on the record in open court, that Creed would have primary physical placement of the parties' daughter, and that Dongarra would have physical placement at such time as agreed to by both parties.

Creed argues that "the Circuit Court and GAL have attempted to paint the picture that this whole thing was based upon a stipulated agreement between the parties, rather than an

adjudication by the Court." Creed contends that a written stipulation was required, and that the court could not accept such an agreement in any event as it would be contrary to the best interests of the child. He further asserts "that while the Court asked both parties if they agree that [the daughter] have no placement with Ms. Dongarra, Ms. Dongarra's [sic] only agrees to such because she has no choice." We reject Creed's placement argument.

Creed agreed to the revised placement order before the circuit court and now seemingly takes an inconsistent position on appeal. At the March 31, 2015 hearing, the GAL explained the agreement of the parties to the court on the record, and represented that the agreement was in the child's best interest. Dongarra also represented to the court at the hearing that the parties' agreement was in the child's best interest. Although Creed raised concerns at the hearing regarding *custody*, he assented on the record to the parties' agreement on physical placement, and he is judicially estopped from maintaining an inconsistent position during the course of this appeal. *See* ***Salveson v. Douglas Cty.***, 2001 WI 100, ¶¶37-38, 245 Wis. 2d 497, 630 N.W.2d 182.

We now turn to modification of legal custody. A fair reading of the March 31, 2015 hearing transcript indicates that Creed disputed whether the parties had an agreement on the issue of custody. Therefore, we conclude that Creed has preserved, at least to some degree, a challenge to the circuit court's custody modification.

Whether to modify a custody order is directed to the circuit court's discretion. *See* ***Hughes v. Hughes***, 223 Wis. 2d 111, 119, 588 N.W.2d 346 (Ct. App. 1998). We sustain discretionary decisions if the circuit 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. *See* ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Our task as a reviewing court is to search the record for reasons to sustain a circuit court's discretionary decision. *See* ***Hughes***, 223 Wis. 2d at 120. We do not search for evidence to support findings that the court could have but did not make.

We see no reason to disturb the circuit court's decision denying custody modification. The court issued a very lengthy oral ruling on December 17, 2013, after three days of trial. The court's decision reveals that the court considered the proper statutory presumption that continuing the current allocation of decision making under a legal custody order was in the child's best interest. *See* WIS. STAT. § 767.451(1)(b)2.a. The court also properly considered Creed's burden, as the party seeking the modification, to show that there had been a substantial change in circumstances since the entry of the last order affecting custody. A substantial change in circumstances exists when 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 custody. ***Keller v. Keller***, 2002 WI App 161, ¶7, 256 Wis. 2d 401, 647 N.W.2d 426. When no substantial change of circumstances is shown, the question of the child's best interest need not be reached. ***Greene v. Hahn***, 2004 WI App 214, ¶22, 277 Wis. 2d 473, 689 N.W.2d 657.

Here, the circuit court gave lengthy explanations concerning the evidence adduced at trial and how the facts interplayed with the relevant statutory factors that the court considers in determining whether to modify legal custody. *See* WIS. STAT. § 767.451(5m). The court discussed in detail the factors that the court found most relevant to its determination, and cited specific evidence in the record to support its conclusions. Based on its review of the evidence, the court found that Creed had not overcome the applicable presumptions, and the court properly exercised its discretion in denying Creed's request for modification of custody.

Creed challenges a statement, made by the circuit court during its oral ruling, that several statutory factors "are not really relevant here," including whether there was evidence that a party engaged in abuse or had a criminal record. *See* WIS. STAT. § 767.41(5)(am)12. & 12m. However, our independent examination of the transcript indicates that the court was aware of allegations of abuse and a criminal record, and it is apparent from the court's ruling in this regard that the court found Creed had failed to demonstrate a change in circumstances since the entry of the last order affecting custody. The court considered Dongarra's deficits concerning parenting, but it also considered those of Creed. We conclude that the court's decision, on the whole, incorporated careful consideration of the relevant evidence, discussed in detail the rationale it used to make its decision, and came to a reasonable determination based on the applicable law.

Creed also insists that the circuit court's credibility findings and the weight accorded the expert reports were improper, and he argues that the court ignored the testimony of the daughter's therapist, Cassandra Quick. Contrary to Creed's insistence, the circuit court did not ignore Quick's testimony. The court specifically stated:

> Then, the next factor I want to look at is No. 15 regarding reports of professionals. And the first person I want to talk about in that regard is Ms. Quick. I'm not giving weight, or much weight at all to what she told me. She seems nice. I'm sure she was credible, and she tells the truth as she sees it, but she has much less information than the other professionals. So I'm giving her opinions much less weight.

The court stated the following regarding other professionals who testified:

> Then, the other professionals who have testified are Mr. Perry, Ms. Patterson, and Dr. Waldron. It's certainly not always the case in my review of professionals and what they say in these physical placement disputes, but I found the testimony of all three useful, I found it consistent, I found it level-headed, and also consistent with the credible evidence as I saw it.

The determination of witness credibility and the weight to be given to their testimony are within the province of the fact finder. We will not upset a fact finder's determination of credibility unless the fact relied upon is inherently or patently incredible. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583-84, 230 N.W.2d 824 (1975). To be incredible as a matter of law, evidence must be in conflict with the uniform course of nature or with fully established or conceded facts. ***Id.*** at 583. That is not the case here. We conclude that the circuit court properly exercised its discretion by placing greater weight on the testimony of Patterson and Perry and the report of Dr. Waldron.

Creed also argues that the circuit court failed to follow WIS. STAT. § 767.41(6)(a), which provides: "If legal custody or physical placement is contested, the court shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child." We acknowledge that the circuit court seemingly failed to comply with this writing requirement. However, Creed does not request a remedy for this alleged error. That failure is sufficient reason to reject his argument, and we do so on that basis. At the same time, we observe that, so far as we can tell, the most Creed could hope for by way of a remedy is a remand to the circuit court to correct the error. And, a remand is unlikely to benefit Creed. Elsewhere in this opinion, we reject Creed's arguments regarding the substance of the circuit court's decision based on transcripts disclosing the circuit court's reasoning. Thus, the writing requirement violation, if it occurred, does not impede our ability to review the circuit court's exercise of discretion. Our point here is that Creed's complaint is extremely limited. His claim is that there is a writing requirement violation. And this violation is easily fixed. As Creed admits, under the reasoning contained in ***Landwehr v. Landwehr***, 2006 WI 64, ¶¶33-34, 291 Wis. 2d 49, 715 N.W.2d 180, a writing requirement like the one here can be met if a written order incorporates by

reference a court's oral statements. Thus, if we were to remand, the circuit court could simply amend the written decision to incorporate by reference the transcript of the court's oral explanation during the December 17, 2013 hearing. Put differently, we fail to understand how the statutory violation, if it occurred, affected Creed's substantial rights.

Creed next argues that granting him sole custody "would also likely reduce the chance of further litigation." Creed asserts that there was "a mountain of evidence and more than enough legal justification" to grant him sole custody, and suggests "some conscious or subconscious bias" in the court's decision. Creed contends: "It is pretty obvious that, for whatever reason or bias, the Circuit Court was much more interested in protecting Ms. Dongarra than it was in protecting [the daughter], and the children's relationship with their father." Creed also characterizes the court's written decision as "sheer laziness."

Creed fails to appreciate our deferential standard of review. At best, Creed presents reasons why the circuit court could have handled custody differently. He does not demonstrate that the circuit court was *required* to do so.[3] Moreover, Creed's disparaging remarks directed at the circuit court are unwarranted. He provides no legitimate support for his very serious allegations of circuit court bias. Given the animosity between the parties, the circuit court in this case was given a difficult task and has demonstrated remarkable patience and thoroughness throughout this matter.

[3] The appendix to Creed's initial brief to this court contains documents, letters, journal entries, and e-mails without any accompanying record citation demonstrating the documents to be part of the record on appeal. We will not consider documents that are not part of the record, and a party cannot use the brief's appendix to supplement the record. ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

In his supplemental brief, Creed next argues that the circuit court has improperly ordered him to pay the entire amount of the GAL fees, despite its December 17, 2013 oral ruling that "within nine months of today each party pay 50 percent of the Guardian ad Litem fees." Creed contends that this change creates the appearance that Creed is "being financially punished for filing an appeal." However, Creed's supporting factual argument is undeveloped. He cites to several documents appended as "Attachment #2" to his supplemental brief, without any accompanying record citation. *See* WIS. STAT. RULE 809.19(1)(e). That is, Creed does not demonstrate that the circuit court actually changed course with respect to GAL fees. Perhaps more importantly, Creed has not shown that he has raised this issue in the circuit court, and we shall therefore not address it. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

In his supplemental brief, Creed also requests that we find Dongarra responsible for all the costs and fees on appeal. This issue was not raised in Creed's initial or reply brief to this court, and we deem it abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). In any event, even were we to reach the issue we would reject Creed's suggestion that he is entitled to fees and costs associated with this appeal.

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

Diane M. Fremgen
Clerk of Court of Appeals