



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 III

July 9, 2024

To:

Hon. Gregory J. Strasser
Circuit Court Judge
Electronic Notice

Kelly Schremp
Clerk of Circuit Court
Marathon County Courthouse
Electronic Notice

Mary Susan Anderson
Dudley Tower 500 N. 1st Street, Suite 2700
Wausau, WI 54403

Special Litigation & Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Kristopher P. Torgerson 545043
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

Andrea R. Wadinski
Electronic Notice

Waupun Correctional Institution
Business Office
P.O. Box 351
Waupun, WI 53963-0351

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

2022AP126

Kristopher P. Torgerson v. Andrea R. Wadinski
(L. C. No. 2016PA13)

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).

This appeal arises out of Kristopher Torgerson's pro se paternity action in which he sought a declaration of paternity, an order establishing custody, placement, and reasonable support, and

an order establishing visitation and correspondence with Gina,¹ a minor child who has lived with her mother from birth. The circuit court granted Torgerson's motion to be adjudicated Gina's father, but it denied Torgerson visitation and contact with Gina. Torgerson appeals from the court's order, arguing that the order amounts to a termination of his parental rights and that he was denied due process. 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 (2021-22).² We affirm.

The order at the heart of this appeal was issued as part of a paternity action brought by Torgerson in 2016. In July 2020, the circuit court appointed a guardian ad litem (GAL) to represent Gina's interests. In November 2020, the GAL filed a motion for summary judgment, seeking dismissal of Torgerson's paternity action. The court initially granted the GAL's motion, concluding that "the undisputed facts on summary judgment demonstrate that it is in the best interest of [Gina] that the petition for paternity be dismissed."

Torgerson filed a motion for reconsideration, in which he introduced a voluntary paternity acknowledgement that he and Gina's mother had executed at Gina's birth.³ The circuit court

¹ We use a pseudonym to protect the minor child's privacy. We have also omitted many of the undisputed record facts regarding Torgerson, who is incarcerated and serving a life sentence. While these facts fully support the circuit court's decision, they are not necessary to resolve the issues raised in Torgerson's appeal.

² All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

³ Torgerson also appealed the initial summary judgment decision, but we remanded the matter to the circuit court so that Torgerson could proceed with his motion for reconsideration. After the circuit court vacated its initial order granting the GAL's motion for summary judgment, we dismissed Torgerson's appeal as moot.

vacated its initial summary judgment decision, explaining that the voluntary paternity acknowledgement established Torgerson's paternity of Gina as a matter of law. The court then turned to the issues of custody, placement, and Torgerson's request for visitation and communication with Gina, determining that these issues were governed by the factors set forth in WIS. STAT. § 767.41(5) (2019-20).⁴ The court explained that although it had "already made findings, regarding many of these factors, the parties may want to provide additional analysis and file dispositive motions, based upon the same." The court ordered the parties to submit dispositive motions by October 1, 2021, and subsequently extended this deadline to October 21, 2021, at Torgerson's request.

Torgerson filed a motion for limited visitation, in which he acknowledged that the circuit court had already ruled against him on many of the factors in WIS. STAT. § 767.41(5). Instead of presenting any facts or making any argument regarding these factors, Torgerson proposed a limited visitation schedule that involved asking Gina annually if she wanted to communicate with him. The GAL moved for summary judgment, arguing that the factors in § 767.41(5) did not support Torgerson's request for visitation and contact. The GAL also responded to Torgerson's motion for limited visitation, reiterating that Torgerson's proposal was not in Gina's best interests and submitted additional evidence regarding the factors in § 767.41(5). Torgerson responded to the GAL's submissions by a letter in which he stated that he wanted to receive a picture of Gina annually and also wanted to be able to petition the court each year to modify its order regarding visitation and communication.

⁴ All references to WIS. STAT. § 767.41(5) are to the 2019-20 version unless otherwise noted.

On December 27, 2021, the circuit court issued an order granting the GAL’s motion for summary judgment. The court explained that the facts presented by the GAL were undisputed, and Torgerson “ha[d] not submitted any argument or introduced any facts that would alter the court’s analysis.” The court concluded that “the uncontroverted and therefore undisputed facts introduced by the GAL, in the context of relevant statutory factors, fully support the GAL’s recommendation that [Torgerson] not be granted any custody or visitation rights.” Torgerson now appeals.

“A court has wide discretion in making physical placement determinations.” *Wiederholt v. Fischer*, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992); *see also Andrew J.N. v. Wendy L.D.*, 174 Wis. 2d 745, 755 n.3, 498 N.W.2d 235 (1993) (describing parental visitation as “short periods of physical placement”). We will affirm the circuit court’s decision unless it is clear that the circuit court erroneously exercised its discretion or misapplied the law. *See Wiederholt*, 169 Wis. 2d at 530.

Because the circuit court decided the visitation and contact issues on summary judgment, we review the decision to grant summary judgment de novo, following the same methodology used by the circuit court. *See Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). Summary judgment is appropriate only if the record demonstrates that no genuine material factual issues exist and that the moving party is entitled to judgment as a matter of law. *See Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994); *see also* WIS. STAT. § 802.08(2). “We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law.” *Streff*, 190 Wis. 2d at 353.

Here, the circuit court determined that Torgerson's requests were governed by the factors in WIS. STAT. § 767.41(5), and it invited the parties to file dispositive motions addressing these statutory factors. In the GAL's motion for summary judgment, the GAL argued that almost all of the sixteen factors in § 767.41(5)(am)⁵ favored denying Torgerson's request for visitation and contact with Gina and that the remaining factors were not applicable.⁶ The facts set forth in the GAL's motion were all supported by evidence in the record. The court determined that Torgerson had not created a factual dispute regarding these factors. The court therefore granted summary judgment, denying Torgerson's request for visitation and contact with Gina.

In his initial appellate brief, Torgerson did not address the circuit court's determination that the material facts were undisputed for the purpose of the GAL's summary judgment motion. In his reply brief, Torgerson concedes that "many of the factual assertions provided by the GAL in support of summary judgment were not disputed (such as ordinary historical facts)." Nonetheless, Torgerson argues that it is incorrect "that the factual record below was not and is not disputed by Torgerson." However, Torgerson does not identify any disputed facts nor does he develop any argument that the factors in WIS. STAT. § 767.41(5) weigh in favor of granting him visitation or contact with Gina. Instead, Torgerson directs us to his brief in opposition to the GAL's November 2020 summary judgment motion.

⁵ The version of WIS. STAT. § 767.41(5)(am) that applied to Torgerson's paternity action set forth sixteen enumerated factors. This paragraph was amended in 2021 to delete some factors and combine others. *See* 2021 Wis. Act 37, § 3 (repealing and recreating § 767.41(5)(am)3.-14.). The current version of the statute contains fourteen factors. *See* WIS. STAT. § 767.41(5)(am) (2021-22).

⁶ For example, regarding "[t]he reports of appropriate professionals if admitted into evidence," WIS. STAT. § 767.41(5)(am)15. (renumbered as § 767.41(5)(am)13. (2021-22)), the GAL stated that neither party had submitted any such reports.

We typically do not consider arguments raised for the first time in a reply brief. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis.2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). Moreover, Torgerson has failed to develop any argument that his response to the GAL's November 2020 motion for summary judgment created a genuine issue of material fact requiring denial of the GAL's October 2021 motion for summary judgment. Our independent review of Torgerson's response to the October 2021 motion for summary judgment establishes that he did not present any evidence regarding the factors in WIS. STAT. § 767.41(5)(am), nor did he ask the circuit court to consider the facts or arguments raised in his response to the November 2020 motion for summary judgment. Because Torgerson did not demonstrate any genuine issue of material fact in connection with the GAL's October 2021 motion for summary judgment, the circuit court did not err by determining that the GAL's facts were undisputed and that summary judgment was therefore appropriate.

Torgerson also argues that “[o]nce a parent has received a paternity determination, visitation, communication, and involvement in the child’s life are presumed.” Torgerson does not cite any authority to support the existence of such a presumption, so we reject this argument as undeveloped. *See State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”). In addition, we see no indication that Torgerson made this argument to the circuit court. “A fundamental appellate precept is that we ‘will not ... blindside [circuit] courts with reversals based on theories which did not originate in their forum.’” *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (citation omitted). Accordingly, “[a]rguments raised for the first time on appeal are generally deemed forfeited.” *State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (citation omitted).

In his reply brief, Torgerson makes a new argument that his effort to demonstrate that he had a substantial relationship with Gina was thwarted by the circuit court's delay in resolving his paternity action. Again, we generally do not address arguments raised for the first time in a reply brief. *See A.O. Smith Corp.*, 222 Wis. 2d at 492. Moreover, we see no indication that Torgerson made this argument in the circuit court in any of his summary judgment submissions. For the reasons explained above, Torgerson has forfeited this argument. *See Schonscheck*, 261 Wis. 2d 769, ¶11; *Hunt*, 358 Wis. 2d 379, ¶32.

Torgerson further argues that he was denied due process of law. “The fundamental requirements of procedural due process are notice and an opportunity to be heard.” *Sweet v. Berge*, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983). The GAL points out that Torgerson received notice of all of the circuit court proceedings and had the opportunity to be heard at each step of these proceedings. Torgerson does not contend that he lacked notice or the opportunity to be heard.

The record shows that the circuit court afforded Torgerson due process on his motion for visitation and contact when it invited him to brief and argue the statutory factors in WIS. STAT. § 767.41(5). The court also extended the deadline for submissions in response to Torgerson's request, and Torgerson made two submissions that the court considered in deciding his motion. The record therefore supports the GAL's assertion that “Torgerson had ample notice of these proceedings and every opportunity to be heard.” After reviewing Torgerson's submissions, however, the court determined that they did not controvert any of the facts set forth in the GAL's summary judgment motion. Based on Torgerson's failure to demonstrate a genuine dispute regarding any of these facts, the court granted summary judgment and denied Torgerson's request for visitation and contact with Gina. Upon our independent review, we see no error in it doing so.

Torgerson argues that these due process protections were insufficient here because, by denying him visitation and contact, the circuit court essentially terminated his parental rights without following the strict procedures set forth in WIS. STAT. ch. 48. *See generally Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶21, 246 Wis. 2d 1, 629 N.W.2d 768 (“Due to the severe nature of terminations of parental rights, termination proceedings require heightened legal safeguards against erroneous decisions.”). In particular, Torgerson argues that the court was required to appoint him counsel at no cost. *See* WIS. STAT. § 48.23(2)(b) (“In a proceeding involving ... an involuntary termination of parental rights, any parent who appears before the court shall be represented by counsel” with limited exceptions).

The GAL argues that Torgerson is incorrectly conflating the denial of visitation and contact in a WIS. STAT. ch. 767 action with a WIS. STAT. ch. 48 action to terminate a person’s parental rights. Under WIS. STAT. § 767.24 (2019-20), the circuit court had authority to deny Torgerson any visitation or contact. *See, e.g., Wolfe v. Wolfe*, 2000 WI App 93, ¶11, 234 Wis. 2d 449, 610 N.W.2d 222 (stating that a circuit court may deny a parent all contact with a minor child if the court determines that such contact “would endanger the child’s physical, mental or emotional health”). The statute governing Torgerson’s action provided that “[i]n rendering a judgment of ... paternity, ... the court shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties, as provided in this section.” WIS. STAT. § 767.24(1) (2019-20). Unlike § 48.23(2)(b), which requires counsel for an involuntary proceeding to terminate a person’s parental rights, the statutory provisions regarding custody and placement do not include any requirement that Torgerson be appointed counsel.

In his initial brief, Torgerson does not provide any authority for his assertion that a denial of all visitation and contact is the equivalent of a termination of parental rights. To the contrary,

in the decision cited by Torgerson, our supreme court explained that “the permanency of termination orders ‘work[s] a unique kind of deprivation. In contrast to matters modifiable at the parties’ will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship.’” See *Evelyn C.R.*, 246 Wis. 2d 1, ¶20 (alteration in original; quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 127-28 (1996)). Here, the circuit court’s order expressly recognized Torgerson’s legal paternity of Gina, so the rationale for the heightened procedural safeguards of a WIS. STAT. ch. 48 proceeding does not apply.

In his reply brief, Torgerson argues that the “ordinary/plain meaning canon” supports his assertion that the circuit court has terminated his parental rights because “the only possible interpretation of the December 27[, 2021 o]rder’s effect is a termination of any parental right Torgerson had or may have had with respect to [Gina].” Torgerson’s argument is based on the faulty premise that the court ordered that he have “no involvement” in Gina’s life. A review of the court’s order shows otherwise, as the court only adopted “the GAL’s recommendation that Torgerson not be granted any custody or visitation rights.”

In sum, Torgerson has not established that the circuit court erroneously exercised its discretion or misapplied the law when it denied Torgerson’s request for visitation and contact with Gina. Nor has Torgerson established that the court’s decision violated his due process or other rights. We therefore affirm the court’s order.

Upon the foregoing,

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.

Samuel A. Christensen
Clerk of Court of Appeals