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DISTRICT IV

June 28, 2017

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

2016AP1711 In re the marriage of: Shannon Schwinn v. Isaiah Schwinn
(L.C. # 2010FA1247)

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

Shannon Schwinn appeals a post-divorce order modifying the custody and physical placement of the parties' minor child. 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 (2015-16).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Shannon and Isaiah Schwinn divorced in 2013 and were awarded joint custody and shared physical placement of their preschool son, E.S. Though the marital settlement agreement provided that E.S. be placed with Shannon about seventy percent of the time, the parties agreed to an equal placement schedule shortly after their divorce.

In July 2015, Isaiah filed a motion seeking primary physical placement and sole legal custody for educational decisions. Following a de novo evidentiary hearing, the circuit court granted Isaiah sole legal custody of E.S. Isaiah was also awarded primary physical placement, with Shannon receiving periods of placement every other weekend. Shannon appeals.

After more than two years have passed since a final divorce judgment, a circuit court may substantially modify custody and physical placement if there has been a substantial change in circumstances and modification is in the child's best interest. WIS. STAT. § 767.451(1)(b)1. Whether to modify a custody or physical placement order is directed to the circuit court's sound discretion. ***Landwehr v. Landwehr***, 2006 WI 64, ¶7, 291 Wis. 2d 49, 715 N.W.2d 180. The reviewing court will affirm a circuit court's decision as long as it examined the relevant facts, applied the correct law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Id.*** We accept a circuit court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2). This includes the circuit court's findings of fact concerning the past and present circumstances and whether they have changed. ***Lofthus v. Lofthus***, 2004 WI App 65, ¶17, 270 Wis. 2d 515, 678 N.W.2d 393.

We conclude that Isaiah established a substantial change of circumstances justifying modification of the custody and placement orders. *See* ***Green v. Hahn***, 2004 WI App 214, ¶23, 277 Wis. 2d 473, 689 N.W.2d 657 (we review de novo whether a change in circumstances is

substantial, but "give weight" to the circuit court's decision which is "dependent upon" and intertwined with the underlying facts). The circuit court's factual findings include that Isaiah remarried and relocated to Monroe which is forty-five miles away from Shannon, that Isaiah changed jobs and had stable employment, that E.S. was now of school age and had adjusted well to life and school in Monroe, and that in the preceding two years, Shannon lived with an abusive partner and exposed E.S. to that violent relationship. The circuit court's findings are not clearly erroneous and constitute a substantial change of circumstances since the divorce. *See* ***Keller v. Keller***, 2002 WI App 161, ¶7, 256 Wis. 2d 401, 647 N.W.2d 426 (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).

Shannon disputes the existence of a substantial change in circumstances, arguing that the only difference is her "two encounters with an abuser," which is "surely … insufficient" to meet the threshold. We disagree. First, the circuit court found incredible Shannon's testimony that during the course of her two-year cohabitation with a boyfriend, the only instances of domestic abuse were the two incidents reported to authorities. Second, while the circuit court considered the effect on E.S. of domestic violence in Shannon's household, it also considered many other facts listed above, including that E.S.'s readiness for school rendered the existing placement schedule unworkable in light of the distance between the parties' homes.

We also conclude that the circuit court properly exercised its discretion in determining that its order modifying custody and placement was in the child's best interest. The court considered the rebuttable presumption in favor of maintaining the status quo as well as the factors set forth in WIS. STAT. § 767.41(5)(am). *See* WIS. STAT. § 767.451(1)(b)2., and

§ 767.451(5m). Consistent with the recommendation of the guardian ad litem, central to the court's decision was the court's finding that Shannon's household was less stable than Isaiah's. Whereas the evidence showed a pattern of instability on Shannon's part, including multiple moves and lapses in employment which resulted in changes to E.S.'s care providers, as well as exposure to unsafe living environments, the court found that E.S. was well-adjusted to his home, school, and community in Monroe. As to custody issues, the evidence established that the parties were unable to communicate regarding major decisions, that exchanges of placement were chaotic and unpredictable, that these problems were mostly attributable to Shannon, and that Shannon had a history of making important decisions on a unilateral basis. The court found Shannon to be unpredictable, unreliable, unreasonable, and manipulative. The circuit court's order modifying custody and placement represented a demonstrably reasonable and proper exercise of discretion with which we will not interfere.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals